NLRB Ditches Browning-Ferris Joint Employer Test

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NEW YORK – A divided National Labor Relations Board on Thursday erased the landmark expansion of its test for determining joint employment that it had issued in the 2015 Browning-Ferris Industries case, voting along party lines to revert back to its previous standard.

Thursday's NLRB majority said that while the panel in Browning Ferris Industries was driven by a "well-intentioned" desire to protect employees' collective bargaining rights with third parties, the standard it created has five "major" problems. (AP)

In the 3-2 vote, the board's Republican members overturned the standard set in BFI that under the National Labor Relations Act, a company and its contractors or franchisees can be deemed a single joint employer even if the company hasn't exerted overt control over workers' terms and conditions.

The majority was composed of NLRB Chair Philip Miscimarra, who penned a dissent in BFI, and the board's two newest members, Bill Emanuel and Marvin Kaplan. Democratic members Mark Gaston Pearce and Lauren McFerran, who were both in the majority in BFI, issued a joint dissent.

"We return today to a standard that has served labor law and collective bargaining well, a standard that is understandable

and rooted in the real world," the board majority said. "It recognizes joint employer status in circumstances that make sense and would foster stable bargaining relationships."

In the BFI decision, the majority had determined that Browning Ferris was a joint employer of recycling workers provided by staffing agency Leadpoint Business Services Inc. at a BFI-owned recycling facility in Milpitas, California.

Before the BFI ruling, the NLRB's test rested on a business having "direct and immediate" control over terms and conditions of employment. In Browning-Ferris, the board revised the standard to include "indirect control" or the ability to exert such control.

In Thursday's ruling, the board returned to its "direct and immediate" control standard, saying the BFI test confused the definition of a joint employer and threatened to produce "wide-ranging instability" in bargaining relationships.

"A finding of joint-employer status shall once again require proof that putative joint employer entities have exercised joint control over essential employment terms (rather than merely having 'reserved' the right to exercise control), the control must be 'direct and immediate' (rather than indirect), and joint-employer status will not result from control that is 'limited and routine,'" the board majority said. "We think that the Browning-Ferris standard is a distortion of common law as interpreted by the board and the courts, it is contrary to the [National Labor Relations Act,] it is ill-advised as a matter of policy, and its application would prevent the board from discharging one of its primary responsibilities under the Act, which is to foster stability in labor-management relations."

The NLRB majority said that while the panel in BFI was driven by a "well-intentioned" desire to protect employees' collective bargaining rights with third parties, the standard

it created has five “major” problems. Among them are that the BFI test exceeds the board’s statutory authority and that the change the board wrought regarding the NLRA’s definition of “employer” “is solely within the province of Congress.”

The majority also said that to the extent the BFI decision sought to correct a perceived inequality in the amount of bargaining leverage workers had due to complex business relationships, that inequality “was the wrong target, and expanding collective bargaining to an employer’s business partners was the wrong remedy.”

“Business entities enter into a variety of relationships, and they have different interests and varying degrees of leverage in their dealings with one another,” the panel majority said Thursday. “There are contractually more powerful business entities and less powerful business entities, and all pursue their own interests. The board would need a clear congressional command – and none exists here – before undertaking an attempt to reshape this aspect of economic reality.”

Using the pre-BFI test, the board on Thursday upheld a ruling by Administrative Law Judge Robert Ringler that Hy-Brand Industrial Contractors Ltd. and Brandt Construction Co., which are construction companies owned by the same individuals, were joint employers and both liable for illegally firing seven employees who had gone on strike to protest their wages and working conditions.

In a joint dissent, Pearce and McFerran said the Hy-Brand ruling brought back a restrictive test, wasn’t the proper vehicle for revisiting the joint employer standard at all since it was really a single employer case and resulted from “a deeply flawed process” meant to achieve a desired result quickly.

The dissenters argued that the board majority failed to

examine relevant data and articulate a satisfactory explanation for its action as required under the Administrative Procedure Act, saying the decision "bears little relationship to the facts, which, as explained, do not fairly present a genuine joint-employer issue."

The board majority also failed to notify the public that a reversal of precedent was under consideration, and didn't solicit briefs – a process followed before deciding the BFI case, according to the dissent.

"Even a cursory glance at today's decision reveals that the majority's policy basis for overruling BFI is entirely speculative: pages upon pages bemoaning the changes supposedly wrought by BFI and their potential catastrophic effects, but no real-world examples or even remotely plausible hypotheticals," Pearce and McFerran said. "It is reasonable to infer that our colleagues do not want to engage the public for fear of what they might learn – namely, that none of the predicted effects of BFI have actually come to pass."

The respondents were represented by Stanley Niew of the Law Offices of Stanley E. Niew PC.

The NLRB general counsel was represented by Patricia Hollis McGruder.

The case is Hy-Brand Industrial Contractors Ltd. and Brandt Construction Co., case numbers 25–CA–163189, 25–CA–163208, 25–CA–163297, 25–CA–163317, 25–CA–163373, 25–CA–163376, 25–CA–163398, 25–CA–163414, 25–CA–164941, and 25–CA–164945, all before the National Labor Relations Board.