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December 21, 2022

Roxanne L. Rothschild, Executive Secretary
National Labor Relations Board
1015 Half Street, S.E.
Washington, D.C. 20570-0001

Re: Reply Comment/Proposed Standard for Determining Joint-Employer Status
RIN 3142-AA21

Dear Ms. Rothschild:

The National Waste & Recycling Association ("NWRA") submits these comments on behalf of the waste and recycling industry in response to the Notice of Proposed Rulemaking issued by the National Labor Relations Board ("NLRB" or "the Board") to establish a standard for determination of joint-employer status under the National Labor Relations Act ("NLRA" or "the Act"). These reply comments respond to arguments made by numerous labor organizations purporting that the proposed rule will foster more efficient collective bargaining relationships, labor peace, or improved health and safety. As set forth below, it will not.

NWRA urges the Board to abandon this effort and keep in place the current joint-employer rule, adopted less than two years ago, which provides clarity and certainty to stakeholders and fosters stable labor relations for all parties.

Introduction.

By way of background, NWRA is the trade association representing the private sector waste and recycling industry that is essential to maintaining the quality of American life by protecting public health and the environment. The delivery of waste and recycling services impacts all residential, commercial, and industrial properties on a daily basis. Our members collect, process, and manage waste, recyclables, organics, and medical waste; operate and manage landfills in compliance with all federal and state laws; manage and service truck fleets and collection vehicles; design, manufacture, sell, and service equipment and supplies.

The association's mission is to provide leadership, education, safety expertise, research, and advocacy to promote the waste and recycling industry. NWRA's goal is to ensure a climate where our members can continue to provide safe, economically sustainable, and environmentally responsible services and jobs that benefit communities throughout America.

NWRA's Safety Committee provides insights and best practices on how to prevent injuries to the industry's workers. The association convenes a number of institutes that provide leadership

on landfills, recycling, and healthcare waste. The association also serves as Secretariat for the American National Standards Institute (ANSI) Z245 Committee on Equipment Technology and Operations for Wastes and Recyclable Materials. Along with our partner Informa, we collaborate on WasteExpo, North America's largest waste and recycling exposition and conference. Our educational offerings are known and respected around the world.

Our members operate in all 50 states and the District of Columbia. Waste and recycling facilities number nearly 18,000 scattered throughout the U.S., mirroring population centers. Our more than 600 members are a mix of publicly traded and privately-owned local, regional, and Fortune 500 national and international companies. NWRA represents approximately 70 percent of the private sector waste and recycling market.

The solid waste industry directly employs more than 480,000 people as of late 2022. It is estimated that the private sector waste and recycling industry is responsible for sustaining more than one million jobs.

The Proposed Rule Ignores the Holding of the D.C. Circuit Court of Appeals and Violates the National Labor Relations Act.

NWRA will not belabor at length points made by other commenters, and generally aligns itself with comments submitted by the U.S. Chamber of Commerce, the Coalition for a Democratic Workplace, and the International Franchise Association opposing the rule for the numerous practical and legal reasons set forth therein. Nevertheless, NWRA stresses at the outset that the proposed rule flies in the face of the direction of the U.S. Court of Appeals for the District of Columbia circuit's ruling in *Browning-Ferris Industries of California, Inc. v. National Labor Relations Board*, 911 F.3d 1195 (D.C. Cir. 2018) (herein, "*BFI*"), and for that reason alone should be abandoned.

In *BFI*, the Court of Appeals acknowledged that "reserved" or "indirect" control could be probative of joint-employer status but fell far short of concluding that either of these things alone would be sufficient to establish joint-employer status in and of itself. In fact, the *BFI* Court held to the contrary, remanding the case to the Board for further proceedings, and reminding the Board that in its application of a joint-employer standard, it is "bounded by the common-law's definition of joint employer" and thus must "color within the common-law lines identified by the judiciary." 911 F.3d at 1208. In light of these facts, the D.C. Circuit remanded the case to the Board with the express direction that it apply the second (narrowing) prong of the *Browning-Ferris* test, that is, to determine whether the company had sufficient control over any term and condition of employment to permit meaningful bargaining. The court specifically directed the Board to do two things: (1) to "erect some legal scaffolding" to keep its standard within the common-law bounds of joint employment; and (2) in doing so, differentiate between control over indicators of *bona fide* joint-employer status from control contemplated by "common and routine" features of arm's-length business-to-business contracts. *Id.* at 1219-1220.

Given this express direction, it is difficult to understand how or why the Board has proposed an even broader standard than the one it adopted in *Browning-Ferris*, jettisoning any link to meaningful bargaining entirely in its proposed regulation. It is even more difficult to imagine

how the Board thinks this proposed rule, if it were to become final, would withstand judicial scrutiny as it directly flies in the fact of the D.C. Circuit's decision. The proposed rule goes far beyond the common-law bounds of joint-employment, and in doing so, violates the National Labor Relations Act.

The Proposed Rule Will Wreak Chaos on the Collective Bargaining Process.

Among its purposes, the NLRA was intended to "encourage[e] the practice and procedure of collective bargaining." The proposed rule in no way serves that purpose. Indeed, by exponentially expanding the scope of joint-employment to potentially include any party to a third-party contract for the supply of labor, the Board threatens a scenario wherein countless parties may be subject to bargaining requirements (many of whom will be unaware of this requirement, or that they have contracted themselves into it by way of a routine business-to-business contract). In doing so, the proposed rule is certain to make good on the prediction of the dissent in *Browning-Ferris* that there will be "no bargaining table [] big enough to seat all of the entities that will be potential joint employers." 362 NLRB No. 186 at 1619 (2015) (Members Miscimarra and Johnson dissenting).

Likewise, the proposed rule wholly fails to explain how abandoning perhaps the single limit on joint-employer status contained in the original *Browning-Ferris* decision—namely, that an employer must exercise or possess control "sufficient to permit meaningful bargaining"—will strengthen the process of collective bargaining or result in successful attainment of a contract. Indeed, the proposed rule rejects this principle with no meaningful analysis, offering only by way of a conclusory footnote that "by focusing on whether a putative joint employer possesses the authority to control or exercises the power to control employees' essential terms and conditions of employment, any required bargaining under the new standard will necessarily be meaningful." 87 Fed. Reg. at 54645 n. 26. This again flies directly in the face of the direction of the Court of Appeals in *BFI*, which remanded the case to the Board for the express purpose of determining whether the control at issue in *Browning-Ferris* was sufficient to meet this test. *See* 87 Fed. Reg. at 54658 (Members Kaplan and Ring dissenting) ("Presumably, the court would not have remanded for that purpose if the inquiry were unnecessary to the joint-employer determination").

The proposed rule would put innumerable parties, many of whose interests are in direct conflict, at the bargaining table, and expect that somehow, some way, these parties will come to agreement on the scope of an acceptable contract. It is beyond the realm of logic or realism to expect a company to be forced to the bargaining table when it has only a limited right of control (perhaps never exercised) or indirect control over a single term or condition of employment for a third-party's employees.

It is safe to assume that many large employers in the waste management and recycling industry—who are direct competitors to one another—enter into contracts with third-party companies that support the industry, and which contract with numerous waste-management clients. In that scenario, all joint-employer parties across the table from the union have directly conflicting interests. The union wants increased wages for its workers. The third-party contractor has no interest in bearing these costs, as its goal is to keep its expenses as low as possible, and pass on any wage increases to its client customers by way of its contacted fee. These clients, in turn, share

a single desire—to have the vendor shoulder increased labor costs—but as between the two, five, or fifty of them, each would prefer another to bear the cost of any wage increase. It is economically irrational to expect that any one of these countless actors will be the one to take the proverbial "bullet," thus ensuring that bargaining will result at impasse on one side of the table, as well as across it.[1]

Indeed, it is for precisely this reason that the Act almost exclusively contemplates a bilateral model of bargaining, with a single employer sitting across the bargaining table from organized labor, negotiating over the terms and conditions of bargaining unit employees the union represents for that employer only. Under the Administrative Procedure Act, where the Board seeks to upend long-standing policy, it is required to show as a factual or legal matter why it is necessary or preferable to do so, and that it is not acting in a manner that is arbitrary and capricious. The proposed rule wholly fails to do so and will instead undermine the NLRA's purpose of "achieving industrial peace by promoting stable collective-bargaining relationships." *Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 790 (1996). Again, for this reason alone, the proposed rule should be withdrawn.

The Proposed Rule Will Dramatically Increase Otherwise Unlawful Secondary Activity, in Contravention of the Clear Will of Congress Expressed in the Taft-Hartley Act.

Similar to its effect on collective bargaining, the proposed rule is likely to dramatically increase otherwise unlawful secondary activity under the Act, which flies directly in the face of both the text and intent of the Taft-Hartley Act of 1947.

As the Board is aware, in 1947, Congress amended the NLRA to limit the ability of organized labor to engage in certain secondary activity against neutral employers (such as suppliers, vendors, or third-party service providers). Among other things, the Taft-Hartley Act prohibited picketing, sympathy strikes, and boycotts designed to compel an employer into bargaining with an unrecognized union, as well as secondary boycotts, in which a union encourages employees of a neutral employer to strike to compel that employer to cease doing business with an employer engaged in a *bona fide* labor dispute.

Under the 2020 rule currently in place, employees of a third-party vendor may not picket an employer simply because that employer contracts with the third-party, unless that employer exercises direct and immediate control over significant terms and conditions of the third-party employer's workers. The proposed rule wholly abandons this principle, and instead leaves any employer subject to boycotts and picket lines merely by virtue of having entered into a routine commercial contract with any third-party that finds itself involved in a labor dispute—even where the dispute in question is wholly unrelated to the contract at issue, or any of the terms and conditions of employment it purports to govern.

[1] Nor does the proposed rule even attempt to explain its implications for employers who, by way of a virtually limitless joint-employer standard, may now find themselves the joint employers of employees covered under multi-employer pension plans, many of which remain dramatically and precariously unfunded. The potential liability of these new joint employers to these pension plans, particularly where withdrawal liability is concerned, does not appear to have crossed the Board's mind. *Cf.* Comments of U.S. Chamber of Commerce (December 7, 2022), at 40-41.

It is common for companies in the waste services and recycling industry to enter into contracts with third-party vendors for certain types of work the company itself is not designed to perform (such as specialized maintenance, tractor-trailer transport of waste, or cell construction at disposal sites, to name but a few). By way of example, assume a client in the waste services and recycling industry enters into such a contract with a third-party for these services. The client employer sets certain conditions on the third-party's employees (such as time and scheduling of when work is performed, or the supervision of the contractor's employees to ensure health and safety protocols are followed while on the client employer's worksite). The client does *not* exercise or retain any reserved right of control over the wages and benefits which the contractor provides to its workers. Under current law, if the contractor's employees decide to strike for the purpose of pressuring the contractor to provide certain benefits (*e.g.*, paid sick leave, over which national rail carriers would have recently faced a strike in the absence of swift action by Congress), these employees can strike, picket, and encourage boycotts of their primary employer to obtain increased wages and benefits. But under the proposed rule, they now may also engage in this behavior at *any* worksite of a client "joint" employer (even one to which the worker has never been assigned), and even where the client indisputably exercises no control over the wages and benefits these workers are provided.

This is a recipe for labor strife the Board could not have better designed if it wanted to. Under the proposed rule, essential workers in a critical industry would be empowered to strike their employer over the terms and conditions of employment of another company's workers over which the primary employer has absolutely no influence or control. It again ignores the direction of the courts and long-standing Board precedent limiting joint-employer status to that which existed under the common law, and likewise expressly contravenes the Act's salutary purpose of establishing stable and peaceful labor relations. It is a solution in search of a yet-to-be-identified problem, and it should be rejected.

The Proposed Rule Will Have a Negative Impact on Workplace Health and Safety.

Safety has always been a top concern for NWRA and our members. As an association, we want every single member of our industry to make it home each day safely, free from injury or fatality. NWRA likewise believes, and has long maintained, that a clear delineation of employer responsibility helps ensure a safe workplace. In contrast, an overbroad standard which practically presumes joint-employer status under the proposed rule's "indirect and reserved forms of control" standard will result in confusing and conflicting directives that make employees less, not more, safe.

The waste services and recycling industry is, perhaps unsurprisingly, among the most heavily regulated industries in the United States, subject to innumerable federal, state, and local regulations regarding, among other things, workplace health and safety. The proposed rule ignores this fact, and explicitly states that health and safety are "essential" terms and conditions of employment and an employer's purported control over issues relating to health and safety will be viewed by the Board as indicia of joint employment. As a legal matter, this dramatically expands the reach of the joint-employer analysis beyond where the Board's case law has gone, with scant justification for doing so offered. At a minimum, to the extent that health and safety requirements are imposed on an employer by statute or regulation, the Board should expressly make clear that

they are *not* probative of joint-employer status. This would be in line with well-settled Board precedent. *See, e.g.*, *Aldworth Co.*, 338 NLRB 137, 139 (2002) ("[A]ctions taken pursuant to government statutes and regulations are not indicative of joint employer status.").

Equally troubling, as a practical matter, the proposed rule is likely to jeopardize the health and safety of workers, insofar as employers will be far less likely to do more than the bare minimum (and perhaps barely that), if any effort to maintain a safe workplace is construed as evidence of "control" suggestive of joint employment. By extending the reach of the joint-employer analysis beyond core terms of employment—*e.g.*, wages, scheduling, hours of work—the proposed rule will result in employers distancing themselves from training, policies, and procedures designed to ensure the safest workplace possible. This flies in the face of efforts made throughout the industry, long before and continuing throughout the current COVID-19 pandemic, to both abide with statutory safety requirements and promote voluntarily policies that protect workers, customers, and the workplace generally. This approach should be rejected. *Cf.* Comments of National Association of Manufacturers (Dec. 7, 2022), at 4 (setting forth unintended consequences for health and safety if proposed rule is adopted).

Conclusion.

The waste services and recycling industry believes that a clear, consistent standard is needed to guide businesses in confidently deciding whether to enter into arrangements intended to constitute contractor relationships and to keep such individuals safe while working on their premises. A bright line test, where substantial, direct, and immediate control over the terms and conditions of employment of putative employees is required for joint-employer status, is the only logical answer. This is the approach adopted by the Board less than three years ago in its 2020 final rule. For all of the reasons set forth above, the Board should abandon this rulemaking unless and until it is shown that the 2020 final rule fails to properly distinguish true joint employers from those who are merely parties to business-to-business contracts, or that it is otherwise inadequate in its application or in furtherance of the objectives of the Act.

Respectfully submitted,

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President & CEO