Labor & Employment Issues
In Focus
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**THE JOINT EMPLOYER SAGA CONTINUES:
D.C. CIRCUIT REVERSES TRUMP NLRB
ORDERS IN BROWNING-FERRIS**

On July 29, 2022, the United States Court of Appeals for the District of Columbia Circuit ("Court" or "DC Circuit") vacated orders by the Trump- era National Labor Relations Board ("NLRB" or "Board"). That Republican-controlled Board refused to find that Browning-Ferris Industries of California, Inc. ("Browning-Ferris") was a joint employer with Leadpoint Business Services ("Leadpoint") and held instead that the joint employer analysis articulated in *Browning Ferris Indus. of Cal., Inc. v, NLRB*, 911 F.3d 1195 (D.C. Cir. 2018) relying on indirect control as a factor could not be retroactively applied to the business relationship between Browning-Ferris and Leadpoint. *See Sanitary Truck Drivers and Helpers, Local 350 v. NLRB*, Case No. 21-1093 (D.C. Cir. 2022). As a result of the latest decision by the Court, the matter was remanded back to the now Democrat-majority Board for further proceedings consistent with this decision holding that "indirect control" can be a factor in determining joint-employer status.

This saga begins back in 2013 when the Sanitary Truck Drivers and Helpers, Local 350 of the International Brotherhood of Teamsters ("Union" or "Local 350") filed a petition to represent the recycling workers of Leadpoint, contending that both Leadpoint and Browning-Ferris were joint employers under the National Labor Relations Act of 1935 ("NLRA" or "Act"). The Board's then-Acting Regional Director determined that these two entities were not joint employers, but that determination was reversed by the Board in *Browning-Ferris Indus. of Cal. Inc.*, 362 NLRB 1599 (2015) ("*Browning-Ferris I*"). As part of the Board's rationale in *Browning-Ferris I*, the Board reasoned that "evidence of indirect control can establish joint-employer status" and as such, Browning-Ferris's "power of control – even unexercised - are clearly relevant to the joint-employer inquiry." *Sanitary Truck Drivers and Helpers, Local 350*, pp. 3-4. The D.C. Circuit then upheld the majority of the findings in *Browning-Ferris I*, but remanded a small portion of that ruling for further clarification concerning the "indirect-control element." *Sanitary Truck Drivers and Helpers, Local 350,* p. 4. Rather than follow through on this limited analysis, the Republican-majority Board, in *Browning-Ferris Indus. of Cal., Inc.*, 369 NLRB 139 (2020) ("*Browning-Ferris II*"), held that "it was manifestly unjust" to apply the joint-employer rule articulated in *Browning-Ferris I* and reversed the finding that Browning-Ferris and Leadpoint were joint employers.

In the instant decision, the Court started by emphasizing that the Board's long-standing, joint-employer standard has been fundamentally based on the concept of common law agency in employment relationships, that "control exercised indirectly, - such as through an intermediary - may be sufficient to establish a joint-employer relationship," and that "the common-law inquiry is not woodenly confined to indicia of direct and immediate control." *Sanitary Truck Drivers and Helpers, Local 350,* pp. 5-6. These

concepts were central to the Court's subsequent analysis with respect to the retroactive application of the standard enunciated in *Browning-Ferris I*, because that Board had previously rejected indirect control that it contended would give rise to injustice in application of the Act to these companies by being "suddenly confronted with the new reality [concerning this] preexisting business relationship." *Sanitary Truck Drivers and Helpers, Local 350*, p. 7.

The D.C. Circuit then held that the Board's overreliance in *Browning-Ferris II* on the "direct and immediate control" element of the joint-employer relationship was a recent development in this area of the law, only dating back to *In re Airborne Freight Co.*, 338 NLRB 597 (2002). So, it would be insincere for the Board and/or Browning-Ferris to contend that the utilization of indirect but unexercised control, as provided in *Browning-Ferris I*, would somehow cast aside decades or established precedent, in part, because the Board's own rule contemplated "indirect and reserved control" as a factor when analyzing a joint-employer situation. *See* 2020 Rule, 85 Fed. Reg. at 11,227. Additionally, the Board in *Browning-Ferris II* failed to undergo the "fact-specific and case-by-case" analysis that is inherent to the joint-employer analysis. *Sanitary Truck Drivers and Helpers, Local 350*, pp. 10-11. Accordingly, the D.C. Circuit remanded the case to the now-Democratically controlled Board for another Browning-Ferris decision in this continuing saga.

UNION LIABILITY FOR RICO EXTORTION WINS LIMITED NEW LIFE IN THIRD CIRCUIT

In 2019, U.S. District Court Judge Susan D. Wigenton for the District of New Jersey ("District Court" or "DNJ") granted United Healthcare Workers East SEIU 1999 ("Union") summary judgment against fraud and extortion claims brought by Care One Management LLC and scores of its affiliated companies ("Care One," "Employer," or "Company") under the Racketeer Influenced and Corrupt Organizations Act ("RICO"). At that time, we expressed concern that the dismissal of the RICO-based extortion claims might not survive appeal given the seriousness of the alleged misconduct and the breadth of the extortion exemption applied by the District Court. On July 28, 2022, a three-member panel of the U.S. Court of Appeals for the Third Circuit ("Appeals Court" or "Third Circuit") affirmed Judge Wigenton on all points *except* the RICO extortion claim, remanding the case for jury trial. *Care One Management LLC et al. v. United Healthcare Workers East*, *et a*l. No. 19-3693 (3rd Cir. July 28, 2022). The Appeals Court's decision provides critical guidance to unions engaged in corporate campaigns and economic warfare in the shadow of RICO liabilities.

Care One and the Union had been engaged in running battles since 2010, including numerous unfair labor practice charges. In July 2011, on the night before an authorized strike, the Connecticut facility was vandalized and sabotaged in a manner putting patients at risk. Prior to the vandalism, Union officials had urged members "to become angry" and "more militant" and decried legal delays as "too long." While condemning the vandalism, the Union declined to cooperate with governmental investigations, adhering to its role as defender of its members. Instead, the Union ramped

up its campaign, including rhetorical questions challenging the Company's care and billing, opposing Care One health applications at public hearings and its billings as criminal to, among others, Senator Richard Blumenthal, and picketing the Company's owner at public events. Care One sued the Union alleging wire fraud and extortion, both predicate acts to RICO liability, but the District Court granted the Union summary judgment on the strength of the Union's documented fact-checking, good faith belief, and a broad application of a "claim of right" by the Union to the objective sought and means used.

Over a year and a half after hearing argument on appeal in September 2020, and after initially affirming the District Court in whole, the Third Circuit reaffirmed summary judgment for the Union on the fraud claims, but, gingerly and with caveats, reversed itself and the District Court on the extortion claims. Appeals Court Judges McKee, Jordan, and Rendell agreed with the dismissal of mail and wire fraud claims on the grounds that the Union's extensive fact- checking refuted any specific intent or reckless disregard to defraud. Notably, the Appeals Court explained that rhetorical questions could not be fraudulent since they were only questions, and the Union had no obligation to be objective or balanced in its campaign. However, though "a very close call," the Third Circuit found sufficient clear proof, meeting the strict Norris-La Guardia standard, to allow a reasonable jury to find that Union members committed the vandalism and the Union authorized or ratified such misconduct. Such proof included the Union's aggressive speech prior to the vandalism, the sabotage occurring the night before the authorized strike, the Union's muted rejection of the vandalism as possible mere cover, and the Union's refusal to cooperate in investigations of the mayhem. While the Appeals Court agreed that the Union enjoyed a "claim of right" to the objective of coercing Care One into better bargaining and employment terms and conditions, it held a jury could find that the Union misused the means to that objective because there was no obvious nexus between a favorable labor contract and the Union's activities in regulatory and criminal forums. Importantly, the Third Circuit did not find that the Union's publicity campaign could support a jury finding of coercion, since it constituted lawful means reasonably tied to the lawful objective.

The Third Circuit's decision in *Care One Management* provides welcome safeguards against the RICO nuclear bomb for a union that publicizes opinion based on vigorous fact checking and engages in public appeals for better terms and conditions of employment. However, resort to regulatory and criminal proceedings against an employer should be justifiable on their face and tied to the Union's lawful goals. Finally, in the event of vandalism or sabotage, unions are well advised to temper their rhetoric, vigorously condemn the misconduct, and actively cooperate in any investigations, lest a jury be asked to weigh whether the Union authorized or ratified violations of RICO.

COURT UPHOLDS PERB FINDING THAT TEACHERS' "SICK OUT" VIOLATED THE TAYLOR LAW'S ANTI-STRIKE PROVISION

On July 21, 2022, the Appellate Division of the New York State Supreme Court for the Third Department ("Court") unanimously upheld a Public Employment Relation's Board ("PERB") ruling that over twenty Buffalo schoolteachers had engaged in an illegal strike when they called in sick one day after the assailant from another school threatened to shoot up Public School 59, also known as the Dr. Charles R. Drew Magnet School ("School"). The five-judge panel affirmed the finding that the absent teachers unlawfully "engaged in a concerted slowdown or stoppage of work as part of a coordinated effort to obtain a safer work environment." *Buffalo Teachers Fedn., Inc. v. New York State Pub. Empl. Rel. Bd.*, 2022 WL 2836236, at *2 (3rd Dept. July 21, 2022).

On March 13, 2018, around dismissal time, an assault occurred between two female seventh grade students and two older females from a local high school. Local police arrived in minutes and arrested one of the older female antagonists. The other female antagonist escaped arrest, and while fleeing, stated: "I'm coming tomorrow with a gun to shoot up this ... f* * * * * * school," and that "if you show up to work tomorrow, you're going to all die." The assault and subsequent threat was witnessed by approximately 20 to 30 teachers. Around 2:55 p.m., Nicole LaRusch, who is a schoolteacher and a building delegate chairperson of the Buffalo Teachers Federation, Inc. ("Union"), organized a teachers' meeting in her classroom. Between 3:05 p.m. and 3:30 p.m., approximately one-half of those teachers who attended the 30-minute meeting called in sick, with the remaining 13 calling in before the next day. Pre-dating the incident, teachers at the School had ongoing safety concerns that the Buffalo School District ("District") was not providing enough security at the building. In fact, one week before the incident, a parent reported that School students posted social media messages that one was going to "blow up the school" and another was allegedly "going to bring a gun to school on Monday [March 12] to shoot up the school." *Buffalo Teachers Federation, Inc.*, 53 PERB 8001 (2019). As a result of these teachers calling out on sick leave, the District filed an improper practice petition against the Union alleging a violation of § 201.9 of Article 14 of the New York State Civil Service Law, also known as the Taylor Law, through there is no indication that any individual disciplinary action was taken against LaRusch or the other teachers.

PERB affirmed an administrative law judge ruling that the teachers engaged in a "concerted sick-out" by calling out sick and failing to work The evidence demonstrated that, while LaRusch told her colleagues that calling out was strictly a personal decision she was making and that every teacher would need to make that decision on their own, the Union did not send out any communications to District staff to explicitly confirm that the Union was not condoning, suggesting, or recommending that anybody call out sick for the following day. PERB also found that the Union failed to prove its "justification defense." In assessing this defense, prior PERB cases, consistent with New York State Court of Appeals' precedent, have recognized "that a refusal to perform a task because of a *bona fide* fear of personal injury does not constitute participation in a strike." To

satisfy this standard, PERB requires evidence affirmatively establishing that the corresponding threat or danger to oneself is "clear and present." The Union's defense was rejected because any threat from the student was alleviated when the perpetrator who fled the scene and made the threatening comments in question was subsequently arrested, irrespective of whether the teachers believed she was not yet apprehended. Additionally, none of the teachers during the time from calling out sick until the next day inquired to find out whether the assailant who made the threat had been arrested.

The Union appealed the PERB ruling by filing an Article 78 petition arguing that PERB's determination was not supported by substantial evidence. The Court first explained that when an administrative agency that is responsible for interpreting specific statutory language makes findings that are supported by the evidence, the Court will defer to the judgment of that agency. Relying upon the same evidence as PERB, the Court found that, although there was evidence that could support an alternate conclusion, substantial evidence supported PERB's determination that the teachers engaged in a concerted slowdown or stoppage of work as part of a coordinated effort to obtain a safer work environment.

ONE HAND WASHING THE OTHER: NLRB AND DOJ ENTER INTO AN AGREEMENT TO PROTECT WORKERS' RIGHTS

On July 26, 2022, the National Labor Relations Board ("NLRB" or "Board") and the United States Department of Justice ("DOJ") entered into a Memorandum of Understanding ("MOU") memorializing a partnership between the two agencies designed to promote the free flow of commerce and fair compensation in the labor markets. *See* dojantitrust-nlrb-mou-72622.pdf.

The Board and DOJ's Antitrust Division will seek to coordinate their efforts in combating collusive and anticompetitive employer practices, such as labor market concentration, labor monopoly, and the use of non-compete, non-solicitation, and non-disclosure agreements in the workplace. Additionally, the NLRB and DOJ will tackle employers' attempts to interfere with workers' rights to organize. This collaboration and coordination will be manifested by: i) the creation of agency liaisons that "will meet with sufficient regularity to carry out the purposes of this MOU," ii) a renewed effort to exchange and share information between these liaisons targeting policy creations and enforcement actions, iii) increases in intra-agency, inter-agency, and public training, education and outreach designed to raise awareness of the laws these agencies enforce, and iv) the creation of a referral system between the NLRB and DOJ, when particular cases arise. Further, the information and referrals provided and received by the respective agencies shall be deemed "non-public information," to encourage communication between the Board and DOJ.

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