LABOR LAW
A PROBLEM-BASED APPROACH

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***Hy-Brand Industrial Contractors*, 365 N.L.R.B. No. 156 (Dec. 14, 2017)**

This case involves a judge's finding that two entities--Hy-Brand Industrial Contractors, Ltd. (Hy-Brand) and Brandt Construction Co. (Brandt)--are collectively joint employers and/or a single employer for purposes of the National Labor Relations Act (NLRA or Act). Five Hy-Brand employees and two Brandt employees were discharged after they engaged in work stoppages based on concerns involving wages, benefits, and workplace safety. We agree that the work stoppages constituted protected concerted activity under Section 7 of the Act, and the discharges constituted unlawful interference with the exercise of protected rights in violation of Section 8(a)(1) of the Act.

We agree with the judge that Hy-Brand and Brandt are joint employers, but we disagree with the legal standard the judge applied to reach that finding. The judge applied the standard adopted by a Board majority in *Browning-Ferris Industries of California, Inc. d/b/a BFI Newby Island Recyclery (Browning-Ferris)*. In *Browning-Ferris*, the Board majority held that, even when two entities have *never* exercised joint control over essential terms and conditions of employment, and even when any joint control is not "direct and immediate," the two entities will still be joint employers based on the mere existence of "reserved" joint control,[3] or based on indirect control[4] or control that is "limited and routine."[55] We find that the *Browning-Ferris* standard is a distortion of common law as interpreted by the Board and the courts, it is contrary to the 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. Accordingly, we overrule *Browning-Ferris* and return to the principles governing joint-employer status that existed prior to that decision. By overruling *Browning-Ferris*, we also make the Board's treatment of joint-employer status consistent with the holdings of numerous Federal and state courts. . . .

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[3] Prior to the Board majority's decision in *Browning-Ferris*, joint-employer status turned on whether two entities *exercised* joint control over essential employment terms, and evidence that an entity had "reserved" the right to exercise such control would *not* result in joint-employer status.

[4] Prior to *Browning-Ferris*, the Board--applying common law principles--held that the "essential element" when evaluating joint-employer status "was whether the putative joint employer's control over employment matters is *direct and immediate*." *Airborne Express*, 338 NLRB 597, 597 fn. 1 (2002) (emphasis added) (citing *TLI, Inc.*, 271 NLRB 798 (1984)). Proof that a putative joint employer *indirectly* affected the terms and conditions of employment of another employer's employees was insufficient prior to *Browning-Ferris*. An example of indirect control would be an agreement between a supplier employer (a business that supplies labor to other businesses) and a user employer (a business that uses the labor supplied by a supplier employer) specifying a maximum total amount of reimbursable labor costs. See *CNN America, Inc.*, 361 NLRB 439, 472 (2014) (Member Miscimarra, concurring in part and dissenting in part). The contractual maximum for reimbursable labor costs, codetermined by the user and supplier, would not directly establish the wage rates or fringe benefits of the supplier's employees, but it would have an indirect effect on the supplier employees' wages and/or benefits when the supplier employer sets or negotiates them.

[5] Before *Browning-Ferris*, the Board held that joint-employer status would not result from control that was "limited and routine." Supervision was found "limited and routine" where a supervisor's instructions consisted primarily of telling employees what work to perform, or where and when to perform it, but not how to perform it.

I. OVERVIEW

The National Labor Relations Act (Act) establishes a comprehensive set of rules for labor relations in this country, and a primary function of the Board is to foster compliance with those rules by employees, unions, and employers. To comply with these rules as they have grown and evolved over the last eight decades, substantial planning is required. This is especially true in regard to collective bargaining, a process that is central to the Act. The Act's bargaining obligations are formidable--as they should be--and violations can result in significant liability. When it comes to the duty to bargain, resort to strikes or picketing, and even the basic question of "who is bound by this collective-bargaining agreement," there is no more important issue than correctly identifying who is the employer. Changing the test for identifying the employer, therefore, has dramatic implications for labor relations policy and its effect on the economy.

In *Browning-Ferris*, a Board majority rewrote the decades-old test for determining who is the employer. More specifically, the majority redefined and expanded the test that makes two separate and independent entities a "joint employer" of certain employees. This change subjected countless entities to unprecedented new joint bargaining obligations that most may not even know they have, to potential joint liability for unfair labor practices and breaches of collective-bargaining agreements, and to economic protest activity, including what have heretofore been unlawful secondary strikes, boycotts, and picketing.

The *Browning-Ferris* majority was driven by a desire to ensure that collective bargaining is not foreclosed by business relationships that allegedly deny employees the right to bargain with employers that share control over essential terms and conditions of their employment. However well-intentioned the majority's decision in *Browning-Ferris* might have been, there are five major problems with that decision.

First, the *Browning-Ferris* test exceeds the Board's statutory authority. From the *Browning-Ferris* majority's perspective, the change their decision wrought in the joint-employer analysis was a necessary adaptation of Board law to reflect changes in the national economy. In making that change, they purported to operate within the limits of traditional common law principles, and they claimed to be returning to the law applied by the Board prior to 1984. In actuality, however, the *Browning-Ferris* majority relied on theories of "economic realities" and "statutory purpose" that extended the definitions of "employee" and "employer" far beyond the common law limits that Congress and the Supreme Court have stated must apply. . . .

Second, the *Browning-Ferris* majority's rationale for overhauling the Act's definition of "employer"--i.e., to protect bargaining from limitations resulting from the absence from the table of third parties that indirectly affect employment-related issues--relied in substantial part on the notion that present conditions are unique to our modern economy and represent a radical departure from simpler times when labor negotiations were unaffected by the direct employer's commercial dealings with other entities. However, such an economy has not existed in this country for more than 200 years. Many forms of subcontracting, outsourcing, and temporary or contingent employment date back to long before the 1935 passage of the Act. Congress was obviously aware of the existence of third-party business relationships in 1935, when it limited bargaining obligations to the "employer"; in 1947, when it limited the definition of "employee" and "employer" to their common law agency meaning; and in 1947 and 1959, when Congress strengthened secondary boycott protection afforded to third

parties who, notwithstanding their dealings with the employer, could not lawfully be required to suffer picketing and other forms of economic coercion based on their dealings with that employer. This is not mere conjecture; it is the inescapable conclusion that follows from Supreme Court precedent recognizing that the Act did not confer "employer" status on third parties merely because commercial relationships made them interdependent with an employer and its employees.

Third, courts have afforded the Board deference in this context merely as to its drawing of factual distinctions when applying the common law agency standard. However, the *Browning-Ferris* majority mistakenly interpreted this as a grant of authority to modify the agency standard itself. It is not, and the change wrought in *Browning-Ferris* is solely within the province of Congress, not the Board. . . . To be specific, we understand the common law standard as codified by the Act to require direct control over one or more essential terms and conditions of employment to constitute an entity the joint employer of another entity's employees. Our fundamental disagreement with the *Browning-Ferris* test is not that it treats indicia of indirect, and even potential, control to be probative of joint-employer status, but that it makes such indicia potentially dispositive without any evidence of direct control in even a single area. Under the common law, in our view, evidence of indirect control or contractually-reserved authority is probative only to the extent that it supplements and reinforces evidence of direct control.

Fourth, *Browning-Ferris* abandoned a longstanding test that provided certainty and predictability, replacing it with a vague and ill-defined standard that would have resulted in the imposition of unprecedented bargaining obligations on multiple entities in a wide variety of business relationships, based solely on a never-exercised right to exercise "indirect" control over what the Board later decides is an "essential" employment term, to be determined in litigation on a case-by-case basis. Thus, the *Browning-Ferris* test deprived employees, unions, and employers of certainty and predictability regarding the identity of the "employer." . . . .

Fifth, to the extent that the *Browning-Ferris* majority sought to correct a perceived inequality of bargaining leverage resulting from complex business relationships involving entities that do not participate in collective bargaining, the inequality addressed therein was the wrong target, and expanding collective bargaining to an employer's business partners was the wrong remedy. As noted above, the inequality targeted by the *Browning-Ferris* joint-employer test is a fixture of our economy. Business entities enter into a variety of relationships, and they have different interests and varying degrees of leverage in their dealings with one another. 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. The Act does not redress imbalances of power between businesses, even if those imbalances have some derivative effect on employees. . . .

The Act encourages collective bargaining, but only between a labor organization and an employer regarding the terms and conditions of employment of the employer's employees. *Browning-Ferris* extended this purpose far beyond what Congress intended. In this respect, *Browning-Ferris* fosters substantial bargaining instability by requiring the nonconsensual presence of too many entities with diverse and conflicting interests on the "employer" side of the table. Indeed, even the commencement of good-faith bargaining

could have been delayed by disputes over whether the correct "employer" parties were present. This predictable outcome is irreconcilable with the Act's overriding policy to "*eliminate* the causes of certain substantial obstructions to the free flow of commerce."

In sum, the *Browning-Ferris* majority opinion did not represent a "return to the traditional test used by the Board," as the majority claimed even as they admitted that the Board had never before described or articulated the test they announced. Rather, the *Browning-Ferris* joint-employer test fundamentally altered the law applicable to user-supplier, lessor-lessee, parent-subsidiary, contractor-subcontractor, franchisor-franchisee, predecessor-successor, creditor-debtor, and contractor-consumer business relationships under the Act. In addition, because the commerce data applicable to joint employers is combined for jurisdictional purposes, the Act's coverage was extended to small businesses whose separate operations and employees had not, until *Browning-Ferris* issued, been subject to Board jurisdiction. As explained in detail below, we believe the *Browning-Ferris* majority impermissibly exceeded the Board's statutory authority, misread and departed from prior case law, and subverted traditional common law agency principles. The result was a new test that confused the definition of a joint employer and threatened to produce wide-ranging instability in bargaining relationships. It did violence as well to other requirements imposed by the Act, notably including the secondary-boycott protection that Congress affords to neutral employers. For all these reasons, we return today to pre-*Browning-Ferris* precedent. Thus, 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."

II. THE JOINT-EMPLOYER TEST PRIOR TO *BROWNING-FERRIS*

The Act does not expressly define who is an employer, whether joint or sole. In relevant part, Section 2(2) of the Act states only that "[t]he term '"employer' includes any person acting as an agent of an employer, directly or indirectly." . . . In two cases decided in 1984--*Laerco Transportation*[, 269 NLRB 324 (1984)] and *TLI, Inc.*--the Board clarified the law by expressly adopting the joint-employer standard announced by the Court of Appeals for the Third Circuit in *NLRB v. Browning-Ferris Indus. of Pennsylvania, Inc.*, 691 F.2d 1117, 1124 (3d Cir. 1982): "The basis of the [joint-employer] finding is simply that one employer while contracting in good faith with an otherwise independent company, has retained for itself sufficient control of the terms and conditions of employment of the employees who are employed by the other employer. Thus, the 'joint employer' concept recognizes that the business entities involved are in fact separate but that they share or co-determine those matters governing the essential terms and conditions of employment." Applying this test as to "essential terms" in both *Laerco* and *TLI*, the Board stated it would focus on whether an alleged joint employer "meaningfully affects matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction."

Both *TLI* and *Laerco* were cases applying the joint-employer test to the relationship between a company supplying labor to a company using that labor. The Board found that evidence of the user employer's actual but "limited and routine" supervision and direction of the supplier employer's employees would not suffice to establish joint-employer

status. Subsequently, in *AM Property Holding Corp.*, 350 NLRB [998, 1001 (2007)], the Board further explained that it has "generally found supervision to be limited and routine where a supervisor's instructions consist primarily of telling employees what work to perform, or where and when to perform the work, but not how to perform the work."

In *Airborne Express*, 338 NLRB at 597 fn. 1, the Board explained that under the joint-employer test, "[t]he essential element in [the joint-employer] analysis is whether a putative joint employer's control over employment matters is direct and immediate." Consistent with this standard, in *AM Property* the Board found that . . . the right to approve hires by the supplier company (PBS) to work at AM's office building was not, standing alone, sufficient to make AM a joint employer of those employees. Instead, "[i]n assessing whether a joint employer relationship exists, the Board does not rely merely on the existence of such contractual provisions, but rather looks to the actual practice of the parties." . . .

III. THE *BROWNING-FERRIS* JOINT-EMPLOYER TEST

The *Browning-Ferris* majority expressly overruled *TLI*, *Laerco*, *Airborne Express*, *AM Property,* and related precedent and purported to return to a joint-employer test that allegedly applied prior to this line of precedent. Their analysis began in a manner that was consistent with prior precedent: "The Board may find that two or more entities are joint employers of a single work force if they are both employers within the meaning of the common law, and if they share or codetermine those matters governing the essential terms and conditions of employment." . . .

The *Browning-Ferris* majority went on to adopt *TLI*'s and *Laerco*'s description of essential terms and conditions of employment as "matters relating to the employment relationship *such as* hiring, firing, discipline, supervision, and direction." (emphasis in *Browning-Ferris*). If this was the extent of the majority's holding in *Browning-Ferris*, there would have been no need for that majority to overrule precedent.

However, the *Browning-Ferris* majority made clear that its new test expanded joint-employer status far beyond anything that had existed under then-current precedent and, contrary to the majority's claim, under precedent predating *TLI* and *Laerco*. In a two-step progression, the first of which misleadingly depicted the limits of common law, the *Browning-Ferris* majority removed all limitations on what kind or degree of control over essential terms and conditions of employment may be sufficient to warrant a joint-employer finding. "We will no longer require," they announced,

> that a joint employer not only possess the authority to control employees' terms and conditions of employment, but must also exercise that authority, and do so directly, immediately, and not in a "limited and routine" manner. . . . The right to control, in the common-law sense, is probative of joint-employer status, as is the actual exercise of control, whether direct or indirect.

Moreover, the *Browning-Ferris* test evaluated the exercise of control by construing "share or codetermine" broadly:

> In some cases (or as to certain issues) employers may engage in genuinely *shared decision-making*, e.g., they *confer or collaborate* to set a term of employment. . . . Alternatively, employers may exercise *comprehensive authority* over different terms and conditions of employment. For example, one employer sets wages and hours, while another assigns work and supervises employees. . . . Or employers *may affect different components of the same term*, e.g. one employer *defines and assigns work tasks*, while the other supervises *how those tasks are carried out*. . . . Finally, one employer may *retain the contractual right to set a term or condition of employment*.

The *Browning-Ferris* majority conceded that "it is certainly possible that in a particular case, a putative joint employer's control might extend only to terms and conditions of employment too limited in scope or significance to permit meaningful collective bargaining." However, the majority failed to provide any guidance as to what degree of control, under what circumstances, would be insufficient to establish joint-employer status.

* * *

IV. *BROWNING-FERRIS* DISTORTED THE COMMON LAW AGENCY TEST AND ADOPTED THE CONGRESSIONALLY-REJECTED "ECONOMIC REALITY" AND "BARGAINING INEQUALITY" THEORIES.

* * *

B. The Browning-Ferris Test Does Not Comport with Common Law Agency Principles.

The *Browning-Ferris* majority . . . attempted to persuade that their test of joint-employer status was consistent with common-law agency's master-servant doctrine. Their attempt failed.

The "touchstone" at common law is whether the putative employer sufficiently controls or has the right to control putative employees. See *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440, 448-449 (2003); Restatement (Second) of Agency §§ 2, 220 (1958). Without attribution, the *Browning-Ferris* majority asserted that the common law considers as potentially dispositive not only direct control, but also indirect control and even reserved control that has never been exercised. They jettisoned the joint-employer test's requirement of evidence that the putative employer's control be direct and immediate. As explained below, however, "control" under common-law principles *requires* some direct and immediate control even where indirect-control factors are deemed probative. The Act, with its incorporation of the common law, does not allow the Board to broaden the standard to include indirect control or an inchoate right to exercise control, *standing alone*, as a dispositive factor, which the *Browning-Ferris* majority did. . . .

To aid in applying [the] well-established common law for employer-employee relationships, the Supreme Court largely adopted the Restatement (Second) of Agency § 220's nonexhaustive list of factors to be considered. *Community for Creative Non-Violence v. Reid*, 490 U.S. at 751-752; see also *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. at 323-324. The *Reid* Court wrote:

> In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

These factors provide useful indicia of the putative employer's direct and immediate control, or its right to exercise such control. . . .

* * *

VI. THE *BROWNING-FERRIS* TEST WAS IMPERMISSIBLY VAGUE AND OVERBROAD, FOSTERING LEGAL UNCERTAINTY AND LABOR RELATIONS INSTABILITY.

A. Browning-Ferris Provided No Guidance as to When and How Parties May Contract for the Performance of Work Without Being Deemed Joint Employers.

Multi-factor tests, like the common-law agency standard that the Board must apply, are vulnerable to an analysis that can be impermissibly unpredictable and results-oriented. As then-Judge Roberts remarked about the standard for determining whether college faculty are managerial employees under the Act under *NLRB v. Yeshiva University*:

> The need for an explanation is particularly acute when an agency is applying a multi-factor test through case-by-case adjudication. The open-ended rough-and-tumble of factors on which *Yeshiva* launched the Board and higher education can lead to predictability and intelligibility only to the extent the Board explains, in applying the test to varied fact situations, which factors are significant and which less so, and why. . . . In the absence of an explanation, the totality of the circumstances can become simply a cloak for agency whim--or worse.

Browning-Ferris' multi-factor test, under which any degree of indirect or contractually reserved control over a single employment term is probative of and may suffice to establish joint-employer status, lacks the required explanation of "which factors are significant and which less so, and why." The *Browning-Ferris* majority provided no meaningful guidelines as to the test's future application. Further, they acknowledged no legitimate grounds for parties in a business relationship to insulate themselves from joint-employer status under the Act.

The *Browning-Ferris* test stands in marked contrast to the prior, longstanding test, under which evidence of direct and immediate control of essential terms of employment was required, thereby establishing a clearly discernible and rational line between what does and does not constitute a joint-employer relationship under the Act. . . .

By comparison, the *Browning-Ferris* test treats as probative of joint-employer status all evidence of indirect control of such factors as determining the place of work, defining the work to be performed and how quickly it needs to be done, prescribing the hours when work will be performed, setting minimum qualifications for the individuals the contractor furnishes to perform the work and reserving the right to reject an individual (even though the contractor may assign the rejected employee to a different job), inspecting the contractor's work, giving results-oriented feedback to the contractor that the contractor's supervisors use in directing the contractor's employees, agreeing to a price for the contractor's services that happens to be in the form of a cost-plus formula, and reserving the right to cancel the arrangement. Accordingly, under the *Browning-Ferris* test, *a homeowner hiring a plumbing company for bathroom renovations could well be deemed a joint employer of the plumbing company's employees!* By adopting such an overbroad, all-encompassing and highly variable test, the *Browning-Ferris* majority extended the Act's definition of "employer" well beyond its common-law meaning, and beyond its ordinary meaning as well. . . .

The number of contractual relationships potentially encompassed by the *Browning-Ferris* standard was vast, including contractual relationships involving

> • insurance companies that require employers to take certain actions with their employees in order to comply with policy requirements for safety, security, health, etc.;
> • franchisors (see below);
> • banks or other lenders whose financing terms may require certain performance measurements;
> • any company that negotiates specific quality or product requirements;
> • any company that grants access to its facilities for a contractor to perform services there, and then regulates the contractor's access to the property for the duration of the contract;
> • any company that is concerned about the quality of contracted services;
> • consumers or small businesses who dictate times, manner, and some methods of performance of contractors. . . .

Browning-Ferris effected a sweeping change in the law without any substantive discussion of significant adverse consequences raised by the parties and amici in that case. . . . In our view, the adverse consequences that logically flow from the *Browning-Ferris* standard warrant a return to the "direct and immediate control" standard.

B. Browning-Ferris Destabilized Bargaining Relationships and Created Unresolvable Legal Uncertainty.

Browning-Ferris greatly expanded the joint-employer test without grappling with its practical implications for real-world collective-bargaining relationships. The majority there purported to be following the command in Section 1 of the Act to "encourag[e] the practice and procedure of collective bargaining." Congress did not mean, however, to blindly expand collective-bargaining obligations whether or not they are appropriate. . . . [T]he Supreme Court has stressed the need to provide "certainty beforehand" to employers and unions alike. Employers must have the ability to "reach decisions without fear of later evaluations labeling . . . conduct an unfair labor practice," and a union similarly must be able to discern

"the limits of its prerogatives, whether and when it could use its economic powers . . ., or whether, in doing so, it would trigger sanctions from the Board." *First National Maintenance Corp. v. NLRB*, [452 U.S. 666, 678-679, 684-686 (1981)].

Collective bargaining was intended by Congress to be a process that could conceivably produce agreements. One of the key analytical problems in widening the net of "who must bargain" is that, at some point, agreements predictably will *not* be achievable because different parties involuntarily thrown together as negotiators under the *Browning-Ferris* test will predictably have widely divergent interests. *Browning-Ferris*' marked expansion of bargaining obligations to other business entities threatened to destabilize existing bargaining relationships and complicate new ones. Even if one takes an extremely simplistic user-supplier scenario, the *Browning-Ferris* standard, which made many clients an "employer" of contractor employees while making contractors an "employer" jointly with their clients, stood to produce bargaining relationships and problems unlike any that have existed in the Board's history, which could not have been contemplated or intended by Congress. . . .

* * *

D. Browning-Ferris Threatened Existing Franchising Arrangements in Contravention of Board Precedent and Trademark Law Requirements.

Of the thousands of business entities with various contracting arrangements that suddenly found themselves to be joint employers under the *Browning-Ferris* standard, franchisors stand out. According to the International Franchise Association (IFA), "in 2012 there were 750,000 franchise establishments in the United States employing 8.1 million workers, generating a direct economic output of $769 billion. These businesses account for approximately 3.4 percent of America's gross domestic product."

For many years, the Board has generally not held franchisors to be joint employers with their franchisees, regardless of the degree of indirect control retained. The *Browning-Ferris* majority did not mention, much less discuss, the potential impact of its new standard on franchising relations, but it was almost certainly momentous and hugely disruptive. Indeed, absent any discussion, *Browning-Ferris* left open whether the majority there even agreed with the General Counsel's position that the Board should continue to exempt franchisors from joint-employer status to the extent their indirect control over employee working conditions is related to their legitimate interest in protecting the quality of their product or brand. . . . Given the breadth of the *Browning-Ferris* test and its supporting rationale, there was reason for concern that a Board applying *Browning-Ferris* would have deemed a franchisor with this type of indirect control a joint employer of its franchisees' employees. . . .

* * *

VII. *BROWNING-FERRIS* CONFLICTS WITH CONGRESSIONAL INTENT TO INSULATE NEUTRAL EMPLOYERS FROM SECONDARY ECONOMIC COERCION.

Not only did the *Browning-Ferris* test impermissibly expand and confuse bargaining obligations under Sections 8(a)(5) and 8(d), it also did violence to other provisions of the Act

that depend on a determination of who is, and who is not, the "employer." Chief among them is Section 8(b)(4)(ii)(B), which prohibits secondary economic protest activity, such as strikes, boycotts, and picketing. That section of the Act "prohibits labor organizations from threatening, coercing, or restraining a neutral employer with the object of forcing a cessation of business between the neutral employer and the employer with whom a union has a dispute," but it does not prohibit striking or picketing the primary employer, i.e., the employer with whom the union does have a dispute. In enacting Section 8(b)(4)(ii)(B), Congress intended to "preserv[e] the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and . . . [to] shield[] unoffending employers and others from pressures in controversies not their own." *NLRB v. Denver Building Trades Council*, [341 U.S. 675, 692 (1951)].

An entity that is a joint employer with the employer involved in a labor dispute is equally subject to union economic protest activities. To put this in practical terms, before *Browning-Ferris* a union in a labor dispute with a supplier employer typically could not picket a user entity in order to urge that entity's customers to cease doing business with the user, with the object of forcing the user to cease doing business with the supplier employer.[85] Likewise, a union with a labor dispute with one franchisee typically could not picket the franchisor and all of its other franchisees.

Browning-Ferris' expansion of the joint-employer doctrine swept many more entities into primary-employer status as to labor disputes that are not directly their own. As a result, unions were enabled to picket or apply other coercive pressure to either or both of the joint employers as they chose. This limited the Act's secondary-boycott prohibitions in a manner Congress could not have intended. . . . For example, a union could picket all of the user entity's facilities even though the supplier employer only provides services at one. Further, assuming that a franchisor exerts similar indirect control over each franchisee, a union could picket the franchisor and all franchisees even though its dispute only involves the employees of one franchisee. . . .

* * *

For the reasons stated above, we overrule *Browning-Ferris* and restore the joint-employer standard that existed prior to the *Browning-Ferris* decision. Thus, a finding of joint-employer status requires proof that the alleged joint-employer entities have actually *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."

MEMBERS PEARCE and MCFERRAN, dissenting.

* * *

. . . The majority errs in failing to adhere to the joint-employer standard adopted in *BFI* (*Browning-Ferris*). That standard, as we will explain, has a required foundation in the common law of agency that the joint-employer standard resurrected today demonstrably lacks. And unlike the majority's test, the *BFI* standard actually serves the policies of the National Labor Relations Act. First, we will review what *BFI* actually was--a measured, common-law based

restoration of earlier Board precedent. Second, we will demonstrate why the *BFI* approach represented the best reading of the common law, and why the majority's approach cannot be reconciled with agency principles. Finally, we will explain why the majority's depiction of *BFI*'s practical consequences is wildly off base and why the majority's approach is contrary to the goals of Federal labor law.

A.

In *BFI*, decided in 2015, the Board sought to address the difficult question of how best to "encourag[e] the practice and procedure of collective bargaining" (in the Act's words) when otherwise bargainable terms and conditions of employment are under the control of more than one statutory employer. As a starting point, the *BFI* Board described the specific legal and policy shortcomings in the Board's existing jurisprudence. First, the *BFI* Board noted that the Board's joint-employer standard had become increasingly restrictive over the past 30 years--a change in the law that had not been explained or squared with earlier, more expansive precedent.[16] (In fact, before *BFI*, the Board's joint-employer doctrine had never been clearly or comprehensively explained at all.) Specifically, beginning in the mid-1980's, the Board had implicitly repudiated its traditional reliance on a putative employer's reserved control and indirect control as indicia of joint-employer status; it instead focused exclusively on actual control and required the exercise of that control to be direct, immediate, and not "limited and routine." See, e.g. *TLI, Inc.*, and *Laerco Transportation*. Second, the *BFI* Board observed that, over the same period, the diversity of workplace arrangements had expanded significantly, particularly those involving staffing and subcontracting arrangements, or contingent employment. The immediate impetus for *BFI* was thus twofold: putting the Board's joint-employer jurisprudence on solid legal footing, while fulfilling the Board's primary responsibility of "applying the general provisions of the Act to the complexities of industrial life."

The Board's holding in *BFI* comprised several key components. First, the Board returned to its traditional joint-employer test, as endorsed by the Third Circuit in *NLRB v. Browning-Ferris*:

> The Board may find that two or more entities are joint employers of a single work force if they are both employers within the meaning of the common law, and if they share or codetermine those matters governing the essential terms and conditions of employment.

"Central to both of these inquiries," the *BFI* Board observed, "is the existence, extent, and object of the putative joint employer's control." Second, the Board reaffirmed that its joint-employer standard was informed by the common-law concept of control, as required by the Act and the Supreme Court's interpretation of the statute. Finally, the Board held that it would no longer require that a joint employer not only possess the authority to control employees' terms and conditions of employment, but must also exercise that authority, and do so directly, immediately, and not in a ""limited and routine" manner. Accordingly, the Board held that the *right* to control, in the common-law sense, was probative of joint-employer status, as was the *exercise* of control, whether direct or indirect.

Properly understood then, *BFI* was essentially a modest and limited holding, with clear constraints built into the majority's formulation of the joint-employer standard. With respect to those constraints, the Board first explained that the existence of a common-law employment relationship was necessary, but not sufficient, to find joint-employer status. Accordingly, even where the common law permitted the Board to find joint employer status in a particular case, the Board would still determine whether it would serve the purposes of the National Labor Relations Act to do so, taking into account the policies of the statute. For instance, the Board explained that, in a particular case, a putative joint employer's control might extend only to terms and conditions of employment too limited in scope or significance to permit meaningful collective bargaining. Second, the Board made clear that, as a rule, a joint employer would be required to bargain only with respect to those terms and conditions which it possessed the authority to control. Finally, the Board emphasized that joint-employment inquiries would take into account "all of the incidents" of the parties' relationship, in accordance with Supreme Court precedent.

The Board's decision in *BFI* belies the current majority's repeated and false assertion that *BFI* created a license to find joint-employer status based on only the slightest, most tangential evidence of control. That assertion, of course, echoes much of the *BFI* dissent, which focused on the allegedly far-reaching, novel, and destabilizing nature of the decision. But, again, the standard announced in *BFI* was hardly a radical or unprecedented departure. In fact, it was not even new: it was a common-law based restoration of the Board's traditional standard that, with court approval, had been applied for decades. Indeed, a leading scholar of labor law recognized the decision for what it was: "nothing more than a narrowly crafted opinion that reinstates a prior definition of the joint employment relationship for purposes of collective bargaining under the regulatory umbrella of the National Labor Relations Act (NLRA)."

* * *

IV.

The issue of joint employment under the National Labor Relations Act is undeniably important. The Board should address this issue with care and with the full benefit of public participation. And it did so--in *BFI*. It is no overstatement to say that the Board's decision in *BFI* was the most fully explicated joint-employer decision in the history of the Board. The standard it adopted was firmly grounded in the common law, while tailored to the aims of the National Labor Relations Act. Today's reflexive reversal of *BFI*, in contrast, reflects neither a grasp of common-law agency principles, nor a commitment to the policy of Federal labor law. The majority has simply failed to engage in reasoned decision-making, in favor of reaching a desired result as quickly as possible. Because we cannot join such an unfortunate exercise, we dissent.

***The Boeing Co.*, 365 N.L.R.B. No. 154 (Dec. 14, 2017)**

This case involves the legality of an employer policy, which is one of a multitude of work rules, policies and employee handbook provisions that have been reviewed by the Board using a test set forth in *Lutheran Heritage Village-Livonia*. In this case, the issue is whether Respondent's mere maintenance of a facially neutral rule is unlawful under the *Lutheran Heritage* "reasonably construe" standard, which is also sometimes called *Lutheran Heritage* "prong one" (because it is the first prong of a three-prong standard in *Lutheran Heritage*). Thus, in *Lutheran Heritage*, the Board stated:

> [O]ur inquiry into whether the maintenance of a challenged rule is unlawful begins with the issue of whether the rule explicitly restricts activities protected by Section 7. If it does, we will find the rule unlawful. If the rule does not explicitly restrict activity protected by Section 7, the violation is dependent upon a showing of one of the following: (1) *employees would reasonably construe the language to prohibit Section 7 activity*; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.

Most of the cases decided under *Lutheran Heritage* have involved the *Lutheran Heritage* "reasonably construe" standard, which the judge relied upon in the instant case. Specifically, the judge ruled that Respondent, The Boeing Company (Boeing), maintained a no-camera rule that constituted unlawful interference with the exercise of protected rights in violation of Section 8(a)(1) of the National Labor Relations Act (NLRA or Act).

Boeing designs and manufactures military and commercial aircraft at various facilities throughout the United States. The work undertaken at Boeing's facilities is highly sensitive; some of it is classified. Boeing's facilities are targets for espionage by competitors, foreign governments, and supporters of international terrorism, and Boeing faces a realistic threat of terrorist attack. Maintaining the security of its facilities and of the information housed therein is critical not only for Boeing's success as a business--particularly its eligibility to continue serving as a contractor to the federal government--but also for national security.

Boeing maintains a policy restricting the use of camera-enabled devices such as cell phones on its property. For convenience, we refer to this policy (which is contained in a more comprehensive policy Boeing calls "PRO-2783") as the ""no-camera rule." Boeing's no-camera rule does not explicitly restrict activity protected by Section 7 of the Act, it was not adopted in response to NLRA-protected activity, and it has not been applied to restrict such activity. Nevertheless, applying prong one of the test set forth in *Lutheran Heritage*, the judge found that Boeing's maintenance of this rule violated Section 8(a)(1) of the Act. Based on *Lutheran Heritage*, the judge reasoned that maintenance of Boeing's no-camera rule was unlawful because employees "would reasonably construe" the rule to prohibit Section 7 activity. In finding the no-camera rule unlawful, the judge gave no weight to Boeing's security needs for the rule.

The judge's decision in this case exposes fundamental problems with the Board's application of Lutheran Heritage when evaluating the maintenance of work rules, policies and employee handbook provisions. For the reasons set forth below, we have decided to overrule the Lutheran Heritage "reasonably construe" standard. The Board will no longer

find unlawful the mere maintenance of facially neutral employment policies, work rules and handbook provisions based on a single inquiry, which made legality turn on whether an employee ""would reasonably construe" a rule to prohibit some type of potential Section 7 activity that might (or might not) occur in the future. In our view, multiple defects are inherent in the Lutheran Heritage test:

> • The "reasonably construe" standard entails a single-minded consideration of NLRA-protected rights, without taking into account any legitimate justifications associated with policies, rules and handbook provisions. This is contrary to Supreme Court precedent and to the Board's own cases.
> • The *Lutheran Heritage* standard, especially as applied in recent years, reflects several false premises that are contrary to our statute, the most important of which is a misguided belief that unless employers correctly anticipate and carve out every possible overlap with NLRA coverage, employees are best served by not having employment policies, rules and handbooks. Employees are disadvantaged when they are denied general guidance regarding what standards of conduct are required and what type of treatment they can reasonably expect from coworkers. In this respect, *Lutheran Heritage* has required perfection that literally is the enemy of the good.
> • In many cases, *Lutheran Heritage* has been applied to invalidate facially neutral work rules *solely* because they were ambiguous in some respect. This requirement of linguistic precision stands in sharp contrast to the treatment of "just cause" provisions, benefit plans, and other types of employment documents, and *Lutheran Heritage* fails to recognize that many ambiguities are inherent in the NLRA itself.
> • The *Lutheran Heritage* "reasonably construe" test has improperly limited the Board's own discretion. It has rendered unlawful every policy, rule and handbook provision an employee might "reasonably construe" to prohibit *any* type of Section 7 activity. It has not permitted the Board to recognize that some types of Section 7 activity may lie at the periphery of our statute or rarely if ever occur. Nor has *Lutheran Heritage* permitted the Board to afford *greater* protection to Section 7 activities that are central to the Act.
> • *Lutheran Heritage* has not permitted the Board to differentiate, to a sufficient degree, between and among different industries and work settings, nor has it permitted the Board to take into consideration specific events that may warrant a conclusion that particular justifications outweigh a potential future impact on some type of NLRA-protected activity.
> • Finally, the Board's *Lutheran Heritage* "reasonably construe" test has defied all reasonable efforts to make it yield predictable results. It has been exceptionally difficult to apply, which has created enormous challenges for the Board and courts and immense uncertainty and litigation for employees, unions and employers.

Paradoxically, *Lutheran Heritage* is too simplistic at the same time it is too difficult to apply. The Board's responsibility is to discharge the "special function of applying the general provisions of the Act to the complexities of industrial life." Though well-intentioned, the *Lutheran Heritage* standard prevents the Board from giving meaningful consideration to the real-world "complexities" associated with many employment policies, work rules and handbook provisions. Moreover, *Lutheran Heritage* produced rampant confusion for employers, employees and unions. Indeed, the Board itself has struggled when attempting to apply *Lutheran Heritage*: since 2004, Board members have regularly disagreed with one

another regarding the legality of particular rules or requirements, and in many cases, decisions by the Board (or a Board majority) have been overturned by the courts of appeals.

These problems have been exacerbated by the zeal that has characterized the Board's application of the *Lutheran Heritage* "reasonably construe" test. Over the past decade and one-half, the Board has invalidated a large number of common-sense rules and requirements that most people would reasonably expect every employer to maintain. We do not believe that when Congress adopted the NLRA in 1935, it envisioned that an employer would violate federal law whenever employees were advised to "work harmoniously" or conduct themselves in a "positive and professional manner." Nevertheless, in *William Beaumont Hospital*, the Board majority found that it violated federal law for a hospital to state that nurses and doctors should foster "harmonious interactions and relationships," and Chairman (then-Member) Miscimarra stated in dissent:

> Nearly all employees in every workplace aspire to have "harmonious" dealings with their coworkers. Nobody can be surprised that a hospital, of all workplaces, would place a high value on "harmonious interactions and relationships." There is no evidence that the requirement of "harmonious" relationships actually discouraged or interfered with NLRA-protected activity in this case. Yet, in the world created by *Lutheran Heritage,* it is unlawful to state what virtually every employee desires and what virtually everyone understands the employer reasonably expects.

Under the standard we adopt today, when evaluating a facially neutral policy, rule or handbook provision that, when reasonably interpreted, would potentially interfere with the exercise of NLRA rights, the Board will evaluate two things: (i) the nature and extent of the potential impact on NLRA rights, *and* (ii) legitimate justifications associated with the rule. We emphasize that *the Board* will conduct this evaluation, consistent with the Board's "duty to strike the *proper balance* between . . . asserted business justifications and the invasion of employee rights in light of the Act and its policy," focusing on the perspective of employees, which is consistent with Section 8(a)(1). As the result of this balancing, in this and future cases, the Board will delineate three categories of employment policies, rules and handbook provisions (hereinafter referred to as "rules"):

> • *Category 1* will include rules that the Board designates as lawful to maintain, either because (i) the rule, when reasonably interpreted, does not prohibit or interfere with the exercise of NLRA rights; or (ii) the potential adverse impact on protected rights is outweighed by justifications associated with the rule. Examples of Category 1 rules are the no-camera requirement in this case, the "harmonious interactions and relationships" rule that was at issue in *William Beaumont Hospital*, [363 N.L.R.B. No. 162 (2016)] and other rules requiring employees to abide by basic standards of civility.[15]

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[15] Although the *maintenance* of Category 1 rules (and certain Category 2 rules) will be lawful, the *application* of such rules to employees who have engaged in NLRA-protected conduct may violate the Act, depending on the particular circumstances presented in a given case.

To the extent the Board in past cases has held that it violates the Act to maintain rules requiring employees to foster "harmonious interactions and relationships" or to maintain basic standards of civility in the workplace, those cases are hereby overruled. As then-Member Miscimarra observed in his dissent in *William Beaumont Hospital*, such rules reflect common-sense standards of conduct that advance substantial employee and employer interests, including the employer's legal responsibility to maintain a work environment free of

• *Category 2* will include rules that warrant individualized scrutiny in each case as to whether the rule would prohibit or interfere with NLRA rights, and if so, whether any adverse impact on NLRA-protected conduct is outweighed by legitimate justifications.
• *Category 3* will include rules that the Board will designate as *unlawful* to maintain because they would prohibit or limit NLRA-protected conduct, and the adverse impact on NLRA rights is not outweighed by justifications associated with the rule. An example of a Category 3 rule would be a rule that prohibits employees from discussing wages or benefits with one another.

The above three categories will represent a classification of *results* from the Board's application of the new test. The categories are not part of the test itself. The Board will determine, in future cases, what types of additional rules fall into which category. Although the legality of some rules will turn on the particular facts in a given case, we believe the standard adopted today will provide far greater clarity and certainty to employees, employers and unions. The Board's cumulative experience with certain types of rules may prompt the Board to re-designate particular types of rules from one category to another, although one can expect such circumstances to be relatively rare.

We emphasize that Category 1 consists of two subparts: (a) rules that are lawful because, when reasonably interpreted, they would have no tendency to interfere with Section 7 rights and therefore no balancing of rights and justifications is warranted, and (b) rules that are lawful because, although they do have a reasonable tendency to interfere with Section 7 rights, the Board has determined that the risk of such interference is outweighed by the justifications associated with the rules. Of course, as reflected in Categories 2 and 3, if a particular type of rule is determined to have a potential adverse impact on NLRA activity, the Board may conclude that maintenance of the rule is *unlawful*, either because individualized scrutiny reveals that the rule's potential adverse impact outweighs any justifications (Category 2), or because the type of rule at issue predictably has an adverse impact on Section 7 rights that outweighs any justifications (Category 3). Again, even when a rule's *maintenance* is deemed lawful, the Board will examine circumstances where the rule is *applied* to discipline employees who have engaged in NLRA-protected activity, and in such situations, the discipline may be found to violate the Act.

The balancing of employee rights and employer interests is not a new concept with respect to the Board's analysis of work rules. For example, in *Lafayette Park Hotel*, the Board

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unlawful harassment based on sex, race or other protected characteristics, its substantial interest in preventing workplace violence, and its interest in avoiding unnecessary conflict that interferes with patient care (in a hospital), productivity and other legitimate business goals; and nearly every employee would desire and expect his or her employer to foster harmony and civility in the workplace. We do not believe these types of employer requirements, when reasonably interpreted, would prohibit or interfere with the exercise of NLRA rights. However, even if basic civility requirements are viewed as potentially interfering with NLRA rights, we believe any adverse effect would be comparatively slight, because a broad range of activities protected by the NLRA are consistent with basic standards of harmony and civility; therefore, rules requiring workplace harmony and civility would have little if any adverse impact on these types of protected activities. Moreover, under the standard we announce today, when an employer lawfully maintains rules requiring employees to foster harmony and civility in the workplace, the *application* of such rules to employees who engage in NLRA-protected conduct may violate the Act, which the Board will determine based on the particular facts in each case.

expressly stated that "[r]esolution of the issue presented by the contested rules of conduct involves 'working out an adjustment between the undisputed right of self-organization assured to employees under the Wagner Act and the equally undisputed right of employers to maintain discipline in their establishments. . . . Opportunity to organize and proper discipline are both essential elements in a balanced society.'" Since *Lutheran Heritage*, the Board has far too often failed to give adequate consideration and weight to employer interests in its analysis of work rules. Accordingly, we find that the Board must replace the *Lutheran Heritage* test with an analysis that will ensure a meaningful balancing of employee rights and employer interests.

Applying these standards to the instant case, we find below that the Respondent's justifications for Boeing's restrictions on the use of camera-enabled devices on Boeing property outweigh the rule's more limited adverse effect on the exercise of Section 7 rights. We therefore reverse the judge's finding that Boeing's maintenance of its no-camera rule violates Section 8(a)(1) of the Act.

* * *

D. Application of the New Standard to Boeing's No-Camera Rule

To determine the lawfulness of Boeing's no-camera rule under the standard we adopt today, the Board must determine whether the no-camera rule, when reasonably interpreted, would potentially interfere with the exercise of Section 7 rights, and if so, the Board must evaluate two things: (i) the nature and extent of the no-camera rule's adverse impact on Section 7 rights, *and* (ii) the legitimate business justifications associated with the no-camera rule. Based on our review of the record and our evaluation of the considerations described above, we find that the no-camera rule in some circumstances may potentially affect the exercise of Section 7 rights, but this adverse impact is comparatively slight. We also find that the adverse impact is outweighed by substantial and important justifications associated with Boeing's maintenance of the no-camera rule. Accordingly, we find that Boeing's maintenance of its no-camera rule does not constitute unlawful interference with protected rights in violation of Section 8(a)(1) of the Act. Although the justifications associated with Boeing's no-camera rule are especially compelling, we believe that no-camera rules, in general, fall into Category 1, types of rules that the Board will find lawful based on the considerations described above.

As stated above, the policy at issue here is Boeing's no-camera rule, which provides in relevant part as follows:

> Possession of the following camera-enabled devices is permitted on all company property and locations, except as restricted by government regulation, contract requirements or by increased local security requirements.
> However, use of these devices to capture images or video is prohibited without a valid business need and an approved Camera Permit that has been reviewed and approved by Security:
>
> 5. Personal Digital Assistants (PDAs)
> 6. Cellular telephones and Blackberrys and iPod/MP3 devices

7. Laptop or personal computers with web cameras for desktop video conferencing, including external webcams.
8. Bar code scanners and bar code readers, or such devices for manufacturing, inventory, or other work, if those devices are capable of capturing images.

* * *

. . . [W]e find that the General Counsel failed to undermine the record evidence establishing the several purposes served by Boeing's no-camera rule's restrictions on the use of camera-enabled devices on its property, and we also find that those purposes constitute legitimate and compelling justifications for those restrictions. Indeed, many of the reasons why Boeing restricts the use of camera-enabled devices on its property provide a sobering reminder that we live in a dangerous world, one in which many individuals--foreign and domestic--may inflict great harm on the United States and its citizens.

Conversely, the adverse impact of Boeing's no-camera rule on NLRA-protected activity is comparatively slight. The vast majority of images or videos blocked by the policy do not implicate any NLRA rights. Moreover, the Act only protects concerted activities that two or more employees engage in for the purpose of mutual aid or protection. Taking photographs to post on social media for the purpose of entertaining or impressing others, for example, certainly falls outside of the Act's protection. It is possible, of course, that two or more Boeing employees might, in the future, engage in protected concerted activity--for example, by conducting a group protest based on an employment-related dispute--and Boeing's no-camera rule might prevent the employees from taking photographs of their activity. However, the no-camera rule would not prevent employees from engaging in the group protest, thereby exercising their Section 7 right to do so, notwithstanding their inability to photograph the event. Additionally, in the instant case, there is no allegation that Boeing's no-camera rule has actually interfered with any type of Section 7 activity, nor is there any evidence that the rule prevented employees from engaging in protected activity.

We find that any adverse impact of Boeing's no-camera rule on the exercise of Section 7 rights is comparatively slight and is outweighed by substantial and important justifications associated with the no-camera rule's maintenance. Accordingly, we find that Boeing's maintenance of the no-camera rule did not constitute unlawful interference with protected rights in violation of Section 8(a)(1) of the Act. . . .

MEMBER PEARCE, dissenting in part.

Overruling 13-year-old precedent, the majority today institutes a new standard for determining whether the maintenance of a challenged work rule, policy, or employee handbook provision is unlawful. Although characterized by the majority as a balancing test, its new standard is essentially a how-to manual for employers intent on stifling protected concerted activity before it begins. Overly protective of employer interests and under protective of employee rights, the majority's standard gives employers the green light to maintain rules that chill employees in the exercise of rights guaranteed by the National Labor Relations Act. Because the new standard is fundamentally at odds with the underlying purpose of the Act, I dissent. . . .

The Board and courts have long recognized that overbroad and ambiguous workplace rules and policies may have a coercive impact as potent as outright threats of discharge, by chilling employees in the exercise of their Section 7 rights. Accordingly, the Board, with court approval, has held that the mere maintenance of a rule likely to chill Section 7 activity can amount to an unfair labor practice even absent evidence of enforcement. In *Lutheran Heritage Village-Livonia,* the Board set forth an analytical framework for determining whether an employer rule or policy would reasonably tend to chill Section 7 activity. Under the *Lutheran Heritage* framework, the Board first considers whether an employer's rule "*explicitly* restricts activities protected by Section 7." "If the rule does not explicitly restrict activity protected by Section 7, the violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights."

In the 13 years since it was adopted, the *Lutheran Heritage* standard has been upheld by every court to consider the matter. Furthermore, no party in this case has asked the Board to overrule *Lutheran Heritage* or to apply a different standard.

The majority's rationale for overruling *Lutheran Heritage* crumbles under the weight of even casual scrutiny. Its assertion that *Lutheran Heritage* "does not permit *any* consideration of the legitimate justifications that underlie many policies, rules and handbook provisions" (majority's emphasis) is demonstrably false, as is its assertion that *Lutheran Heritage* has not been well-received by the courts. The majority also disingenuously claims that the Board "has struggled when attempting to apply *Lutheran Heritage*" and that "Board members have regularly disagreed" regarding the legality of challenged rules. It fails to acknowledge, however, that most of the dissents are attributable to Chairman Miscimarra's personal disagreement with the test or the manner in which it has been applied. Once the majority's melodramatic flourishes and mischaracterizations are stripped away, what remains is a stratagem to greatly increase protection for employer interests to the detriment of employee Section 7 rights.[9]

Further, in upending the clear analytical framework in *Lutheran Heritage,* the majority announces a sweeping new standard for evaluating facially neutral work rules that goes far beyond the issues presented in this case. Moreover, it does so without seeking public input, and without even allowing the parties in this and other pending rules cases to be heard on whether the new standard is appropriate. Parties to this and the numerous pending cases are

[9] Taking a page out of a familiar playbook, the majority seeks to leverage a hyped-up fear of terrorism and a host of other conjured-up horribles to chip away at fundamental employee rights. I find particularly repellent the majority's unfounded suggestion that the Board's protection of Sec. 7 rights has left employees more vulnerable to sexual harassment and assault. This crude attempt to link *Lutheran Heritage* to sexual harassment and assault--for no discernible reason other than to appeal to emotion and fear--represents a new low in advocating for a position. There has never been--and I cannot even imagine--a case in which the Board would strike down a rule prohibiting sexual harassment, assault, or other workplace violence on the grounds that it interferes with the exercise of Sec. 7 rights. The majority's professed concern for the safety and well-being of employees--to justify weakening fundamental employee protections--is offensive and disrespectful to the victims of sexual harassment, assault, and other workplace violence.

also denied the opportunity to introduce evidence on the application of the majority's new standard.

I agree with my dissenting colleague, Member McFerran, that the majority's new standard lacks a rational basis and is inconsistent with the Act. I also agree with her that, before the Board abandons or modifies a decade old standard, without prompting by adverse court precedent or any party to this case, it should notify the public and the parties that a reversal of important precedent is under consideration, solicit the informed views of affected stakeholders in industry and labor, and allow the parties to introduce evidence under the new standard.

That the new Board members eschewed a full and fair consideration of the issue is particularly troubling, given their representations in the confirmation process that they would approach issues with an open mind. The majority's rush to impose its ill-conceived test and its disregard for public input are revealed by its statement that it should not be bound by "fruitless marathon discussions" of the relevant legal principles and considerations. Is the majority convinced that the parties and the public have nothing to offer or is it afraid that it might learn that its emperor of a test has no clothes? . . .

MEMBER MCFERRAN, dissenting in part.

*** * ***

The problem before the Board is how to address the fact that some work rules maintained by employers will discourage employees subject to the rules from engaging in activity that is protected by the National Labor Relations Act. An employee who may be disciplined or discharged for violating a work rule may well choose not to do so--whether or not a federal statute guarantees her right to act contrary to her employer's dictates. Not surprisingly, then, it is well established (as the *Lutheran Heritage* Board observed) "that an employer violates Section 8(a)(1) when it maintains a work rule that reasonably tends to chill employees in the exercise of their Section 7 rights." The aspect of the *Lutheran Heritage* test that the majority attacks is its approach to a subset of employer work rules that do "not explicitly restrict activity protected by Section 7" of the Act, were not "promulgated in response to union activity," and have not been "applied to restrict the exercise of Section 7 rights." For such rules, the *Lutheran Heritage* Board explained, the "violation is dependent upon a showing ... [that] employees would reasonably construe the language to prohibit Section 7 activity."

Thirteen years after this standard was adopted, the majority belatedly concludes that the Board was not permitted to do so, insisting that the "*Lutheran Heritage* 'reasonably construe' standard is contrary to Supreme Court precedent because it does not permit *any* consideration of the legitimate justifications that underlie many policies, rules and handbook provisions." This premise is simply false.

The Board has never held that legitimate business justifications for employer work rules may not be considered--to the contrary. As the Board recently explained in *William Beaumont*, responding to then-Member Miscimarra's dissent, the claim made by the majority here:

> reflects a fundamental misunderstanding of the Board's task in evaluating rules that are alleged to be unlawfully *overbroad*.
> * * *
> [T]he appropriate inquiry is whether the rules would reasonably tend to chill employees in the exercise of their Section 7 rights.
> * * *
> That a particular rule threatens to have a chilling effect does not mean, however, that an employer may not address the subject matter of the rule and protect his legitimate business interests. Where the Board finds a rule unlawfully overbroad, the employer is free to adopt a more narrowly tailored rule that does not infringe on Section 7 rights.
> * * *

When, in contrast, the Board finds that a rule is *not* overbroad - that employees would not "reasonably construe the language to prohibit Section 7 activity" (in the *Lutheran Heritage Village* formulation) - it is typically because the rule is tailored such that the employer's legitimate business interest in maintaining the rule will be sufficiently apparent to a reasonable employee . . . . Here, too, the *Lutheran Heritage Village* standard demonstrably does take into account employer interests. . . .

It is hard to know precisely what the majority's new standard for evaluating work rules *is*. The majority opinion is a jurisprudential jumble of factors, considerations, categories, and interpretive principles. To say, as the majority does, that its approach will yield "certainty and clarity" is unbelievable, unless the certainty and clarity intended is that work rules will almost never be found to violate the National Labor Relations Act. Indeed, without even the benefit of prior discussion, the majority reaches out to declare an entire, vaguely-defined category of workplace rules--those "requiring employees to abide by basic standards of civility"--to be always lawful. That today's decision narrows the scope of Section 7 protections for employees is obvious. Put somewhat differently, the majority solves the problem addressed by *Lutheran Heritage* - how to guard against the chilling effect of work rules on the exercise of statutory rights - by deciding it is no real problem at all where a rule does not explicitly restrict those rights and was not adopted in response to Section 7 activity. . . .

***PCC Structurals, Inc.*, 365 N.L.R.B. No. 160 (Dec. 15, 2017)**

The Employer requests review of the Regional Director's Decision and Direction of Election, in which the Regional Director found that a petitioned-for unit of approximately 100 full-time and regular part-time rework welders and rework specialists employed by the Employer at its facilities in Portland, Clackamas, and Milwaukie, Oregon, comprise a unit appropriate for collective bargaining. The Employer contends that the smallest appropriate unit is a wall-to-wall unit of 2565 production and maintenance employees in approximately 120 job classifications. For the reasons stated below, we grant review, clarify the applicable standard, and remand this case to the Regional Director for further appropriate action consistent with this Order.

Today, we clarify the correct standard for determining whether a proposed bargaining unit constitutes an appropriate unit for collective bargaining when the employer contends that the smallest appropriate unit must include additional employees. In so doing, and for the reasons explained below, we overrule the Board's decision in *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB 934 (2011) and we reinstate the traditional community-of interest standard as articulated in, e.g., *United Operations, Inc.*, 338 NLRB 123 (2002).[3]

Background

The Employer manufactures steel, superalloy, and titanium castings for use in jet aircraft engines, airframes, industrial gas turbine engines, medical prosthetic devices, and other industry markets. The Employer's operation in the Portland, Oregon area consists of three "profit and loss centers" located within approximately a 5-mile radius of one another. Petitioner and Employer agree that these three centers comprise the entire Portland operation. As described by the Regional Director, the manufacturing process is the same at all three facilities. That process involves two stages. The first or "front end" stage involves creation of the casting. In this stage, production employees create a wax mold of the customer's product, "invest" the mold by alternately dipping it into a slurry and into sand until a hard ceramic shell is formed around the wax, and then melt the wax away to leave the empty ceramic shell, into which liquid metal is poured to create the casting. The second stage (sometimes referred to as "back end") involves inspecting and reworking the casting. The employees in the petitioned-for unit are welders who work in the "back end" stage of the production process, primarily repairing defects in the metal castings. The exception is the one rework specialist/crucible repair employee, who appears to work in the "front end" or casting portion of the manufacturing process.

To determine the appropriateness of the petitioned-for unit, the Regional Director applied the standard set forth in *Specialty Healthcare*. As a Board majority explained its

[3] Additionally, for the reasons stated by former Member Hayes in his dissenting opinion in *Specialty Healthcare*, we reinstate the standard established in *Park Manor Care Center*, 305 NLRB 872 (1991), for determining appropriate bargaining units in nonacute healthcare facilities. [Eds: *Park Manor* used a wide set of factors, including those gleaned from the NLRB's experience in promulgating a regulation for acute health care facilities].

standard in that decision, when a union seeks to represent a unit of employees "who are readily identifiable as a group (based on job classifications, departments, functions, work locations, skills, or similar factors), and the Board finds that the employees in the group share a community of interest after considering the traditional criteria, the Board will find the petitioned-for unit to be an appropriate unit" for bargaining. If the petitioned-for unit is deemed appropriate, the burden shifts to the proponent of a larger unit (typically the employer) to demonstrate that the additional employees the proponent seeks to include "share 'an overwhelming community of interest'" with the petitioned-for employees, "such that there 'is no legitimate basis upon which to exclude certain employees from'" the petitioned-for unit because the traditional community-of-interest factors "'overlap almost completely."

* * *

Discussion

A. The Board's Role in Determining Appropriate Bargaining Units

The National Labor Relations Act (NLRA or Act) and its legislative history establish three benchmarks that must guide the Board in making determinations regarding appropriate bargaining units.

First, Section 9(a) of the Act provides that employees have a right to representation by a labor organization "designated or selected for the purposes of collective bargaining by the majority of the employees *in a unit appropriate for such purposes*." Thus, questions about unit appropriateness are to be resolved by reference to the "purposes" of representation, should a unit majority choose to be represented--namely, "collective bargaining."

Second, Congress contemplated that whenever unit appropriateness is questioned, the Board would conduct a meaningful evaluation. Section 9(b) states: "The Board shall decide *in each case* whether, in order to *assure to employees the fullest freedom* in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof." Referring to the "natural reading" of the phrase "in each case," the Supreme Court has stated that

> whenever there is a disagreement about the appropriateness of a unit, the Board shall resolve the dispute. Under this reading, the words "in each case" are synonymous with "whenever necessary" or "in any case in which there is a dispute." Congress chose not to enact a general rule that would require plant unions, craft unions, or industry-wide unions for every employer in every line of commerce, but also chose not to leave the decision up to employees or employers alone. Instead, the decision "in each case" in which a dispute arises is to be made by the Board.

* * *

In the final enacted version of the Wagner Act, Section 9(b) stated that the Board's unit determinations "in each case" were "to insure to employees *the full benefit* of their right to self-organization, and to collective bargaining, and otherwise to effectuate the policies of this Act."

In 1947, in connection with the Labor Management Relations Act (Taft-Hartley Act or LMRA), Congress devoted further attention to the Board's unit determinations. The LMRA amended Section 7 so that, in addition to protecting the right of employees to engage in protected activities, the Act protected "the right to *refrain from* any or all of such activities." The LMRA also added Section 9(c)(5) to the Act, which states: "In determining whether a unit is appropriate . . . *the extent to which the employees have organized shall not be controlling*.". . .

Finally, the LMRA also amended Section 9(b) to state--as it presently does-- that the Board shall make bargaining unit determinations "in each case" in "order to assure to employees the *fullest freedom* in exercising the rights guaranteed by [the] Act."

This legislative history demonstrates that Congress intended that the Board's review of unit appropriateness would not be perfunctory. In the language quoted above, Section 9(b) mandates that the Board determine what constitutes an appropriate unit "in each case," with the additional mandate that the Board only approve a unit configuration that "assure[s]" employees their "fullest freedom" in exercising protected rights. Although more than one appropriate unit might exist, the statutory language plainly requires that the Board "in each case" consider multiple potential configurations--i.e., a possible ""employer unit," "craft unit," "plant unit" or "subdivision thereof."

It is also well established that the Board may not certify petitioned-for units that are "arbitrary" or "irrational"--for example, where functional integration and similarities between two employee groups "are such that neither group can be said to have any separate community of interest justifying a separate bargaining unit." However, it appears clear that Congress did not intend that the petitioned-for unit would be controlling in all but those extraordinary cases when the evidence of overlapping interests between included and excluded employees is overwhelming, nor did Congress anticipate that every petitioned-for unit would be accepted unless it is "arbitrary" or ""irrational." Congress placed a much higher burden on the Board "in each case," which was to determine which unit configuration(s) satisfy the requirement of assuring employees their "fullest freedom" in exercising protected rights.

B. The Board's Traditional Community-of-Interest Test is an Appropriate Framework for Unit Determinations

To ensure that the statutory mandate set forth above is met, the Board traditionally has determined, in each case in which unit appropriateness is questioned, whether the employees in a petitioned-for group share a community of interest sufficiently distinct from the interests of employees excluded from the petitioned-for group to warrant a finding that the proposed group constitutes a separate appropriate unit. Throughout nearly all of its history, when making this determination, the Board applied a multi-factor test that requires the Board to assess

> whether the employees are organized into a separate department; have distinct skills and training; have distinct job functions and perform distinct work, including inquiry into the amount and type of job overlap between classifications; are functionally integrated with the Employer's other employees; have frequent contact with other

> employees; interchange with other employees; have distinct terms and conditions of employment; and are separately supervised.

United Operations, Inc., supra, 338 NLRB at 123.

Thus, in *Wheeling Island Gaming*, where the Board applied its traditional community-of-interest test, the Board indicated that it

> never addresses, solely and in isolation, the question whether the employees in the unit sought have interests in common with one another. Numerous groups of employees fairly can be said to possess employment conditions or interests "in common." Our inquiry--though perhaps not articulated in every case--necessarily proceeds to a further determination whether the interests of the group sought are *sufficiently distinct* from those of other employees to warrant the establishment of a separate unit.

The required assessment of whether the sought-after employees' interests are sufficiently distinct from those of employees excluded from the petitioned-for group provides some assurance that extent of organizing will not be determinative, consistent with Section 9(c)(5); it ensures that bargaining units will not be arbitrary, irrational, or "fractured"--that is, composed of a gerrymandered grouping of employees whose interests are insufficiently distinct from those of other employees to constitute that grouping a separate appropriate unit; and it ensures that the Section 7 rights of excluded employees who share a substantial (but less than "overwhelming") community of interests with the sought-after group are taken into consideration.

C. The Specialty Healthcare Standard Improperly Detracts from the Board's Statutory Responsibility to Make Appropriate Bargaining Unit Determinations

The Board majority in *Specialty Healthcare* described its decision as a mere clarification of preexisting standards for determining appropriate bargaining units. However, we believe the majority in *Specialty Healthcare* substantially *changed* the applicable standards. . . . [T]he Board majority in *Specialty Healthcare* did three things that have affected the Board's bargaining-unit determinations since *Specialty Healthcare* was decided.

First, in *Specialty Healthcare*, the majority overruled *Park Manor Care Center*, which set forth the standard for determining appropriate bargaining units in non-acute healthcare facilities.

Second, the majority in *Specialty Healthcare* established that the ""traditional community-of-interest approach" would thereafter apply to unit determinations in such facilities rather than the so-called "pragmatic" test described in *Park Manor*.

Third and most significantly, although the majority in *Specialty Healthcare* nominally was considering unit questions specific to non-acute healthcare facilities, the *Specialty Healthcare* decision applied to *all* workplaces (except acute care hospitals) whenever a party argues that a petitioned-for unit improperly excludes certain employees. Although the majority purported to apply the traditional community-of-interests standard as exemplified in *Wheeling Island Gaming*, the *Specialty Healthcare* standard discounts--or eliminates altogether--

any assessment of whether shared interests among employees *within* the petitioned-for unit are sufficiently distinct from the interests of *excluded* employees to warrant a finding that the smaller petitioned-for unit is appropriate. . . .

In these respects, *Specialty Healthcare* detracts from what Congress contemplated when it added mandatory language to Section 9(b) directing the Board to determine the appropriate bargaining unit "in each case" and mandating that the Board's unit determinations guarantee to employees the "fullest freedom" in exercising their Section 7 rights. . . . We believe *Specialty Healthcare* effectively makes the extent of union organizing "controlling," or at the very least gives far greater weight to that factor than statutory policy warrants, because under the *Specialty Healthcare* standard, the petitioned-for unit is deemed appropriate in all but rare cases. Section 9(b) and 9(c)(5), considered together, leave no doubt that Congress expected *the Board* to give careful consideration to the interests of all employees when making unit determinations, and Congress did not intend that the Board would summarily reject arguments, in all but the most unusual circumstances, that the petitioned-for unit fails to appropriately accommodate the Section 7 interests of employees outside the "subdivision" specified in the election petition. . . .

Having reviewed the *Specialty Healthcare* decision in light of the Act's policies and the Board's subsequent applications of the "overwhelming community of interest" standard, we conclude that the standard adopted in *Specialty Healthcare* is fundamentally flawed. We find there are sound policy reasons for returning to the traditional community-of-interest standard that the Board has applied throughout most of its history, which permits the Board to evaluate the interests of all employees--both those within and those outside the petitioned-for unit--without regard to whether these groups share an "overwhelming" community of interests. . . .

MEMBERS PEARCE AND MCFERRAN, dissenting.

It is a foundational principle of United States labor law that, when workers are seeking to organize and select a collective-bargaining representative, and have petitioned the Board to direct an election to that end, the role of the Board in overseeing this process should be conducted with the paramount goal of ensuring that employees have "the fullest freedom in exercising the rights guaranteed by" the Act. Thus, as numerous courts of appeals have acknowledged, the "initiative in selecting an appropriate unit [for bargaining] resides with the employees." *FedEx Freight, Inc. v. NLRB*, 816 F.3d 515, 523 (8th Cir. 2016), quoting *American Hospital Assn. v. NLRB*, 499 U.S. 606, 610 (1991). When workers seeking a representative have selected a bargaining unit in which they seek to organize, the role of the Board in reviewing that selection is to determine whether the selected unit is an appropriate one under the statute not the unit the Board would prefer, or the unit the employer would prefer. Part of ensuring workers the "fullest freedom" in exercising their right to organize is acknowledging that they can, and should--within the reasonable boundaries that the statute delineates--be able to associate with the coworkers with whom they determine that they share common goals and interests.

With these principles in mind, this case should present no difficult issues for the Board. The Union has filed a petition to represent a bargaining unit of 102 welders at an advanced manufacturing plant in the Portland, Oregon area. The welders are a group of highly-skilled,

highly-paid employees performing a distinct function. These workers have gone through specialized training and certifications unique to their positions. They do not significantly interchange with other employees, but instead perform distinct work that no other employees are qualified to do. They are readily identifiable as a group and represent two clearly delineated job classifications within the Employer's organizational structure. The 102 workers in this unit would constitute a significantly larger-than-average bargaining unit when compared to other recently certified units.

Despite these largely uncontested facts, the Employer objected to the proposed unit, claiming that the *only* appropriate unit in which these workers should be able to choose a representative would have to include all 2,565 employees who work in production and maintenance at the petitioned-for facilities. The Regional Director correctly rejected the Employer's contention, and directed an election among the welders. The workers voted 54 to 38 for the Union, and the Employer sought review of the Regional Director's decision with the Board.

The Regional Director's decision was unquestionably correct--these 102 workers clearly share a community of interest under any standard ever applied by the Board.[1] Nonetheless, the majority nullifies the Direction of Election for the unit of welders and orders the Regional Director to reconsider, under more favorable terms, the Employer's argument that welders should not be able to bargain collectively unless they can win sufficient support from all 2565 production and maintenance employees. Instead of performing its statutory duty to affirm these workers' choice to organize in an appropriate unit and allowing them to commence the collective-bargaining process with their employer, the Board's newly-constituted majority seizes on this otherwise straightforward case as a jumping off point to overturn a standard that has been upheld by every one of the eight federal appellate courts to consider it. The newly-constituted Board majority makes sweeping and unwarranted changes to the Board's approach in assessing the appropriateness of bargaining units when an employer asserts that the unit sought by the petitioning union must include additional employees. Without notice, full briefing, and public participation, and in a case involving a manifestly appropriate unit, the majority overturns *Specialty Healthcare*. In its place, the majority adopts an arbitrary new approach that will frustrate the National Labor Relations Act's policies of ensuring that employees enjoy ""the fullest freedom in exercising" their right to self-organization and of expeditiously resolving questions of representation. The majority's new approach will bog down the Board and the parties in an administrative quagmire--a result that the majority apparently intends. . . .

* * *

III.

The majority offers few factual and legal arguments in support of its decision. Most prominent is the unfounded assertion that the test articulated in *Specialty Healthcare* is somehow contrary to the National Labor Relations Act. . . .

[T]he majority's claims of statutory infirmity fail as they ignore authoritative Supreme Court precedent and misstate what *Specialty Healthcare* actually provides. The Supreme Court has already reviewed Section 9(b)'s ""sparse legislative history" and construed the statutory language, and has concluded that all Section 9(b) requires in relevant part is that when there

is a dispute over the unit in which to conduct the election, the Board must resolve it. *American Hospital Assn. v. NLRB*, 499 U.S. at 611, 613. It certainly does not preclude the Board from evaluating the appropriateness of a unit pursuant to broadly applicable principles. . . .

The majority also claims that *Specialty Healthcare* contravenes Section 9(c)(5) by making the extent of organizing controlling. . . .However, the courts have uniformly rejected the majority's position. Section 9(c)(5) of the Act provides that "[i]n determining whether a unit is appropriate for the purposes specified in subsection (b) the extent to which the employees have organized shall not be controlling." The Supreme Court has construed this language to mean that although "Congress intended to overrule Board decisions where the unit determined could only be supported on the basis of the extent of organization, . . . the provision was not intended to prohibit the Board from considering the extent of organization as one factor, though not the controlling factor, in its unit determination." *NLRB v. Metropolitan Life Insurance Co.*, 380 U.S. 438, 441-442 (1965). In other words, as the Board noted in *Specialty Healthcare*, "the Board cannot stop with the observation that the petitioner proposed the unit, but must proceed to determine, based on additional grounds (while still taking into account the petitioner's preference), that the proposed unit is an appropriate unit." . . .

Thus, contrary to the majority's unsupported assertions, the outcome of a unit determination under *Specialty Healthcare* is neither foreordained nor coextensive with the extent of organizing. Instead, the courts have uniformly found that the Board's approach correctly provides an individualized inquiry into the appropriateness of the unit, consistent with what the Act requires.

* * *

V.

In lieu of *Specialty Healthcare*, the majority advocates that when the parties cannot agree on the unit in which to conduct an election, the Board should not focus on the Section 7 rights of employees who seek to organize in the petitioned-for unit, but must instead consider the statutory interests of employees *outside* the unit, as advanced by the employer. In the majority's view, in other words, the statutory right of employees to seek union representation, as a self-defined group, is contingent on the imputed desires of employees outside the unit who have expressed no view on representation at all--with the employer serving as their self-appointed proxy. Of course, the extent of employees' freedom of association (which, by definition, includes the freedom *not* to associate) is not a matter for *employers* to decide. As the Supreme Court has made clear, the Board is entitled to "giv[e] a short leash to the employer as vindicator of its employees' organizational freedom." *Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 790 (1996).

As we show below, (A) the majority's approach is inconsistent with the statute and will frustrate the Act's policies; (B) *Specialty Healthcare* does not impair the Section 7 rights of employees outside the petitioned-for unit; and (C) the majority's approach will entangle the Board and the parties in an administrative quagmire.

A.

The majority's approach is plainly inconsistent with the statute and will frustrate the Act's policies. In Section 1 of the Act, Congress declared it to be the policy of the United States to "protect[] 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[.]" The first and central right set forth in Section 7 of the Act is the employees' "right to self-organization." As the Board has explained, "A key aspect of the [Section 7] right to 'self-organization' is the right to draw the boundaries of that organization--to choose whom to include and whom to exclude." The majority's approach flies in the face of Section 9(a)'s instruction that representatives need be designated only by a majority of employees in "a unit appropriate" for collective bargaining, not in "the most appropriate" unit. The majority's approach breaches Section 9(b)'s command that the Board's unit determinations "assure to employees the fullest freedom in exercising the rights guaranteed by" the Act, i.e., that of *self*-organization and collective bargaining.[15] The majority ignores the Supreme Court's authoritative interpretation of Section 9(c)(5) to the effect that the Board may consider the extent of organization in making unit determinations, so long as it is not the controlling factor. And its approach fails to acknowledge that pursuant to Section 9(c)(1), the unit described in the petition "necessarily drives the Board's unit determination." *Overnite Transportation Co.*, 325 NLRB 612, 614 (1998). . . .

* * *

***Raytheon Network Centric Systems*, 365 N.L.R.B. No. 161 (Dec. 15, 2017)**

In *NLRB v. Katz*, 369 U.S. 736 (1962), the Supreme Court held that unionized employers must refrain from making a unilateral change in employment terms, unless the union first receives notice and the opportunity to bargain over the change.

In the instant case, the Respondent is alleged to have violated Section 8(a)(5) of the National Labor Relations Act (NLRA or Act) in 2013, following expiration of its collective-bargaining agreement (CBA), when it unilaterally modified employee medical benefits and related costs consistent with what it had done in the past. Relying primarily on the Board's decision in *E.I. du Pont de Nemours, Louisville Works*, 355 NLRB 1084 (2010) (*DuPont I*), the judge found that the Respondent violated Section 8(a)(5) of the Act. The judge rejected the Respondent's defense that its 2013 adjustments were a lawful continuation of the status quo, even though the Respondent had made similar modifications to healthcare costs and benefits at the same time every year from 2001 through 2012.

Subsequent to the judge's decision, the Board decided *E.I. du Pont de Nemours*, 364 NLRB No. 113 (2016) (*DuPont*). In *DuPont*, which issued without any prior invitation for the filing of amicus briefs, the Board majority dramatically altered what constitutes a "change" requiring notice to the union and the opportunity for bargaining prior to implementation. The majority in *DuPont* held that, even if an employer continues to do precisely what it had done many times previously--for years or even decades--taking the same actions constitutes a "change," which must be preceded by notice to the union and the opportunity for bargaining, if a CBA permitted the employer's past actions and the CBA is no longer in effect. The *DuPont* majority also stated, as part of its holding, that bargaining would always be required, in the absence of a CBA, in every case where the employer's actions involved some type of "discretion."

Then-Member Miscimarra criticized the Board majority's decision in *DuPont* as follows:

> When evaluating whether new actions constitute a "change," my colleagues do not just compare the new actions to the past actions. Instead, they look at whether other things have changed--specifically, whether a collective-bargaining agreement . . . previously existed, whether the prior CBAs contained language conferring a management right to take the actions in question, and whether a new CBA exists containing the same contract language. If not, the employer's new actions constitute a "change" even though they are identical to what the employer did before.
>
> In effect, my colleagues . . . [hold that] whenever a CBA expires, past practices are erased and everything subsequently done by the employer constitutes a "change" that requires notice and the opportunity for bargaining before it can be implemented.

We conclude that the Board majority's decision in *DuPont* is fundamentally flawed, and for the reasons expressed more fully below, we overrule it today. *DuPont* is inconsistent with Section 8(a)(5), it distorts the long-understood, commonsense understanding of what constitutes a "change," and it contradicts well-established Board and court precedent. In addition, we believe *DuPont* cannot be reconciled with the Board's responsibility to foster

stable bargaining relationships. We further conclude that it is appropriate to apply our decision retroactively, including in the instant case.

Accordingly, we find that the Respondent's modifications in unit employee healthcare benefits in 2013 were a continuation of its past practice of making similar changes at the same time every year from 2001 through 2012. Therefore, the Respondent did not make any "change" when it made the challenged modifications, and accordingly it lawfully implemented these modifications without giving the Union prior notice and opportunity to bargain. Because the 2013 modifications were lawful, we also find that the Respondent's 2012 announcement of those modifications was lawful. For these reasons, we reverse the judge's unfair labor practice findings and dismiss the complaint.[5]

* * *

Discussion

A. The Supreme Court's Katz Decision and Other Cases Addressing What Constitutes a "Change"

* * *

The Supreme Court's *Katz* decision establishes that a unilateral change in a mandatory bargaining subject (i.e., wages, hours, and other terms and conditions of employment) violates Section 8(a)(5). In cases interpreting *Katz*, the Board has stated that "the vice . . . is that the employer has *changed* the existing conditions of employment. It is this *change* which is prohibited and which forms the basis of the unfair labor practice charge."

In reliance on *Katz*, the Board has likewise held:

> [W]here an employer's action does *not* change existing conditions--that is, *where it does not alter the status quo*--the employer does *not* violate Section 8(a)(5) and (1). . . . *An established past practice can become part of the status quo.* Accordingly, the Board has found *no violation* of Section 8(a)(5) and (1) *where the employer simply followed a well-established past practice.*

The principle that an employer may *lawfully* take unilateral action that "does not alter the status quo," which permits changes that have become part of the status quo, is often referred to as the "dynamic status quo." This principle was described by Professors Gorman and Finkin in their well-known labor law treatise as follows:

> [T]he case law (including the *Katz* decision itself) makes clear that conditions of employment are to be viewed dynamically and that *the status quo against which the employer's "change" is considered must take account of any regular and consistent past pattern of change.* An employer modification consistent with such a pattern *is not a "change" in working conditions at all.*

* * *

[5] Because we find that the Respondent's benefit changes did not alter the status quo and therefore did not require notice and an opportunity to bargain before implementation, we need not reach the question of whether the Union waived its right to bargain.

B. DuPont Is Incompatible with the Supreme Court's Decision in NLRB v. Katz *and Important Purposes of the Act*

In *DuPont*, the Board majority held that, when evaluating whether actions constitute a "change," parties may not simply compare those actions to past actions. Instead, the majority held that parties must look at whether other things have changed--specifically, whether a CBA previously existed, whether the prior CBA contained language conferring a management right to take the actions in question, and whether a new CBA exists containing the same contract language. If not, according to the *DuPont* majority, the employer's new actions constitute a "change" even though they *continue* what the employer previously did and can be seen *not* to involve any "substantial departure" from past practice. The majority in *DuPont* also held that, if the employer's past and present actions involved any "discretion," this *always* means a "change" occurred (requiring advance notice and the opportunity for bargaining), even where the employer obviously was continuing its past practice and was not altering the status quo. In so holding, the *DuPont* majority overruled *Beverly II*, *Capitol Ford*, and the *Courier-Journal* cases, plus earlier cases consistent with those decisions, including *Shell Oil Co.*, 149 NLRB at 283, and *Winn-Dixie Stores, Inc.*, 224 NLRB at 1418.

As explained below, we find that the Board majority's decision in *DuPont* is incompatible with established law as reflected in *NLRB v. Katz* as well as fundamental purposes of the Act. We overrule *DuPont*, and we restore the correct analysis to this area, specifically, principles reflected in the *Shell Oil* line of cases and embodied more recently in the *Courier-Journal* cases, *Capitol Ford*, and *Beverly II*.

Our view of this case is straightforward, and it consists of two parts: (1) in 1962, the Supreme Court held in *Katz*, supra, that an employer must give the union notice and the opportunity for bargaining before making a "change" in employment matters; and (2) actions constitute a "change" only if they materially differ from what has occurred in the past.

The *DuPont* majority disagreed with the second of these two points. When evaluating whether new actions constitute a "change," the *DuPont* majority did not just compare the new actions to the past actions. Instead, the *DuPont* majority held that parties must look at whether *other things* had changed--specifically, whether a CBA previously existed, whether the prior CBA or CBAs contained language conferring on management the right to take the actions in question, and whether a new CBA exists containing the same contract language. If not, the employer's new actions constitute a "change" even though they are identical to what the employer did before. . . .

We believe that this outcome is wrong because it contradicts the Supreme Court's decision in *Katz* and defies common sense. Moreover, we believe the *DuPont* majority's approach will produce significant labor relations instability at a time when employers and unions already face serious challenges attempting to negotiate successor collective-bargaining agreements. . . .

[A]pplying the *Katz* doctrine in a straightforward manner . . . does not permit employers to evade their duty to bargain under Section 8(d) and 8(a)(5) of the Act. Even though

employers, under *Katz*, have the right to take unilateral actions where it can be seen that those actions are not a substantial departure from past practice, employers still have an obligation to bargain *upon request* with respect to all mandatory bargaining subjects--including actions the employer has the right to take unilaterally-- whenever the union *requests* such bargaining. The Act imposes two types of bargaining obligations upon employers: (1) the *Katz* duty to refrain from making a unilateral "change" in any employment term constituting a mandatory bargaining subject, which entails an evaluation of past practice to determine whether a "change" would occur if the employer took the contemplated action; and (2) the duty to engage in bargaining regarding any and all mandatory bargaining subjects *upon the union's request* to bargain. Existing law makes it clear that this duty to bargain upon request *is not affected by an employer's past practice*. . . .

* * *

Henceforth, regardless of the circumstances under which a past practice developed--i.e., whether or not the past practice developed under a collective-bargaining agreement containing a management-rights clause authorizing unilateral employer action--an employer's past practice constitutes a term and condition of employment that permits the employer to take actions unilaterally that do not materially vary in kind or degree from what has been customary in the past. We emphasize, however, that our holding has no effect on the duty of employers, under Section 8(d) and 8(a)(5) of the Act, to bargain upon request over any and all mandatory subjects of bargaining, unless an exception to that duty applies.[81]

* * *

MEMBER KAPLAN, concurring.

I join in the decision today to overrule the Board's holding in *DuPont*. I am writing separately, however, to express my support for an alternative rationale, not raised by the Respondent, that would also support a finding that the Respondent's modifications to the Raytheon Plan on January 1, 2013 did not alter the status quo and that, therefore, the Respondent did not violate Section 8(a)(5). . . .

Following the expiration of the parties' CBA on April 29, 2012, the Respondent was required to maintain the terms and conditions of employment of the expired CBA until the parties negotiated a new agreement or bargained in good faith to impasse.[2] In my view, pursuant to this duty to maintain the status quo, the Respondent was required to continue to provide unit employees with coverage under the Raytheon Plan, in its entirety.[3] The Respondent was not free to provide the unit employees with only certain aspects of the Raytheon Plan, nor was the Respondent free to provide unit employees with different benefits than that provided to non-unit employees under the Raytheon Plan on an annual basis. In fact, it seems clear that, had the Respondent kept in place for unit employees the specific benefits in place at contract expiration, but then revised the Raytheon Plan benefits for all other employees, such action would constitute a violation of the Act. For these reasons, in my view, it is not reasonable to consider the Respondent's responsibility to maintain the status quo as a responsibility to maintain certain, specific benefits that were in place at the time of the contract expiration. Rather, the Respondent's status quo duty was to continue providing the unit employees with the coverage provided to all employees under

the Raytheon Plan, including annual changes made pursuant to the terms of the Raytheon Plan itself. . . .

The Respondent never agreed to provide benefits under the Raytheon Plan without the unilateral right to make changes to such plan; it agreed to provide those benefits with conditions, and those conditions are as much a part of the parties' agreement concerning benefits as are the benefits themselves. It is the Raytheon Plan in its entirety, and the language in the CBA governing the plan that is the term and condition of employment and, under this plan, the Respondent reserved the right to modify unit employees' costs and/or benefits. Once the parties' CBA expired on April 29, 2012, the status quo required the Respondent to maintain this term and condition of employment until the parties negotiated a new contract. . . .

MEMBERS PEARCE and MCFERRAN, dissenting.

Reversing our recent *DuPont* precedent, a newly-constituted Board majority today gives employers new power to make unilateral changes in employees' terms and conditions of employment after a collective-bargaining agreement expires. Here, as in other new decisions, the majority fails to provide notice and an opportunity for briefing, violating an agency norm.[2] And it changes course even though *DuPont* is currently under review by the U.S. Court of Appeals for the District of Columbia Circuit, which had - in a prior remand - plainly indicated that the Board was free to choose the rule adopted and explained in *DuPont*.[3]

With little justification other than a change in the Board's composition,[4] the majority essentially cuts and pastes Chairman Miscimarra's dissent in *DuPont* into a new majority opinion. In holding that an employer may continue to make sweeping discretionary changes in employment terms even after a contractual provision authorizing such changes has expired and while the parties are seeking to reach a new collective-bargaining agreement, the majority's decision fundamentally misinterprets the Supreme Court's decision in *NLRB v. Katz*. Indeed, *Katz* clearly says the exact opposite: that an employer's unilateral change violates the duty to bargain under the National Labor Relations Act, even where the change is consistent with a past practice of changes made, if the changes involve significant employer discretion.

The Board is not free to adopt a position so manifestly inconsistent with Supreme Court precedent. Moreover, the majority's new rule is not only foreclosed by Supreme Court authority, it is also impermissible as a policy choice. As the Supreme Court and other Federal courts have explained, permitting an employer to make unilateral changes while negotiations for a new contract are under way frustrates the process of collective bargaining. The Act demonstrably was intended to "encourag[e] the practice and procedure of collective bargaining," not to undermine it. Undermining collective bargaining to the advantage of employers is precisely what the majority achieves today. But, for reasons we will show, that result cannot stand.

* * *

II. DISCUSSION

* * *

B. The Duty to Bargain

As the Board stated in *DuPont*, a fundamental policy of the Act is to protect and promote the practice of collective bargaining. In furtherance of this statutory policy, Sections 8(a)(5) and 8(d) of the Act require employers to bargain collectively and in good faith with respect to wages, hours, and other conditions of employment. An employer's duty to bargain in good faith, however, includes more than a willingness to engage in negotiations with an open mind and with a purpose of reaching a collective-bargaining agreement with the union that represents its employees. The duty also includes the obligation to refrain from unilaterally changing established terms and conditions of employment without prior notice to and bargaining to an impasse with the union. *Katz*; *Bottom Line Enterprises*. This prohibition against unilateral changes extends both to negotiations for an initial contract and for successor agreements. *Litton*.

The Supreme Court has explained that unilateral changes made during contract negotiations injure the very process of collective bargaining and "must of necessity obstruct bargaining, contrary to the congressional policy." *Katz*. "[I]t is difficult to bargain if, during negotiations, an employer is free to alter the very terms and conditions that are the subject of those negotiations." *Litton*. Indeed, "an employer's unilateral change in conditions of employment under negotiation . . . is a circumvention of the duty to negotiate which frustrates the objectives of § 8(a)(5) much as does a flat refusal." *Katz*.

As the Board recognized in *DuPont*, permitting an employer to make unilateral changes during bargaining would have a deleterious effect on the bargaining process by requiring the union to bargain to regain benefits lost through the employer's unilateral action. Placing a union in this weakened position fundamentally undermines the process of collective bargaining "and interferes with the right of self-organization by emphasizing to the employees that there is no necessity for a collective bargaining agent." *Honeywell Int'l, Inc. v. NLRB*. In *McClatchy Newspapers*, the Board explained that the employer's "ability to exercise its economic force" by unilaterally imposing changes, and thereby excluding the union from negotiating them, "disparage[s] the [union] by showing, despite its resistance to th[e] proposal, its incapacity to act as the employees' representative in setting terms and conditions of employment." It poses the very real danger that the unilateral action will destabilize relations by undermining a union's institutional credibility. . . .

In addition to refraining from unilaterally *changing* terms and conditions of employment during negotiations, an employer has the corollary duty *to maintain* terms and conditions of employment during bargaining. *Litton*. Where, as in this case, the parties were engaged in bargaining for a successor contract, the status quo consists of the terms and conditions that existed at the time the contract expired. Although these terms and conditions "are no longer agreed-upon terms; they are terms imposed by law." This is so because "an expired contract has by its own terms released all its parties from their respective contractual obligations." The "rights and duties under the expired agreement 'retain legal significance because they define the *status quo'* for purposes of the prohibition on unilateral changes." It is

this status quo that constitutes the baseline from which negotiations for a new agreement will occur, and from which the union will base its bargaining proposals.

There are two limited exceptions to the foregoing principles which, if established by an employer, will preclude finding a Section 8(a)(5) violation. Under the first exception, an employer in certain narrow circumstances may implement unilateral changes to terms and conditions of employment if it has an established past practice of doing so. *Katz*; *Post-Tribune Co.* As described below, the past practice exception is narrowly construed (*Adair Standish Corp. v. NLRB*), and an employer claiming this exception bears a heavy burden of proof. *NLRB v. Allis-Chalmers Corp.*; *Eugene Iovine*. The second exception is waiver. Under this exception, if the evidence establishes that a union has waived its statutory right to bargain about a mandatory subject of bargaining, an employer may lawfully implement changes to it. *Provena St. Joseph Medical Center*. . . .

C. Past Practice

. . . In *Katz*, the Supreme Court held that the employer violated Section 8(a)(5) in three respects during bargaining for an initial contract: (1) unilaterally announcing a change in its sick leave policy, (2) unilaterally instituting a new system of automatic wage increases, and (3) unilaterally granting merit wage increases. After finding that the unilateral changes with respect to the first two subjects "plainly frustrated the statutory objective of establishing working conditions through bargaining" and "conclusively manifested bad faith in the negotiations," the *Katz* Court considered whether the employer's unilaterally instituted merit increases should be treated as lawful because they were consistent with a "long-standing practice" of granting such increases. The Court firmly *rejected* this past practice defense. . . .

As the Board discussed in *DuPont*, the Board and courts have consistently adhered to these principles in *Katz* by holding that "employers may act unilaterally pursuant to an established practice *only* if the changes do not involve the exercise of significant managerial discretion." The importance of that precedent and the majority's failure to acknowledge it here, compels us to reiterate it. We start with the decisions in *State Farm Mutual Auto Insurance Co.* and *Oneita Knitting Mills, Inc.* In both cases, applying *Katz*, the Board found that although the employers had a past practice of granting merit increases, they violated Section 8(a)(5) by continuing their practice of unilaterally granting the increases during contract negotiations, because the increases were informed by a significant degree of discretion. . . .

In the years following these decisions, *Katz*'s emphasis on the degree of employer discretion exercised in prior unilateral changes has been the foundation underlying the Board's narrow definition of what constitutes a past practice. What the Board has required is "reasonable certainty" as to the purported practice's "timing and criteria." *Eugene Iovine, Inc.* In *Eugene Iovine*, for example, the Board found that the employer failed to establish a past practice of recurring reductions of employees' work hours because the alleged practice lacked a "'reasonable certainty' as to timing and criteria" and the employer's discretion to reduce hours "appear[ed] to be unlimited.". . .

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3. The majority's newly-fashioned standard is predicated on a misreading of *Katz* and is incompatible with the past practice doctrine

The wealth of precedent establishes that discretionary unilateral changes to a mandatory subject of bargaining that are not fixed as to timing and criteria do not establish a past practice that permits continued implementation of such changes postcontract expiration. Nevertheless, the majority states that we (and by extension, the Board and courts) have been wrong for years in interpreting *Katz* this way. The majority, which does not dispute that the Respondent here exercised broad discretion over the years when it implemented changes to health benefits, asserts that this discretion is irrelevant in determining whether an employer has implemented an unlawful unilateral change under *Katz*. Instead, it states "the only relevant factual question is whether the employer's action is similar in kind and degree to what the employer did in the past." This statement indicates a basic misunderstanding of the issue in *Katz*.

By posing the issue this way, the majority, in effect, reads *Katz* as finding that the unilateral merit increases therein were unlawful because they were not "similar in kind and degree to what the employer did in the past," but would have been lawful had the increases been similar in kind and degree to the past increases. This is simply incorrect, as the plain language of the Supreme Court's decision establishes. As discussed above, the Supreme Court noted that the merit increases were "in line with the company's long-standing practice" or, as the majority phrases it, "similar in kind and degree," but nevertheless found them unlawful because of their discretionary nature. . . .

Clearly, the majority's interpretation of *Katz*--which would permit an employer to make whatever changes it desires, including the elimination of all health benefits, simply because it has a past pattern of making changes to benefits--cannot be right. As the Supreme Court explained in *Katz*, when changes made to employee terms and conditions are informed by a large measure of discretion, "[t]here is simply no way ... for a union to know whether or not there has been a substantial departure from past practice." . . .

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D. Waiver

The judge correctly rejected the Respondent's defense that the Union waived its right to bargain over changes to the health plan after contract expiration, by agreeing in the 2009-2012 collective bargaining agreement to grant the Respondent broad discretion to make changes to its plan. The judge's finding is consistent with longstanding Board law, on which *DuPont* is based, where the Board held that when a union agrees to a contractual management-rights clause that permits an employer to act unilaterally on a mandatory subject of bargaining, the union thereby waives its statutory right to bargain about that subject only for the term of the contract. As the Board explained in *Du Pont*, because the source of the employer's authority to act unilaterally on that subject exists solely by virtue of the union's contractual waiver, the waiver expired on the termination date of the collective-bargaining agreement. Thus, the Board found that the respondent failed to establish a waiver defense when it made postexpiration unilateral changes to health insurance benefits that it had been permitted to make during the term of the contract under a reservation of rights clause (which we found to be a management-rights clause). . . .

Because it is undisputed that the Respondent exercised wide-ranging discretion to make changes to the Plan during the term of the contract, the Respondent's practice of altering the Plan never became a cognizable past practice and part of the expiration-day "status quo." Consequently, it is immaterial that the Respondent's post-expiration discretionary changes to the employee health benefits are comparable to its pre-expiration discretionary changes, *unless of course the Union has somehow waived its right to bargain*. For reasons explained, there was no waiver here, but the majority's failure to recognize that waiver was the only remaining potentially viable defense speaks clearly to its basic misunderstanding of the principles that should have resulted in an affirmance of the judge's unfair labor practice findings in this case.

Conclusion

The majority then is simply wrong when it insists that today's decision will ""do no harm." It is clear, rather, that permitting employers to unilaterally change--at their whim and in their sole discretion--significant terms of employment during negotiations over those very terms, is inimical to the collective-bargaining process, for reasons that the Supreme Court and other Federal courts have explained. Rather than promoting collective bargaining, the majority's decision is the quintessential "blueprint for how an employer might effectively undermine the bargaining process while at the same time claiming that it was not acting to circumvent its statutory bargaining obligation." *McClatchy*. This result is flatly contrary to the expressed policy of the National Labor Relations Act, and it is based on a willful misreading of the Supreme Court's decision in *Katz*. The Board has no authority to deviate from Supreme Court precedent and no authority to adopt its own, flawed labor policy in place of that established by Congress. . . .