



UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
1015 HALF STREET SE
WASHINGTON D.C. 20570

January 17, 2019

Robert C. "Bobby" Scott
Chairman
Committee on Education and Labor

Rosa DeLauro
Chairwoman
Subcommittee on Labor, Health
And Human Services, Education,
And Related Agencies
Committee on Appropriations

Dear Chairman Scott and Chairwoman DeLauro:

I write in response to your letter dated January 8, 2019, urging the National Labor Relations Board (NLRB or Board) to withdraw its Notice of Proposed Rulemaking (NPRM) on the joint-employer standard. I welcome the opportunity to address the concerns you raise.

Your letter urges the NLRB to "abide by its current joint employer standard articulated in *Browning-Ferris*," which you contend was affirmed by the December 28, 2018 decision of the United States Court of Appeals for the District of Columbia Circuit.¹ Unfortunately, the joint-employer standard articulated by the Board in *Browning-Ferris* was neither a clear standard nor was it affirmed by the D.C. Circuit. In fact, the 2015 *Browning-Ferris* decision² leaves much unresolved, as both that decision and the court point out. Indeed, the NLRB's majority opinion in *Browning-Ferris* candidly admitted an absence of clear guidance,³ while the dissent in the case detailed many of the problems created by that lack of clarity and predictability.

¹ *Browning-Ferris Industries of California, Inc. v. NLRB*, 911 F.3d 1195 (D.C. Cir. 2018) ("*BFI v. NLRB*"). Although the court's decision has been assigned a Federal Reporter cite, the decision has not yet been paginated in Westlaw as of the writing of this letter. Accordingly, the cites in this letter are to the page numbers in the court's December 28, 2018 slip opinion.

² *Browning-Ferris Industries of California, Inc., d/b/a BFI Newby Island Recyclery*, 362 NLRB No. 186 (2015) ("*Browning-Ferris*").

³ "[W]e do not and cannot attempt today to articulate every fact and circumstance that could define the contours of a joint employment relationship. Issues related to the nature and extent of a putative joint-employer's control over particular terms and conditions of employment will undoubtedly arise in future cases—just as they do under the current test—and those issues are best examined and resolved in the context of specific factual circumstances." *Id.*, slip op. at 16.

With regard to the D.C. Circuit's recent decision, the case has been widely reported inaccurately. The court panel denied enforcement of the Board's *Browning-Ferris* order and remanded the case to the Board for further consideration. Moreover, although the court's recent decision *did* hold that an employer's indirect control of, and contractually reserved right to control, the terms and conditions of employment of another employer's employees can be *relevant* to determining joint-employer status, the D.C. Circuit expressly disapproved of the Board's application of that indirect control test. Specifically, the court stated in the last paragraph of its opinion:

In sum, we 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. We accordingly grant Browning-Ferris's petition in part, deny the Board's cross-application, dismiss without prejudice the Board's application for enforcement as to Leadpoint, and remand for further proceedings consistent with this opinion.⁴

The court *reversed* "the Board's articulation . . . of the indirect-control element," and it held that the Board *misapplied* that aspect of the joint-employer standard. The court also explained exactly where and how the Board's *Browning-Ferris* decision went astray:

The problem with the Board's decision is not its recognition that indirect control (and certainly control exercised through an intermediary) can be a relevant consideration in the joint-employer analysis. It is the Board's failure when applying that factor in this case to hew to the relevant common-law boundaries that prevent the Board from trenching on the common and routine decisions that employers make when hiring third-party contractors and defining the terms of those contracts. . . . The Board's analysis of the factual record in this case failed to differentiate between those aspects of indirect control relevant to status as an employer, and those quotidian aspects of common-law third-party contract relationships.⁵

⁴ *BFI v. NLRB*, slip op. at 50-51.

⁵ *Id.*, slip op. at 44-45.

Robert C. "Bobby" Scott
Rosa DeLauro
Page 3
January 17, 2019

Further stating its disapproval, the court wrote, "the Board provided no blueprint for what counts as 'indirect' control," explaining that the Board's "assurance that "'influence" is not enough *** if it doesn't amount to control' misses the point that not every aspect of control counts."⁶

The court's criticism of *Browning-Ferris* is unsurprising, and the noted lack of clarity is precisely why the NLRB initiated rulemaking on the joint-employer standard. As you know, the standard for determining joint-employer status under the NLRA has been and continues to be one of the most difficult and debated subjects in labor law. And, if the response to the Board's NPRM is any indication, I can affirm that there is significant interest in this topic and a wide range of views. To date, the Board has received over 26,000 individual comments, and there are still almost two weeks left in our extended comment period. We certainly look forward to considering the views of all interested parties.

Moreover, nothing in the D.C. Circuit's decision "forecloses" the Board's joint-employer rulemaking or otherwise requires the Board to suspend or withdraw its NPRM. To start with, the NLRB has long adhered to a consistent policy of deciding for itself whether to acquiesce to the views of any particular circuit court, or whether to adhere to its own view until the United States Supreme Court rules otherwise. While, on remand, the NLRB must apply the D.C. Circuit's decision in *BFI v. NLRB* as the law of the case in *Browning-Ferris* itself, it is not compelled to adopt the court's position as its own, in either *Browning-Ferris* itself or the final rule on joint-employer status.⁷

In addition, the D.C. Circuit *recognized* that the NPRM and its decision in *BFI v. NLRB* are not incompatible. Indeed, whether correctly or not, the court interpreted the Board's request that it issue a decision in *Browning-Ferris* "notwithstanding the pending rulemaking" as a request for judicial guidance in the rulemaking itself. See *BFI v. NLRB*, slip op. at 21 ("The Board's rulemaking . . . must color within the common-law lines identified by the judiciary. That presumably is why the Board has thrice asked this court to dispose of the petitions in this case during its rulemaking process."). Since the court viewed its decision as *informing* the Board's joint-employer rulemaking, it cannot be read to suggest that it "forecloses" the NPRM.

Notably, the NPRM appears to overlap with the court's position on indirect control in certain respects. The court held that "control that is exercised through an

⁶ *Id.*, slip op. at 45, 46.

⁷ To be clear, I am not suggesting or implying in any way the Board's position on acquiescence in *Browning-Ferris* or more generally. I am merely noting that, based on the Board's well-established policy, nonacquiescence is an option.

intermediary" is relevant to determining joint-employer status. *BFI v. NLRB*, slip op. at 40-41. *So did the Board*. The only difference between the court's and the Board's positions is that the court treated "control that is exercised through an intermediary" as a form of indirect control, whereas the Board viewed it as an example of direct and immediate control. Compare *BFI v. NLRB*, slip op. at 41 ("[T]he Board's conclusion that it need not avert its eyes from indicia of indirect control—including control that is filtered through an intermediary—is consonant with established common law."), with this hypothetical scenario contained in the NPRM:

Company A supplies line workers and first-line supervisors to Company B at B's manufacturing plant. Company B also employs supervisors on site who regularly require the Company A supervisors to relay detailed supervisory instructions regarding how employees are to perform their work. As required, Company A supervisors relay those instructions to the line workers. Company B possesses and exercises direct and immediate control over Company A's line workers. The fact that Company B conveys its supervisory commands through Company A's supervisors rather than directly to Company A's line workers fails to negate the direct and immediate supervisory control.⁸

For all these reasons, a majority of the Board continues to believe that notice-and-comment rulemaking offers the best vehicle to address the uncertainty surrounding the joint-employer standard. Rulemaking provides an opportunity for input by tens of thousands of public commenters, including those who may not be able to afford an attorney to participate in our case adjudication process. Withdrawing the NPRM at this time certainly would be unfair to the thousands of individuals and groups that have expressed such a strong desire to be heard on this important topic.

Rulemaking also allows the Board to elucidate the joint-employer standard ultimately adopted in the final rule by putting it to work in a variety of scenarios. As our NPRM makes clear, rulemaking permits the Board to address a wide range of hypothetical factual circumstances, furnishing all our stakeholders the guidance that the Board's *Browning-Ferris* decision admittedly failed to provide. This is guidance that can only be provided through rulemaking; further consideration of the *Browning-Ferris* case on remand from the court will be limited to the facts of that case. Rulemaking also provides the best vehicle for doing what the D.C. Circuit has instructed the Board to do: "erect some legal scaffolding that keeps the inquiry within traditional common-law bounds." *BFI v. NLRB*, slip op. at 46. This is precisely what our rulemaking is intended to accomplish.

⁸ 83 FR 46681, at 46697.

Robert C. "Bobby" Scott
Rosa DeLauro
Page 5
January 17, 2019

Lastly, in light of the unique circumstances presented by the recent D.C. Circuit *Browning-Ferris* decision, however, the Board recognized the appropriateness of extending the comment period in order for issues raised in that decision to be addressed in comments submitted to the Board. Accordingly, on January 11, 2019, the Board extended the comment period deadline from January 14, 2019 to January 28, 2019.

I can assure you that whatever standard the Board ultimately adopts at the conclusion of the rulemaking process, it will bring far greater certainty, predictability and stability to this key area of labor law, consistent with congressional intent. A majority of the Board believes we owe no less to the American public.

I hope this response addresses the concerns you expressed in your recent letter. If you have any further concerns, please do not hesitate to contact me.

Sincerely,


John F. Ring
Chairman