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

February 11, 2021

BY CHAIRMAN MCFERRAN AND MEMBERS KAPLAN AND RING

ORDER DENYING MOTION FOR RECONSIDERATION[1]

The Charging Party's motion for reconsideration of the Board's Supplemental Decision and Order reported at 369 NLRB No. 139 (2020) is denied. The Charging Party has not identified any material error or demonstrated extraordinary circumstances warranting reconsideration under Section 102.48(c)(1) of the Board's Rules and Regulations.[2]

Dated, Washington, D.C. February 11, 2021

Marvin E. Kaplan, Member

John F. Ring, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

CHAIRMAN MCFERRAN, dissenting.

As today's decision illustrates, the current Board majority simply can't pass up any opportunity to insulate employers from joint-employer status under the National Labor Relations Act, even when it means ignoring an explicit directive from a court of appeals and dramatically departing from its own past views on retroactivity issues.

As most observers of the Board are well aware, in this case, a prior Board had broadened the joint-employer standard by eliminating restrictions that had no basis in the common-law principles that we are bound to follow.[1] The United States Court of Appeals for the District of Columbia Circuit largely upheld the prior Board's decision,[2] but remanded the case to the Board to clarify certain issues related to the new standard, including the question of retroactivity. The majority chose not to comply with the court's clear instructions on remand.

Instead, it determined that no iteration of the new standard could be applied retroactively and so applied the *old* finding, without allowing a remand for the Board to realize its own error, if retroactive application could never have been appropriate. We understood the court to very much doubt the propriety of retroactive application and to be modeling judicial restraint in respecting the Board's role under the Act.

Second, our colleague falsely states that the D.C. Circuit found that the Board's prior joint-employer standard was contrary to the controlling common law, and thus the Act, because it did not consider putative joint employers' indirect and reserved control over employees. The D.C. Circuit no more than agreed that indirect and reserved control *can be* relevant considerations in the common law, not that they must be given weight independent of direct-and-immediate control. As explored in exacting detail in the Board's recent final rule, the Board's prior standard fell within the boundaries of the common law as applied in the particular context of the Act. Joint Employer Status Under the National Labor Relations Act, 85 Fed. Reg. 11184 (Feb. 26, 2020).

Third, our colleague argues our retroactive-application analysis fails to weigh the reliance interests we cite against the damage to the administration of the Act of not applying the new standard retroactively. As was at least implicit in our Supplemental Decision and Order, we disagree that applying the prior standard that was well-grounded in the common law, the policies of the Act, and our precedent—instead of applying the sharp departure represented by the new standard—does any damage to the administration of the Act at all.

[1] *Browning-Ferris Industries of California, Inc. d/b/a BFI Newby Island Recyclery,* 362 NLRB 1599 (2015). I was a member of the majority there.

[2] *Browning-Ferris Industries of California, Inc. v NLRB*, 911 F.3d 1195 (D.C. Cir. 2018).

[1] The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel. Member Emanuel took no part in the consideration of this motion or the merits of the underlying Supplemental Decision and Order.

[2] The Charging Party asserts that language in the Supplemental Decision and Order indicates that the Board's decision to affirm the Acting Regional Director's conclusion that BFI Newby Island Recyclery was not a joint employer with Leadpoint Business Services was not based on a full review of the Charging Party's arguments challenging that conclusion. Rather, citing this language, the Charging Party argues that the Board's finding was based on the fact that the Board majority in the original representation-case decision had not argued that the Acting Regional Director erred.

We disagree with the Charging Party's assertion that the cited language establishes that the Board failed to consider its arguments. Nevertheless, we clarify that, in the Supplemental Decision and Order, the Board fully considered the Charging's Party's arguments challenging the Acting Regional Director's Decision and Direction of Election and that the Board affirmed that decision for the reasons the Acting Regional Director stated therein.

Our dissenting colleague alleges our Supplemental Decision and Order materially erred in holding any form of the new joint-employer standard introduced in *Browning-Ferris Industries of California, Inc. d/b/a BFI Newby Island Recyclery*, 362 NLRB 1599 (2015), would be manifestly unjust to apply retroactively. First, our colleague accuses us of defying the United States Court of Appeals for the District of Columbia Circuit's remand instructions by not first curing the new standard's defects before analyzing retroactive application. We do not share our colleague's view that the D.C. Circuit necessarily would have made that

standard, without ever clarifying the new standard.[3] But the District of Columbia Circuit has already effectively held that the old, narrower standard is contrary to the Act because it is inconsistent with the common law of agency. Meanwhile, there is no legal or factual basis for concluding that the new standard (as appropriately clarified) could not be applied retroactively, consistent with established principles. Because the Union has compellingly shown the material errors in the Board's decision on remand, I would grant its motion for reconsideration.[4] Put simply, the Board must comply with the court's remand instructions, however much the majority may wish to eliminate the joint-employer standard adopted in this case.[5]

I.

There is nothing ambiguous about what the District of Columbia Circuit held in this case or what it told the Board to do on remand.

In crucial respects, the court upheld the prior Board's decision here. Thus, the court observed that "under Supreme Court and circuit precedent, the National Labor Relations Act's test for joint-employer status is determined by the common law of agency." 911 F.3d at 1206.

The question presented, the court explained, was "whether the common-law analysis of joint-employer status can factor in both (i) an employer's authorized but unexercised forms of control, and (ii) an employer's indirect control over employees' terms and conditions of employment." Id. at 1209. The Board's old test had held that neither factor could be considered; the Board's new test deemed both factors relevant. The new test, the court concluded, reflected the correct understanding of common law agency principles, but with respect to indirect control, the Board's test required refinement. The court summarized its holding this way:

> [W]e uphold as fully consistent with the common law the Board's determination that both reserved authority to control and indirect control can be relevant factors in the joint-employer analysis. We reverse, however, the Board's articulation and application of the indirect-control element in this case to the extent that it failed to distinguish between indirect control that the common law of agency considers intrinsic to ordinary third-party contracting relationships, and indirect control over the essential terms and conditions of employment.

Id. at 1222–1223. Accordingly, it "remand[ed] [the case] for further proceedings consistent with [its] opinion." Id. at 1223.[6]

An important part of the court's opinion addressed the issue of the retroactive application of the Board's new joint-employer test. In its entirety, the court's discussion of retroactivity follows:

> In this case the Board both refined its joint-employer standard and immediately applied it retroactively to conclude that Browning-Ferris and Leadpoint were joint employers of the workers in the petitioned-for unit. Browning-Ferris challenges that retroactive application as 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*

[3] *Browning-Ferris Industries of California, Inc. d/b/a BFI Newby Island Recyclery*, 369 NLRB No. 139 (2020). I was not a member of the Board when the decision was issued.

[4] See Board's Rule and Regulations, Sec. 102.48(c). Even apart from the Union's motion, the Board retains the authority to reconsider its earlier decision, as Sec. 10(d) of the Act contemplates. 29 U.S.C. §160(d) ("Until the record shall have been filed in a court, . . . the Board may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it."). In cases too numerous to cite, the Board has reconsidered a decision sua sponte. E.g., *Cordua Restaurants, Inc.*, 2018 WL 3914703 (Aug. 15, 2018).

[5] Eliminating the broadened joint-employer standard is a goal that the majority has pursued relentlessly, as described in the District of Columbia Circuit's decision. See 911 F.3d at 1205–1206. The majority: (1) attempted to overrule the new standard in a decision that the Board was then required to vacate on ethics grounds; (2) proposed a return to the old standard in rulemaking, even before the Circuit had ruled in this case; and (3) finally adopted a joint-employer standard even more restrictive than the old standard. See *Hy-Brand Industrial Contractors, Ltd.,* 366 NLRB No. 26 (2018), granting reconsideration in part and vacating order reported at 365 NLRB No. 156 (2017); National Labor Relations Board, Notice of Proposed Rulemaking, *The Standard for Determining Joint-Employer Status*, 83 Fed. Reg. 46681 (Sept. 14, 2018); National Labor Relations Board, Final Rule, *Joint Employer Status under the National Labor Relations Act*, 85 Fed. Reg. 11184 (Feb. 26, 2020).

I dissented from the original decision in *Hy-Brand* (see 365 NLRB No. 156, slip op. at 35), then joined in the unanimous decision to vacate that decision, following a report by the Board's Inspector General and a determination by the Designated Agency Ethics Official. I dissented from the notice of proposed rulemaking. 83 Fed Reg. 46687 (dissent). I was not a member of the Board when the final rule was issued.

[6] The judgment issued by the District of Columbia Circuit tracked this language, reciting that it was:

> ordered and adjudged that the Board's articulation of the joint-employer test as including consideration of both an employer's reserved right to control and its indirect control over employees' terms and conditions of employment be affirmed; however, the Board's articulation and application of the indirect-control element in this case to the extent that it failed to distinguish between indirect control that the common law of agency considers intrinsic to ordinary third-party contracting relationships, and indirect control over the essential terms and conditions of employment be reversed; that Browning-Ferris's petition for review be granted in part, the Board's cross-application be denied, and the Board's application for enforcement as to Leadpoint be dismissed without prejudice, and *the case is remanded for further proceedings, in accordance with the opinion of the court* filed herein this date.

Browning-Ferris Industries of California, Inc. v NLRB, No. 16–1028 (D.C. Cir. Dec. 28, 2018) (emphasis added). The court's mandate, which linked to the judgment, issued on February 21, 2019.

> *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*, *Inc.,* 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. 2016) (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 (emphasis added).

In short, the District of Columbia Circuit's remand required the Board to do two things: (1) in "rearticulating its joint employer test," explain the scope of "the indirect-control element's operation" in the test; and (2) explain "how a properly limited test would apply in this case," including whether the revised standard would be applied retroactively, if Browning-Ferris were found to be a joint employer.

Rather than comply with the court's remand, the Board sought to evade it. It did not rearticulate the new joint-employer standard, addressing the proper scope of the indirect-control element. Nor did it explain how the rearticulated test would apply in this case to Browning-Ferris, the potential joint employer.

Instead, after acknowledging that the "the court's remand sought clarification and redress of two critical shortcomings in the Board's discussion of its new joint-employer standard," the Board on remand asserted that "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."[7] Given this "departure," the new joint-employer standard could never be applied retroactively, consistent with the principles set out in the court's decision, which the Board acknowledged as "law of the case."[8] According to the Board, the "court clearly emphasized the centrality of reliance interests to the retroactivity determination."[9] It was also "abundantly clear that many businesses did rely on [the old] legal standard and that the new standard . . . would substantially affect reasonable, settled expectations for relationships established on the basis of the prior standard."[10]

The result, according to the Board, was that "the joint-employer issue must be resolved under the prior longstanding standard requiring proof of direct and immediate control," as the Regional Director had done originally, before the prior Board had announced the new joint-employer standard.[11] Affirming the Regional Director's finding that Browning-Ferris was *not* a joint-employer, the Board "vacate[d] the prior Decision and Order and dismiss[ed] the complaint in that proceeding."[12]

II.

There can be no question that the Board was required to comply with the terms of the District of Columbia Circuit's remand. As that court has explained, the "decision of a federal appellate court establishes the law binding further action in the litigation by another body subject to its authority," including an administrative agency, which "is without power to do anything which is contrary to either the letter or spirit of the mandate construed in the light of the opinion of (the) court deciding the case."[13] Under this standard, it is clear that the Board's decision on remand cannot stand. It is contrary to both the letter and the spirit of the mandate here, construed in light of the court's opinion.

Contrary to the court's direction, the Board did not rearticulate the new joint-employer standard, explaining the operation of the indirect-control element in a way that conformed to common-law principles. Nor did the Board

[7] *Browning-Ferris Industries of California, Inc. d/b/a BFI Newby Island Recyclery*, supra, 369 NLRB No. 139, slip op. at 3.

[8] Id. The Board examined the agency's own precedent addressing retroactivity, but stated that it did "not write on a blank slate," but rather was "guided in [its] retroactivity analysis by the court's decision, which [was] law of the case." Id.

[9] Id.

[10] Id.

[11] Id. at 4.

[12] Id.

[13] *City of Cleveland, Ohio v. Federal Power Commission*, 561 F.2d 344, 346 (D.C. Cir. 1977) (footnotes omitted).

explain how the rearticulated standard would apply in this case. Instead, as shown, the Board treated these steps as somehow optional or unnecessary, based on its assertion that a new joint-employer standard—whatever form it might have taken in response to the court's remand—could never be applied retroactively in this case, leaving only the old standard to apply. The opinion of the District Columbia Circuit, however, rules out this remarkable approach, for three reasons. Re-articulating the new standard was made an explicit precondition to determining retroactivity, applying the old standard would violate the requirement that the Board conform to common-law agency principles, and established law in any case supports retroactive application of a new standard that was consistent with those principles. The Board was not permitted to go backward to the old standard, nor could it refuse to go forward to a new standard.

A.

To begin, the court's opinion made clear that the retroactivity analysis here depended on the re-articulation of the joint-employer standard on remand. The court explained, in language already quoted, that "it would be premature for [the court] to decide Browning-Ferris's challenge to the Board's retroactive application of its test," because (1) the court did "not know whether, under a properly articulated and cabined test of indirect control, Browning-Ferris will still be found to be a joint employer;" and (2) "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."[14]

The District of Columbia Circuit never imagined that the Board would fail to rearticulate the new joint-employer standard and would fail to decide whether, under the rearticulated test, Browning-Ferris was a joint employer. If, as the Board insisted on remand, *no* re-articulation of the new standard could properly be applied retroactively to find that Browning-Ferris was a joint employer, then the court would have decided the retroactivity issue itself, instead of leaving it to the Board. But the court expressly stated that such a decision was "premature" prior to the Board's re-articulation of the new standard, consistent with the court's opinion. Put another way, with respect to the issue of retroactivity, it was an explicit premise of the remand that the Board would re-articulate the new standard, as the court had directed it to do. Obviously, the court contemplated the possibility that a rearticulated new standard, in some form, *could* be applied retroactively in this case. Otherwise, a remand would have been largely pointless.

B.

The Board's attempt to evade the remand has another obvious and fatal flaw. It necessarily resulted in the application of the *old* joint-employer standard. But that standard, as the District of Columbia Circuit's opinion necessarily implied, was not viable under the National Labor Relations Act, because it was contrary to the common-law agency principles that the Board is required to apply, as well as contrary to the Circuit's own joint-employer decisions under the Act.

As the court recognized, under the old standard (dating to 1984), the "Board, would rely in analyzing joint-employer claims only on evidence of (i) actual control, as opposed to the right to control, and (ii) direct and immediate control, not indirect control," while the Board's "decision in this case changed both of those factors by making the right to control and indirect control relevant considerations in determining joint employer status."[15] The Board's new standard—not the old one—reflected a correct understanding of common-law agency principles. Thus, the court held "that the right-to-control element of the Board's [new] joint-employer standard has deep roots in the common law" and that the "common law also permits consideration of those forms of indirect control that play a relevant part in determining the essential terms and conditions of employment."[16] "Accordingly," the court explained, it "affirm[ed] the Board's articulation of the joint-employer test as including consideration of both an employer's reserved right to control and its indirect control over employees' terms and conditions of employment."[17]

The necessary implication of the court's opinion is that the Board's old joint-employer standard—insofar as it prevented the Board from considering both the reserved right to control and indirect control—was contrary to common-law agency principles and thus contrary to the Act. The court explained that the "policy expertise that the Board brings to bear on applying the National Labor Relations Act to joint employers is bounded by the common-law's definition of a joint employer."[18] The Board's old standard, as reflected in its decisions, simply ignored the common-law's definition of a joint employer.[19] With

[14] 911 F.3d at 1222.
[15] Id. at 1201.
[16] Id. at 1199–1200.
[17] Id. at 1200.
[18] Id. at 1208.

[19] As the prior Board correctly pointed out, "the Board ha[d] never articulated how these additional requirements [that control be exercised, directly] are compelled by the Act or by the common-law definition of the employment relationship." *Browning-Ferris*, supra, 362 NLRB at 1599. Defenders of the old standard have not even attempted to refute this observation.

respect to the right to control, the court observed that the "common-law rule"—at the time the Act was passed and still today—was that "unexercised control bears on employer status,"[20] although it was excluded from consideration by the Board's old joint-employer standard. And, as the court's opinion illustrates, the Board's old approach was contrary to the District of Columbia Circuit's own joint-employer decisions under the Act, which recognized that the right to control was an element of the proper standard.[21] In requiring direct control, too, the old standard was contrary to common-law agency principles. The court quoted with approval the Board's statement that "[t]raditional common-law principles of agency do not require that 'control . . . be exercised directly and immediately' to be 'relevant to the joint-employer inquiry.'"[22] The court pointed out, in turn, that its own "cases too have considered indirect control relevant to employer status."[23]

In remanding the case to the Board, after affirming the key aspects of the Board's new joint-employer standard as consistent with common-law agency principles, the court could not have contemplated that the Board would defiantly revert to the old standard as the default, without at least first having complied with the court's direction to rearticulate the new standard, to determine whether Browning-Ferris was a joint employer under that standard, and *then* to address the issue of retroactivity. Surely applying a joint-employer test that was contrary to the common law and to Circuit precedent would be a last resort, not a first option—if it could ever be proper for the Board to apply a standard inconsistent with the National Labor Relations Act, as the old standard manifestly was.

C.

Even assuming that the Board could somehow be excused for proceeding directly to the issue of retroactivity, the Board's retroactivity holding was wrong. It cannot be squared with what the Board described as the law of the case (the court's statement on retroactivity, quoted earlier), with established principles governing retroactivity, with the record in this case, and with the goals of federal labor law.

The Supreme Court's decision in *SEC v. Chenery Corp.*,[24] often cited by the Board[25] and by the District of Columbia Circuit,[26] sets out the bedrock principles governing retroactivity. There, the Court rejected the argument that the Securities and Exchange Commission was precluded from retroactively applying a new legal rule, developed through adjudication, to prohibit stock purchases by managers during a company reorganization. It made clear that the supposed impact of retroactivity on a claimed reliance interest was not the only consideration, observing:

> *[R]etroactivity must be balanced against the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles. If that mischief is greater than the ill effect of the retroactive application of a new standard, it is not the type of retroactivity which is condemned by law.*
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> And so in this case, the fact that the Commission's order might retroactively prevent Federal's management from securing the profits and control which were the objects of the preferred stock purchases may well be outweighed by the dangers inherent in such purchases from the statutory standpoint. If that is true, the argument of retroactivity becomes nothing more than a claim that the Commission lacks power to enforce the standards of the [Public Utility Holding Company] Act in this proceeding. Such a claim deserves rejection.

332 U.S. at 203–204 (citations omitted; emphasis added). Here, as will become clear, the Board's categorical refusal to apply any new joint-employer standard retroactively produces a result that is contrary to the statutory design of the National Labor Relations Act.

1.

Any analysis of the retroactivity issue must start with what the court told the Board in its opinion:

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[20] 911 F.3d at 1210.

[21] Id. at 1209, citing *International Chemical Workers Union Local 483 v. NLRB*, 561 F.2d 253 (D.C. Cir. 1977).

[22] Id. at 1216 (emphasis omitted), citing *Browning-Ferris*, supra, 362 NLRB at 1600.

[23] Id. at 1217, citing *Dunkin' Donuts Mid-Atlantic Distribution Center, Inc. v. NLRB*, 363 F.3d 437, 440 (D.C. Cir. 2004).

[24] 332 U.S. 194 (1947).

[25] See, e.g., *General Motors LLC*, 369 NLRB No. 127, slip op. at 11 (2020). On remand, the Board here cited an earlier Board decision quoting *SEC v. Chenery Corp.*, but then failed to apply its balancing test, on the apparent view that the court's opinion somehow made it unnecessary to do so. 369 NLRB No. 139, slip op. at 3, citing *SNE Enterprises, Inc.*, 344 NLRB 673, 673 (2005). In *SNE Enterprises*, the Board explained that "[i]n determining whether the retroactive application of a Board rule will cause manifest injustice, the Board will consider 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." 344 NLRB at 673. Accordingly, the Board retroactively applied a new rule of law with respect to pro-union supervisory conduct, setting aside a union's election victory, despite the fact that the challenged conduct was unobjectionable at the time it occurred. It concluded that "the statutory interest in protecting employees' Sec. 7 rights under the Act and assuring free and fair elections outweigh any injustice resulting from the retroactive application of the [new] standard." Id. at 674.

[26] See, e.g., *American Tel. & Tel. Co. v. FCC*, 454 F.3d 329, 332–334 (D.C. Cir. 2006); *Verizon Telephone Companies, Inc. v. FCC*, 269 F.3d 1098, 1109 (D.C. Cir. 2001); *General American Transp. Corp. v. ICC*, 872 F.2d 1048, 1060–1061 (D.C. Cir. 1989); *Electrical Workers IUE Local 900 v. NLRB*, 727 F.2d 1184, 1194–1195 (D.C. Cir. 1984).

> [I]n rearticulating its joint-employer test on remand, . . . 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.[27]

That statement, however, was followed immediately by a citation to *American Telephone & Telegraph*, supra,[28] a decision that the court described (in a parenthetical) as "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."[29]

The court's statement identified relevant, and possibly competing, considerations for the Board. On the one hand, the court observed that if there had been "a substitution of new law for old law that was reasonably clear," then the Board must consider the potential reliance interest of employers in the old standard "when organizing their business relationships."[30] On the other hand, the court contrasted the situation where the prior legal standard "reflected a highly fact-specific, case-by-case style of adjudication that did not establish a clear rule of law exempting certain conduct" and so there could be no true reliance.[31] The court's statement was not offered as a comprehensive articulation of the law on retroactivity, which (as *SEC v. Chenery* illustrates) requires balancing the effect of retroactive application on the losing party with the harm done to statutory administration if a new rule of law is applied only prospectively.[32] Rather, the court's statement is better read as indicating *when* a reliance interest might exist, requiring a balancing of that private interest with the public, statutory interest.

On remand, the Board asserted that the "court clearly emphasized the centrality of reliance interests to the retroactivity determination."[33] It concluded that the Board's old joint-employer standard represented a "clear rule of law" and that "[i]t is reasonable to assume that parties would rely on this law when organizing their business relationships," referring generally to comments filed in the joint-employer rulemaking proceeding that followed the Board's original decision in this case.[34] According to the Board, retroactive application of the new joint-employer standard "would mean that entities such as [Browning-Ferris] would be suddenly confronted with the new reality that preexisting business relationships with other entities . . . thrust upon them unanticipated and unintended duties and liabilities under the Act."[35] The Board cited no actual evidence of reliance by Browning-Ferris or other entities on the old standard. It gave no consideration to the impact of its decision on the effective administration of the Act and on the statutory rights of employees seeking to collectively bargain with the statutory employers that control their terms and conditions of work.[36]

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[27] 911 F.3d at 1222 (emphasis added), quoting *Epilepsy Foundation*, supra, 268 F.3d at 1102.

[28] 454 F.3d at 333–334.

[29] 911 F.3d at 1222.

[30] Id.

[31] Id. Fairly read, the court's statement does not suggest that these two considerations defined an either-or alternative for the Board, i.e., that this case must be placed in one of two analytical boxes, dictating the outcome. As I will explain, presenting the Board with such a choice would not be consistent with the approach to retroactivity reflected in the decisions of the Supreme Court and the District of Columbia Circuit.

[32] Compare, for example, the en banc decision of the District of Columbia Circuit in *Clark-Cowlitz Joint Operating Agency v. FERC*, 826 F.2d 1074, 1081–1082 (D.C. Cir. 1987) (en banc). There, the court explained:

> In this circuit, *Retail, Wholesale & Department Store Union v. NLRB,* 466 F.2d 380 (D.C. Cir.1972), provides the framework for evaluating retroactive application of rules announced in agency adjudications.
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> * * *
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> The general principle is that when as an incident of its adjudicatory function an agency interprets a statute, it may apply that new interpretation in the proceeding before it.
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> * * *
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> Nevertheless, a retrospective application can properly be withheld when to apply the new rule to past conduct or prior events would work a "manifest injustice."
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> The Retail, Wholesale court set forth a non-exhaustive list of five factors to assist courts in determining whether to grant an exception to the general rule permitting "retroactive" application of a rule enunciated in an agency adjudication:
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> > (1) whether the particular case is one of first impression, (2) whether the new rule represents an abrupt departure from well established practice or merely attempts to fill a void in an unsettled area of law, (3) the extent to which the party against whom the new rule is applied relied on the former rule, (4) the degree of the burden which a retroactive order imposes on a party, and (5) the statutory interest in applying a new rule despite the reliance of a party on the old standard.
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> Id. at 390.

826 F.2d at 1081–1082 (case citations omitted).

[33] 369 NLRB No. 139, slip op. at 3.

[34] Id.

[35] Id.

[36] The Board did cite the (irrelevant) "fact that the election was held, and the employees voted, on the basis that Leadpoint was the sole employer, not [Browning-Ferris) and Leadpoint as joint employers." Id. at 4. This fact is simply a function of the Regional Director's determination that under the old Board standard, Browning-Ferris was not a joint employer, despite the Union's contrary argument. The decision cited by the

2.

Each of the Board's assertions on remand was incorrect. First, although the District of Columbia Circuit certainly identified the potential reliance interest of employers as a relevant consideration, it hardly made reliance dispositive of the retroactivity issue, nor could it be consistent with long-established law. It is one thing to say that *if* there is a reason not to apply the new standard retroactively, then it can only be the effect of retroactivity on the legitimate reliance interests of employers. It is another thing to say that the effect of the new standard on employers must be the Board's overriding concern, regardless of the effect on the administration of the Act caused by the failure to apply the new standard retroactively. The case law requires a balancing test that the Board failed to perform.

Second, while the pre-*Browning Ferris* standard was clear insofar as it demanded the exercise of direct control (one element of the standard), the Board had never defined what "direct control" meant.[37] The Board's application of the joint-employer standard (no matter how the standard was articulated) has always "reflected a highly fact-specific, case-by-case style of adjudication that did not establish a clear rule of law exempting certain conduct" (in the District of Columbia Circuit's words).[38] The Supreme Court itself has pointed to the complexity of making employment-status decisions under the common law, given the variety of factual settings in American workplaces.[39] And, as already suggested, the fact that the Board's old joint-employer standard was contrary to common-law agency principles (and thus contrary to the Act) is a powerful reason to conclude that employer reliance on the Board's old standard could never be justified. Indeed, inasmuch as the joint-employer standard must be based on common-law agency principles, the standard is always subject to de novo judicial review.[40] For this reason, too, employers could never *safely* rely on the Board's standard. The court's opinion, meanwhile, pointed to District of Columbia Circuit decisions that demonstrated that the old Board standard was incorrect.[41] No federal appellate decision had ever upheld the old standard in the face of a direct challenge to its validity. In short, the old standard was always living on borrowed time. The Board has relied on such considerations in dismissing the significance of parties' reliance on a Board rule far older than the joint-employer standard at issue here.[42]

Third, the Board pointed to no evidence in the record of this case that Browning-Ferris actually relied on the old joint-employer standard in establishing its relationship with Leadpoint, although prior Board decisions on retroactivity have demanded such evidence.[43] (Indeed, it is entirely possible that had it applied the old standard, the prior Board—in contrast to the current Board—might well have found Browning-Ferris to be a joint employer.[44]) Nor did

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Board, *H&W Motor Express*, 271 NLRB 466 (1984), is easily distinguishable, both factually and legally. It did not present an issue of retroactivity. Rather, it involved a situation where employees voted on the erroneous basis that two employers *were* joint employers (the reverse of the situation here). The Board there directed a new election. It did not hold, as the Board effectively did here, that employees were forever precluded from choosing representation with respect to all employers that could properly be required to recognize and bargain with the union. In this case, there is no reason to think that employees who voted for the Union wished to have the Union bargain only with Leadpoint, despite the Union's position that Browning-Ferris was a joint employer.

[37] In contrast, the Board's new joint-employer rule *does* define "substantial direct and immediate control" as well as "indirect control," and does not simply codify existing decisions. See National Labor Relations Board, Final Rule, *Joint Employer Status under the National Labor Relations Act*, 85 Fed. Reg. 11184, 11235–11236 (Feb. 26, 2020).

[38] 911 F.3d at 1222. See *AM Property Holding Corp.*, 350 NLRB 998, 1000 (2007) ("The question of joint employer status turns on the facts of each particular case."); *Southern California Gas Co.*, 302 NLRB 456, 461 (1991) ("Primarily, the question of joint employer status must be decided on the totality of the facts of the particular case."). See also *Boire v. Greyhound Corp.*, 376 U.S. 473, 481 (1964) ("And whether Greyhound possessed sufficient indicia of control to be an 'employer' is essentially a factual issue."); *Holyoke Visiting Nurses Assn. v. NLRB,* 11 F.3d 302, 307 (1st Cir. 1993) ("[A] slight difference between two cases might tilt a case toward a finding of a joint employment."), *quoting Carrier Corp.,* 768 F.2d 778, 781, fn. 1 (6th Cir. 1985).

[39] See, e.g., *NLRB v. United Insurance Co. of America*, 390 U.S. 254, 258 (1968) ("There are innumerable situations which arise in the common law where it is difficult to say whether a particular individual is an employee or an independent contractor."). See also *NLRB v. Hearst Publications*, 322 U.S. 111, 120–123 (1944) (examining complexity of common-law test for establishing employment relationship and concluding that Congress could not have intended Board to apply test under Act).

[40] 911 F.3d at 1207–1208. Those decisions have already been cited.

[41] Id. at 1209, 1217.

[42] See *MV Transportation, Inc.*, 368 NLRB No. 66, slip op. at 12 (2019). There, the Board abandoned the 70-year-old "clear and unmistakable" waiver standard, thus making it easier for employers to make unilateral changes in employees' working conditions by invoking certain provisions in collective-bargaining agreements. The Board applied its new approach retroactively, affecting every contract provision that had been negotiated under the old, stricter standard and creating a windfall for employers. To justify this result, the Board cited the District of Columbia Circuit's relatively recent rejection of the waiver standard, beginning in 1993. See id. ("[T]he parties could not have *justifiably* relied on the Board continuing to adhere to that standard, nor could the parties in any pending case.") (emphasis in original). I dissented, but, of course, my position did not prevail. See id., slip op. at 37–38 (dissenting opinion).

[43] See, e.g., *SNE Enterprises*, supra, 344 NLRB at 674 (dismissing asserted reliance interest as "pure speculation"). As noted, the Board cited this decision here. 369 NLRB No. 139, slip op. at 3.

[44] Significantly, Browning-Ferris exercised direct and immediate control over the speed of work, counseled Leadpoint workers about productivity, communicated detailed work directions to Leadpoint workers, assigned tasks to Leadpoint workers, and requested that Leadpoint fire specific individuals. 362 NLRB at 1616–1617. Accordingly, there is certainly an argument to be made that Browning-Ferris would be a joint employer under *any* variation of the joint-employer test, old, new,

the Board identify a single specific comment in the joint-employer rulemaking where an employer asserted (much less proved) that it had relied on the old standard in establishing its business relationships. It should be obvious that there is a shifting constellation of considerations—economic, financial, legal, and practical—that inform such business decisions. It is hard to imagine that the possible application of the National Labor Relations Act is routinely considered, much less a driving factor. Even if avoiding an employment relationship were a crucial consideration for a company, the fact is that other federal statutory schemes have utilized joint-employer standards far broader than even the Board's new standard, never mind the tests used by the statutes and common law of the 50 states to determine the existence of an employment relationship, with its wide-ranging consequences.[45]

Fourth, and perhaps most important, the Board inaccurately described the consequences for employers of applying the new standard retroactively. The Board asserted that that employers would face a "new reality that preexisting business relationships with other entities . . . thrust upon them unanticipated and unintended duties and liabilities under the Act."[46] There are no automatic consequences when, in a representation proceeding, an employer is found to be a joint employer. Those consequences follow if and only if a majority of employees vote to be represented by a union in an election conducted by the Board. The consequences themselves are hardly punitive or even remedial. They are the realization of the Act's explicit goal of making it possible for employees to freely choose union representation and pursue collective bargaining with their employers.[47] The employer must simply recognize and bargain in good faith with the union. It is not required by the Act to agree to any particular terms or, indeed, to any agreement at all.[48] Nor is it required to bargain with respect to terms and conditions over which it does not possess the authority to control.[49] Moreover, any employer that meets the broad statutory definition (as Browning-Ferris does) is always subject to the Act—regardless of whether it is also a joint employer, along with another statutory employer, of particular employees. No employer subject to the Act, in turn, is entitled to assume that its employees will never successfully exercise their statutory right to seek union representation, just because the employer may have made that task more difficult, even if by lawful means.

The contrast with the situation in *Epilepsy Foundation*,[50] cited in the court's opinion here,[51] is stark. This is not an unfair labor practice case where the Board is imposing monetary liability and other remedies on an employer which, at the time, took lawful disciplinary action against an employee.[52] Nor is it a case where the Board had adhered to one permissible view of what the National Labor Relations Act meant and then adopted an opposite,

or new and rearticulated. In these circumstances, any reliance interest that Browning-Ferris might claim in having assertedly structured its business relationships based on the old joint-employer standard is a weak interest at best.

[45] See Restatement of Employment Law §1.04, "Employees of Two or More Employers," Reporter's Note (2015) (discussing various joint-employment standards under statutory and common law). See, e.g. *Salinas v. Commercial Interiors, Inc.*, 848 F.3d 125, 141 (4th Cir. 2017) (defining the "fundamental question" under the Federal Labor Standards Act as "whether two or more persons or entities are 'not completely dissociated' with respect to a worker such that the persons or entities share, agree to allocate responsibility for, or otherwise codetermine—formally or informally, directly or indirectly—the essential terms and conditions of the worker's employment."); *Butler v. Drive Automotive Industries of America, Inc.*, 793 F.3d 404, 414 (4th Cir. 2015) (setting forth a nine-factor "hybrid test" for joint-employment liability under Title VII that "allows for the broadest possible set of considerations in making a determination of which entity is an employer" and that "correctly bridges the control test and the economic realities test."); *Antenor v. D & S Farms*, 88 F.3d 925, 932–933 (11th Cir. 1996) (describing joint-employer factors under the Migrant and Seasonal Agricultural Worker Protection Act as "aids-tools to be used to gauge the degree of dependence of alleged employees on the business to which they are connected. It is dependence that indicates employee status."). See also Restatement (Second) of Agency §2(1) ("A master is a principal who employs an agent to perform service in his affairs and who controls or has the right to control the physical conduct of the other in the performance of the service.") (emphasis added); id., §220(1) ("A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control.") (emphasis added); Restatement (Second) of Agency §220, comment d ("[T]he control or right to control needed to establish the relation of master and servant may be very attenuated.").

[46] 369 NLRB No. 139, slip op. at 3.

[47] See National Labor Relations Act, Sec. 1, 29 U.S.C. §151 ("It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.").

[48] See National Labor Relations Act, Sec. 8(d), 29 U.S.C. §158(d). See also *H.K. Porter Co., Inc. v. NLRB*, 397 U.S. 99 (1970).

[49] *Browning-Fe*rris, supra, 362 NLRB at 1614.

[50] *Epilepsy Foundation of Northeast Ohio v. NLRB*, 268 F.3d 1095, 1099–1101 (D.C. Cir. 2001).

[51] 911 F.3d at 1222.

[52] The Board has previously distinguished *Epilepsy Foundation* on this ground, in a decision cited by the Board here. See, e.g., *SNE Enterprises*, supra, 344 NLRB at 673–674 ("In the instant case [a representation matter, setting aside an election], the Board is not finding a violation or ordering any party to pay damages or issuing any kind of order against a party."). The violation of Sec. 8(a)(5) in this case is purely a technical one, which follows from a refusal to bargain as a means of obtaining judicial review of the Board's decision in the representation case. See, e.g., *International Union, UAW v. NLRB*, 449 F.2d 1046, 1048 & fn. 2 (D.C. Cir. 1971).

but also permissible, view. The better analogy to this case, rather, is the Supreme Court's decision in *Bell Aerospace*, which held that the Board could reconsider, in an adjudication (as opposed to a rulemaking), the employee status under the Act of buyers who had sought union representation, notwithstanding the "possible reliance of industry on the Board's past decisions with respect to buyers."[53]

3.

What the Board said on remand is incorrect, but what it did *not* say is most telling. Focusing on the supposed reliance interest of employers in the old joint-employer standard, the Board failed to address the impact of its holding on the effective administration of the Act. This omission reflects a failure to engage in reasoned decision-making, because the Board simply neglected "an important aspect of the problem," in the words of the Supreme Court.[54]

Apparently, the Board intended to require that the old (and statutorily impermissible) joint-employer standard apply to every potential joint-employer relationship established before the new standard was adopted, no matter how long those relationships continued to exist. This means that employees across the country would be denied the statutory right to bargain collectively with companies that are joint employers under the new standard, but not under the old—perhaps for many years to come.[55] But, in fact, the Board was required to take employees' interests into account. The District of Columbia Circuit has pointed out that "as is common with comprehensive regulatory schemes, often 'every loss that retroactive application . . . would inflict on [one party] is matched by an equal and opposite loss that non-retroactivity would inflict on [another].'"[56]

Of course, this is not just a matter of competing private interests, but of an overriding public interest. In passing the National Labor Relations Act, Congress declared that it is "the policy of the United States to encourage[e] the practice and procedure of collective bargaining and [to] … protect[] the exercise by workers of . . . designation of representatives . . . for the purpose of negotiating the terms and conditions of their employment."[57] The Board's remand decision, in effect, determined that the reliance interests of employers on the old joint-employer standard, standing alone, outweighed the need to fully achieve the goals of the statute that the Board enforces. To paraphrase the Supreme Court in *SEC v. Chenery Corp.*, supra, this is nothing more than a claim that the Board lacks power to enforce the standards of the Act. For that reason alone, the Board's decision cannot stand.

III.

For all of the reasons explained, the Board's decision to defy the District of Columbia Circuit was unjustified. Viewed solely in light of the Board's approach to retroactivity, it is also anomalous. The current Board has overruled precedent many times, reversing legal rules that are far older than the joint-employer standard at issue here,[58] and it has virtually always chosen to apply its new rule of law retroactively.[59] This case stands in sharp, inexplicable contrast—now the Board's position, quite literally, is that retroactive application of the new joint-employer standard is inconceivable. That conclusion seems driven by the Board's determination to erase the new standard from the books, resulting in a tangled web of adjudication and rulemaking which perhaps only Congressional action can sort out definitively. And the long saga of this case may not

[53] *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 295 (1974). The Court, contrasting a representation proceeding with an unfair labor practice proceeding, observed:

> It has not been shown that the adverse consequences ensuing from such reliance are so substantial that the Board should be precluded from reconsidering the issue in an adjudicative proceeding. Furthermore, this is not a case in which some new liability is sought to be imposed on individuals for past actions which were taken in good-faith reliance on Board pronouncements. Nor are fines or damages involved here.

Id.

[54] *Motor Vehicle Manufacturers Association v. State Farm Auto Mutual Insurance Co.,* 463 U.S. 29, 43 (1983).

[55] Given the Board's adoption of a joint-employer rule after the court's remand of this case, of course, I acknowledge that it is not clear what cases besides this one might be affected by the Board's decision here to continue to apply the old standard. But insofar as the Board's restrictive approach to retroactivity in this case might be precedential, it threatens broad harm to the effective administration of the Act in future cases, whenever some change in Board law might be argued to upset a supposed reliance interest of employers.

[56] *NetworkIP, LLC v. FCC*, 548 F.3d 116, 123 (D.C. Cir. 2008), quoting *Qwest Servs. Corp. v. FCC,* 509 F.3d 531, 540 (D.C. Cir. 2007).

[57] National Labor Relations Act, Sec. 1, 29 U.S.C. §151

[58] See, e.g., *MV Transportation,* supra, 368 NLRB No. 66, slip op. at 12 (retroactive application of new rule supplanting "clear and unmistakable" waiver standard, first adopted in *Tide Water Associated Oil Co.*, 85 NLRB 1096 (1949)).

[59] A partial list of decisions, covering both unfair labor practice cases and representation cases, in which the current Board has reversed precedent and applied a new rule retroactively, includes *NBC Universal Media LLC*, 369 NLRB No. 134 (2020); *General Motors LLC*, 369 NLRB No. 127 (2020); *800 River Road Operating Co., LLC*, 369 NLRB No. 109 (2020); *Providence Health & Services Oregon*, 369 NLRB No. 78 (2020); *Green JobWorks, LLC*, 369 NLRB No. 20 (2020); *United Parcel Service Inc.,* 369 NLRB No. 1 (2019); *Caesars Entertainment d/b/a Rio All-Suites Hotel & Casino*, 368 NLRB No. 143 (2019); *Cristal USA, Inc.*, 368 NLRB No. 141 (2019); *Valley Hospital Medical Center, Inc.*, 368 NLRB No. 139 (2019); *MV Transportation,* supra, 368 NLRB No. 66; *Kroger Limited Partnership Mid-Atlantic*, 368 NLRB No. 64 (2019); *Bexar County Performing Arts Center*, 368 NLRB No. 46 (2019); *Johnson Controls, Inc.* 368 NLRB No. 20 (2019); *UPMC*, 368 NLRB No. 2 (2019); *United Nurses & Allied Professionals (Kent Hospital)*, 367 NLRB No. 94 (2019); *Raytheon Network Centric Systems*, 365 NLRB No. 161 (2017); *Boeing Co.*, 365 NLRB No. 154 (2017); *UPMC*, 365 NLRB No. 153 (2017).

be over, even now. The Board's order, which dismisses an unfair labor practice complaint, is judicially reviewable under Section 10(f) of the Act.[60] Because I believe that the Board should have adhered to the basic joint-employer standard adopted in this case and affirmed by the District of Columbia Circuit, and that the Board should have rearticulated that standard in compliance with the court's remand, I dissent today.

Dated, Washington, D.C. February 11, 2021

Lauren McFerran, Chairman

NATIONAL LABOR RELATIONS BOARD

[60] Sec. 10(f) of the Act provides in relevant part that "[a]ny person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order" in the appropriate federal court of appeals. 29 U.S.C. §160(f).