**UNITED STATES OF AMERICA**
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**
**REGION FIVE**

GREEN JOBWORKS, LLC/ACECO, LLC
(A JOINT EMPLOYER)

Employers

and Case 05-RC-154596

CONSTRUCTION AND MASTER LABORERS'
LOCAL UNION NO. 11

Petitioner

## DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act ("the Act"), as amended, a hearing was held on July 2 and 6, 2015 before a hearing officer of the National Labor Relations Board ("the Board").[1] The Construction and Master Laborers' Local Union 11, affiliated with Laborers' International Union of North America ("Petitioner") filed the petition seeking to represent a unit of employees jointly employed by Green JobWorks ("GJW") and ACECO, LLC ("ACECO"), comprised of "all full-time and regular part-time laborers, including demolition and asbestos removal workers employed by the joint employer, but excluding office clericals, confidential and management employees, guards, and supervisors under the Act."

The parties stipulated, and I find, that Petitioner is a labor organization within the meaning of Section 2(5) of the Act, that GJW and ACECO are employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act,[2] and that all parties are therefore subject to the jurisdiction of the Board.

[1] In light of the Board's August 27, 2015 decision in *Browning-Ferris Industries of California, Inc.*, 362 NLRB No. 186 (2015), the Region solicited supplemental briefs from the parties in response to the decision. Petitioner and ACECO filed supplemental briefs.

[2] The parties stipulated, and I find, that Green JobWorks, LLC has been a limited liability company with an office and place of business in Baltimore, Maryland, and has been engaged in business as a temporary staffing agency engaged in the business of demolition and environmental remediation, including asbestos remediation. In conducting its operations during the previous 12 months, Green JobWorks, LLC performed services valued in excess of $50,000 in states other than the State of Maryland.

## I. ISSUES AND POSITIONS OF THE PARTIES

There were three principal issues presented at the hearing: (1) whether GJW and ACECO constitute a joint employer under the Act; (2) whether a unit of all GJW employees working on an ACECO worksite is appropriate; and (3) whether all other GJW employees at non-ACECO sites share an overwhelming community of interest with the petitioned-for employees.[3] In the event that I do not find that a joint employer relationship, Petitioner indicated it was willing to proceed to an election for a unit consisting of GJW employees assigned to ACECO worksites.

On the first issue, Petitioner's position is that GJW and ACECO have a joint employer relationship. Petitioner relies upon the Board's recent decision in *Browning-Ferris Industries of California, Inc.*, 362 NLRB No. 186 (2015) ("*BFI*").[4] In *BFI*, the Board restated its joint-employer standard, holding that two or more entities will be considered joint employers of a single work force if: (1) there is a common-law employment relationship with the employees in question; and (2) the putative joint employer possesses sufficient control over employees' essential terms and conditions of employment to permit meaningful collective bargaining. *BFI,* 362 NLRB No. 186. at slip op. 2. According to the Petitioner, the facts in *BFI* are indistinguishable from the instant case, as evidenced by ACECO's overwhelming influence over discipline, overtime, layoffs, and direction of work. GJW and ACECO deny that they are joint employers. According to ACECO, the petition should be dismissed because the present facts are fundamentally different from *BFI*, namely ACECO's lack of ownership over the project sites, and its lack of control over the site and GJW employees.

Regarding the second issue, Petitioner's position is that if no joint-employer relationship is found, a unit of GJW employees at ACECO sites is an appropriate unit. However, GJW and ACECO both argue that such would not be an appropriate unit, but that there is an overwhelming community of interest between all asbestos and demolition employees employed by GJW in the greater Washington, D.C. metropolitan area and that such is the appropriate unit. Tied in with the last issue, Petitioner maintains that GJW and ACECO failed to meet their burden of establishing an overwhelming community interest of the additional employees it seeks to add to

[3] In addition to these substantive issues, Petitioner alleges that ACECO failed to comply with its subpoena *duces tecum* because it provided electronic copies of the required documents, rather than paper copies. Petitioner thus seeks reimbursement for $367.66 it incurred in printing expenses. I find that ACECO complied with the subpoena as requested, and deny the motion for reimbursement.

[4] At the time of the hearing, the Board had not issued *BFI*; thus, Petitioner's original argument on the issue was that the evidence at the hearing established that ACECO was a joint employer of GJW employees working at its sites because ACECO meaningfully affected the conditions of employment for the employees in the petitioned-for unit, as under *Laerco Transportation*, 269 NLRB 324 (1984). In *BFI*, the Board explicitly overruled *Laerco* to the extent its formulation of the joint-employer standard was inconsistent with the standard provided in *BFI*.

the unit, namely, all of GJW's employees working at non-ACECO sites in the greater Washington, D.C. metropolitan area.

## II. BACKGROUND AND FACTS

### A. Overview Of GJW's Operations

GJW is a staffing company that provides temporary labor to various construction companies.[5] Specifically, GJW provides demolition and asbestos abatement laborers to approximately 15 to 20 client construction companies, including ACECO.[6] Companies performing asbestos removal in Maryland, Virginia, or Washington, D.C. must be licensed, and GJW is not licensed to perform asbestos removal in Maryland, Virginia, or Washington, D.C. At the time of the hearing, GJW was responsible for providing labor to eight different projects.

GJW primarily recruits new employees through advertisements and word-of-mouth-referrals. All applicants for employment must pass a drug-screening exam. If an applicant is applying for a demolition position, he must pass a safety and general knowledge test for demolition. After a drug-screening exam and general knowledge test has been completed, the individual completes an application, and GJW enters the individual's information into its database until a position becomes available.

Before assigning an employee to a particular site, GJW examines his credentials to ensure that the employee is licensed. GJW reimburses the employee for his license renewal fees if GJW assigns the employee to a site when the employee's license is up for renewal. GJW also provides training, including videos, discussions on policies and procedures in the GJW handbook regarding conduct on a job site, and safety protocols. In addition to the training, GJW tests an employee to assess his skill set, and ability to use tools that will be required on the job.

When a position becomes available, GJW contacts qualified employees in its database to offer them the position. Each employee is told the assigned wage rate for the job, and has the option to accept or reject the position. The wage rate is based on GJW's contractual relationship with the particular client, or set rates for government jobs. According to GJW's president, Larry

[5] The parties stipulated, and I find, that ACECO, LLC has been a limited liability company with an office and place of business in Spring, Maryland, and has been engaged in the business of providing demolition, environmental remediation and renovation services to private and governmental entities in Maryland, Washington, D.C. and Virginia. In conducting its operations during the 12-month period ending June 1, 2015, ACECO performed services valued in excess of $50,000 in States other than the State of Maryland.

[6] Asbestos abatement refers to the removal of asbestos, a hazardous material, from buildings.

Lopez, GJW employees assigned to an ACECO site can work overtime only when ACECO gives GJW confirmation that GJW can bill ACECO for the overtime hours of GJW's employees.

GJW has an evaluation process to determine whether an employee should receive a wage increase, based on that employee's length of service and previous performance. GJW clients such as ACECO are not involved in this evaluation, or in setting the wage rate that GJW pays its employees. GJW offers benefits to its employees, such as health insurance and paid time off.

GJW field supervisor Juan Rodriguez is responsible for traveling to each project site to interact with lead employees and individual client supervisors to ensure that GJW employees have reported to work. Rodriguez is also responsible for relaying information from the GJW office to its employees at the project sites, as well as information from the client supervisors back to GJW. Rodriguez, GJW recruiting manager Alexander Miranda, GJW and clerical employee Carlos Guzman collectively determine when a GJW employee is to be reassigned to another project site.

While on ACECO sites, GJW employees are required to sign in with GJW's lead employees every day.[7] A GJW lead employee typically takes a picture of the sign-in sheet, and sends it to GJW field supervisor Rodriguez, who the submits it to GJW for payroll processing.

While ACECO is able to request particular employees with the desired skill set by name, GJW is not obligated to comply with the request. Lopez testified that ACECO had requested employees by name in the past because it was easier than asking for a certain number of employees with the desired skill set.

**B. Overview Of ACECO's Operations**

ACECO is a licensed demolition and environmental remediation contractor. ACECO primarily deals with asbestos removal, but it also occasionally removes mold and lead paint. ACECO employs its own workforce, and supplements its workforce with GJW employees assigned to ACECO's work sites. ACECO provides its employees with benefits, such as a 401(k) plan and paid time off.

ACECO's president, Michael Citren, testified that ACECO's work schedule at any given work site is set by its client, the general contractor or the owner of the site where ACECO is contracted to work. At each site where ACECO is contracted, the general contractor for the project employs a supervisor who is responsible for the general safety and coordination of the site. According to Citren, ACECO's supervision of the site is restricted and subject to the general contractor's instructions. ACECO does not have the authority to go onto the site without permission from the general contractor or owner. For certain jobs, the general contractor

[7] No party asserts that GJW lead employees are supervisors under Section 2(11) of the Act.

provides site orientation to employees assigned to work at the particular site. Citren testified that the orientation is considered a prerequisite to work on the site.

For asbestos abatement jobs, a hygienist is hired to ensure safety in the asbestos removal process. Depending on the site, the hygienist is hired by ACECO as an independent contractor, or by the building owner. According to Citren, the hygienist serves as an additional layer of oversight over workers at the sites by stepping in to direct employees in order to avoid safety violations.

### C. Details Of The Relationship Between GJW and ACECO

ACECO engaged GJW to provide asbestos abatement and demolition workers to its jobsites sometime in 2012. For the first half of 2015, GJW provided labor on 26 ACECO projects. At the time of the hearing, there were four to eight ACECO work sites at which GJW employees were assigned.

When GJW receives a request for laborers from ACECO, it refers to its database to determine which available employees match the requested skill set. GJW sends the selected employees to the ACECO site until it receives notice that a particular assignment is finished, or that a skill set is no longer needed. On occasion, an ACECO representative has contacted GJW representatives and asked GJW to send particular employees, and refrain from sending others. Lopez testified that these requests were based on the skill set of the employees, and the fact that the employees had already been oriented and trained to work on the particular projects. In the event of an unplanned work stoppage on an ACECO site, GJW is responsible for reassigning its employees, while ACECO independently reassigns its employees. GJW employees that have been assigned to ACECO sites in the past do not need to request permission from ACECO before working for one of ACECO's competitors.

On May 8, 2015, GJW and ACECO entered into a Master Labor Services Agreement with a Subcontract Addendum ("the MLSA"). Under the terms of the MLSA, GJW must provide lead workers at ACECO work sites where GJW employees are assigned. These lead employees are tasked with documenting and tracking GJW employee hours, determining breaks and rest periods, and removing GJW workers from the site, if necessary. The MLSA also reinforces GJW's exclusive responsibilities regarding its employees:

a) Recruiting, hiring, assigning, orienting, reassigning, counseling, disciplining, and discharging the Employees.

b) Making legally-required employment law disclosures (wage hour posters, etc.) to them.

c) Establishing, calculating, and paying their wages and overtime.

d) Exercising human resources supervision of them.

e) Withholding, remitting, and reporting on their payroll taxes and charges for programs that GJW is legislatively required to provide (including workers' compensation).

f) Maintaining personnel and payroll records for them.

g) Obtaining and administering I-9 documentation of employees' right to work in the United States.

h) Paying employees' wages and providing the benefits that GJW offers to them.

i) Paying or withholding all required payroll taxes, contributions, and insurance premiums for programs that GJW is legislatively mandated to provide to employees as GJW's employees.

j) Providing workers' compensation benefits or coverage for employees in amounts at least equal to what is required by law.

k) Fulfilling the employer's obligations for unemployment compensation.

l) Complying with employment laws, as they apply to GJW.

The MLSA also stipulates that GJW can pay an additional wage premium to each GJW crew leader tasked with supervising GJW employees at ACECO's work sites, including tracking the attendance of GJW employees. Lopez and Citren both testified that GJW sets the rate of pay for its employees, without input from ACECO. Under the MLSA, GJW and ACECO are prohibited from soliciting the other's employees.

In addition, GJW provides its employees with hardhats, safety vests, safety glasses, steel-toed boots, respirators, and filters. ACECO provides its own employees with the listed items, but does not provide such items to GJW employees. Once at the site, ACECO provides replacement filters (for respirators) and special Tyvek suits (for asbestos containment areas) to both GJW and ACECO employees.

During the hearing, Petitioner sought to elicit evidence concerning day-to-day episodes involving GJW employees working at ACECO work sites. Regarding one particular incident in which GJW considered substituting one employee for another because of the employee's prior conflict with an ACECO supervisor, Lopez was unable to provide details about a text message exchange between GJW and ACECO supervisors because he was not involved. However, Lopez testified that GJW tries to avoid issues with its clients while providing the best workforce that can do the job.

In another distinct incident, an ACECO representative sent a GJW employee home early for going into a known restricted area without permission. An ACECO representative informed

a GJW representative that it sent the employee home, and asked that the GJW employee not return to that particular site until further notice. The GJW representative informed the ACECO representative that it would address the issue immediately. Lopez acknowledged the incident and described his understanding that ACECO's client, the general contractor, imposed the restriction, and ACECO appropriately relayed the message to GJW.

Regarding a separate occurrence, an ACECO representative sent a text message to a GJW representative, stating, "FYI, this morning around 10am, we send home one of your labors [sic] due not performing with the work and was no found at this work area, our Foreman and GC [general contractor] were looking for him for 20 minutes. So we do not need him back tomorrow. Thanks." According to the text message exchange that followed, the GJW representative asked for the name of the employee, and asked if ACECO needed a replacement. However, Lopez was unaware of the incident and could not provide any information about it during the hearing. ACECO's president, Michael Citren, acknowledged that the GJW employee in question was sent home at the direction of ACECO's client, the general contractor, because the employee committed a safety violation.

Petitioner asked Lopez about another occasion, in which it appeared that a GJW representative asked an ACECO representative by text message whether it would transfer a GJW employee from demolition work to asbestos work. Lopez was unaware of the situation, and testified that he was confused by the text message exchange. He maintained that ACECO did not have the power to transfer GJW employees, but could discuss the need to move employees from one area to another with GJW if the need arose. Citren similarly testified that GJW was not required to terminate or discipline an employee that had been removed from an ACECO jobsite.

Petitioner asked Lopez about a text message exchange in which an ACECO supervisor complained to a GJW representative about a GJW employee showing up to a work site when he should not have. The GJW representative responded, "Alexander spoke with him today and told him specifically not to go to work I'm so sorry about this."[8] In another responsive text message to the ACECO representative, the GJW representative indicated that the GJW employee had been informed to not go to the work site, and that GJW would terminate that employee. When asked about this incident, Lopez was unaware of it and could not provide any testimony about the facts.[9] Lopez added that Petitioner's interpretation of the text did not account for other potentially relevant facts, such as the employee's record prior to the termination.

Arturo Campos, a GJW employee, testified that in his three-year tenure with GJW, 90 percent of his assignments have been at an ACECO work site. Campos also stated that an ACECO supervisor usually gave him his daily tasks. In addition, he had never seen an ACECO supervisor send a GJW employee home, though he witnessed several instances in which a GJW supervisory employee sent a GJW employees home. Campos testified that the only discipline he

[8] Presumably, "Alexander" refers to Alexander Miranda, GJW's recruiting and staffing manager.

[9] No other witness was presented to discuss this incident.

had received while working for GJW was from Lopez, and that he had not received any discipline from an ACECO supervisor.

## III. ANALYSIS

As explained below, I conclude that: (1) there is insufficient evidence to establish that GJW and ACECO are joint employers; (2) a unit of solely GJW employees at ACECO work sites is an appropriate unit; and (3) there is insufficient evidence to demonstrate an overwhelming community of interest among all GJW employees in the greater Washington, D.C. metropolitan area that warrants an expansion of that unit.

### A. There Is Insufficient Evidence To Establish That GJW And ACECO Are Joint Employers

The Petitioner did not meet its burden of introducing specific, detailed and relevant evidence into the record for me to find that ACECO is a joint employer of the GJW employees in the petitioned-for unit. To establish a joint employer relationship, "the initial inquiry is whether there is a common-law employment relationship with the employees in question." *BFI,* 362 NLRB No. 186, at slip op. 2 (2015). If the common-law employment relationship exists, then the inquiry turns to "whether the putative joint employer possesses sufficient control over employee's essential terms and conditions of employment to permit meaningful collective bargaining." *Id*. The Board no longer requires that a joint employer possess and exercise the authority to control employees' terms and conditions. Rather, the Board identified that the putative employer's "[r]eserved authority to control terms and conditions of employment, even if not exercised," is probative of a joint-employer relationship, as is the actual exercise of that control. *Id.* at slip op. 2, 16. The Board includes subjects such as hiring, firing, discipline, supervision and direction as "essential terms and conditions of employment," but the Board stated that it would recognize other examples of terms and conditions of employment in conducting a joint-employer analysis. *Id.* at slip op. 15

In the recently-decided *BFI* , the Board examined the existence of the relationship between Browning-Ferris Industries of California (BFI), a recycling facility operator, and Leadpoint, the staffing agency that provided labor to BFI. The Board determined that BFI and Leadpoint were joint employers, despite the existence of a temporary labor services agreement between the parties that stated otherwise. Although Leadpoint recruited, interviewed, and administered tests to its employees, the Board found that BFI still possessed significant control over who Leadpoint could hire to work at BFI's facility. One of the clauses in the labor services agreement between the two entities gave BFI the unqualified right to reject any Leadpoint-referred worker for "any or no reason." The Board deemed this power to be clear evidence that BFI exercised significant control over Leadpoint's hiring decisions. The Board also relied upon two specific instances in which a BFI representative reported to Leadpoint the misconduct of a

Leadpoint employee and requested their immediate dismissal. Leadpoint complied with BFI's requests and dismissed the employees, demonstrating the depth of BFI's influence over Leadpoint's workforce.

Regarding day-to-day supervision and management, BFI managers had the power to counsel Leadpoint employees regarding their productivity. BFI also had the power to assign specific tasks to Leadpoint employees, as well as to hold meetings to address customer complaints and business objectives. In sum, the Board found that BFI exercised "near-constant oversight" over the Leadpoint employees. The Board noted that BFI's communicating of its directives through Leadpoint supervisors still evinced clear control over the employees by BFI, indicative of an employer-employee relationship.

Finally, the Board found that BFI played a significant role in determining the wages of Leadpoint employees. While Leadpoint had the authority to determine the pay rates for its employees, its authority was constrained by its labor services agreement with BFI. Under the terms of that agreement, Leadpoint could not pay its employees more than BFI paid its own employees for comparable work. The Board found that the sharing and codetermining of terms and conditions established that BFI and Leadpoint were joint employers of the employees in question.

Applied to the facts of the case before me, I conclude that the Petitioner failed to establish by specific, detailed evidence that ACECO had the authority to control matters governing the essential terms and conditions of GJW employees in a manner comparable to the facts of *BFI*. Based on the record evidence, I view the scope of ACECO's involvement in determining the terms of employment for GJW employees assigned to its sites as not rising to the level of BFI's involvement in the terms of employment of Leadpoint employees. Furthermore, the record evidence indicates that much of ACECO's involvement is subject to the discretion of GJW, the general contractor and the hygienist at the work sites. Thus, I conclude there is an insufficient factual basis in this record for me to find that a joint-employer relationship exists between ACECO and GJW for the GJW employees assigned to work at ACECO work sites.

### 1. Business Organization, Hiring, Transferring, Discipline, and Firing

The evidence demonstrates that GJW and ACECO are separate business entities, with different management that independently set and pay wages, maintain payroll records, withhold payroll taxes and provide worker's compensation for their own employees. The independent relationship is embodied in the MLSA, which places all hiring, discipline and discipline authority within GJW's exclusive discretion. There is insufficient evidence in the record to support Petitioner's assertion that either company influences the decisions of the other with regards to essential terms and conditions of employment. However, there is sufficient evidence to establish that GJW solely makes these decisions regarding its employees with minimal input from ACECO. GJW recruits and hires the employees in the petitioned-for unit, and assigns

those employees to the ACECO sites when its employees are offered and accept available positions at ACECO work sites. As in *BFI*¸ ACECO is not involved in interviewing or hiring GJW employees. Though ACECO can request specific GJW employees with particular skills and has done so, GJW is under no obligation to accede to any such request and provide particular employees. I do not share Petitioner's conclusion that certain text messages sent by ACECO representatives to GJW representatives that suggest a request for certain specific GJW employees establishes that ACECO has the right to control GJW's hiring decisions. Rather, I conclude that there is insufficient evidence to demonstrate that ACECO possessed or exercised the level of control identified in *BFI*.

While Petitioner attempted to demonstrate that the ACECO had the authority to transfer GJW employees from one assignment to another or to remove an employee, I do not view the evidence as supporting this assertion. Instead, the record shows that the instances in which GJW employees were sent home by non-GJW representatives were based on directives from ACECO's client, the general contractor, rather than ACECO's itself. In one instance, a GJW employee went into a restricted area, and ACECO's general contractor asked that the employee be sent home for violating safety precautions and explicit instructions. In turn, ACECO asked GJW to keep the employee in question from returning to that particular work site until further notice, as ACECO was instructed by its general contractor. According to Lopez, GJW's president, GJW complied with the general contractor's request. In another instance, ACECO's general contractor and an ACECO foreman searched for a GJW employee for 20 minutes when that employee should have been on duty. Citren, ACECO's president, testified that the general contractor directed that this employee be sent home. With this limited record evidence, I conclude that there is insufficient evidence in the record to establish that ACECO, in its sole discretion, possessed or exercised transfer or disciplinary authority over GJW employees.

Petitioner also posits that ACECO can request not to have specific GJW employees work at its site because of personality issues with ACECO workers. To support this assertion, Petitioner introduced text messages in which a GJW representative offered to send a replacement employee to an ACECO site because the initial employee "had some issues with [a] supervisor" in the past. The record evidence shows that while GJW was open to accommodating ACECO's preferences regarding the employee, GJW had final discretion. On this limited evidence, I am not willing to conclude that ACECO possesses the authority Petitioner contends that ACECO has over GJW's employees.

The MLSA between ACECO and GJW grants ACECO the "right to direct GJW management and/or supervisory personnel to dismiss from the job site/location any GJW staff member for safety issues or any other reasonable objections to such staff members remaining on site." In *BFI*, the Board noted BFI's power to reject any personnel and discontinue the use of any personnel for "any reason." However, ACECO's right to refuse a GJW employee for safety violations or other *reasonable* objections does not rise to the level of BFI's unqualified right of

refusal. That said, this authority, as indicated in the MLSA, is arguably an element within ACECO's control that favors a finding of a joint employer relationship.

Regarding the authority to terminate GJW employees, Petitioner did not introduce evidence comparable to the facts in *BFI*, where BFI possessed and exercised the power to request the immediate dismissal of employees. Rather, the record indicates that ACECO does not have the authority to do so, nor is there any indication that ACECO had exercised such a right. To support its assertion that ACECO possessed the authority to terminate the employment of a GJW employee, Petitioner refers to a text message exchange in which an ACECO representative asked a GJW representative for an explanation regarding an employee that had reported to the site. According to the response from the GJW representative, that employee had been specifically instructed by GJW to not report to that site. The record does not provide any supporting details to explain why the GJW employee was not supposed to be at the site, or who had requested the prohibition in the first place. Furthermore, the evidence does not indicate that ACECO was demanding that GJW terminate the employee, but rather that GJW explain the employee's presence. The record is vague on the circumstances that precipitated the incident, but it is clear that GJW had previously informed the employee to not report to the site, and the employee violated GJW's instruction. Without more information about the circumstances of this incident, I do not view it as rising to the level in *BFI*, in which BFI sent an e-mail to Leadpoint requesting immediate dismissal of employees. There is little indication in the record that ACECO possessed or exercised control over the termination decision for the employee in question.

**2. Wages**

Unlike the facts in *BFI*, ACECO exercised limited influence on the wages of GJW employees. Citren testified that he did not know the rate of wages for GJW employees. Petitioner seems to posit that ACECO controls the wages of GJW employees when it negotiates with GJW the contract price for each project. Based on the contract between the parties, GJW charges ACECO a set amount per hour for different tasks to be completed by GJW employees. Under such a contractual arrangement, Petitioner seems to argue that ACECO controls the authority of the wage rate for GJW employees because, in effect, ACECO is reimbursing GJW for the wages that GJW pays its employees. As a practical consideration, I assume the argument is that ACECO thus possesses control over the GJW employees' wage rate because GJW will not pay its employees a wage rate if more than GJW can charge to ACECO. However, Lopez testified that GJW employees had the power to individually negotiate a higher wage by demonstrating a stellar job performance record and other relevant factors. Lopez indicated that some GJW employees had done this successfully. Thus, I conclude that there is insufficient evidence in the record to determine what rates ACECO employees receive, in comparison to GJW employees. There is similarly insufficient evidence to determine whether any GJW employee has ever negotiated a wage higher than an ACECO employee makes for comparable work. Unlike the agreement in *BFI*, the MLSA between ACECO and GJW does not specifically

prohibit GJW from paying its employees more than ACECO pays its employees for comparable work. Therefore, ACECO's authority over the wages of GJW's employees in wage setting is not comparable to BFI's influence on the wages of Leadpoint employees. This factor cuts against a joint employer finding.

### 3. Daily Supervision

Arturo Campos, a GJW employee familiar with ACECO sites, testified that GJW sends employees home, sets the employees' schedules, and informs the employees of their next client project. This supports GJW and ACECO's position that ACECO has minimal involvement in terms and conditions of employment of GJW employees. Other than Campos's claim that he received instructions about day-to-day tasks from ACECO supervisors, most of his testimony supported the position that GJW made most of the substantive decisions surrounding the terms and conditions of his employment. Furthermore, there is insufficient evidence on the record to address whether Campos continued to receive day-to-day instructions from ACECO after the execution of MLSA and the Addendum in May 2015. Thus, Campos' claims regarding the level of daily supervision by ACECO supervisors could concern the time period prior to the effective date of the MLSA.

In *BFI*, the Board found that supervisors exercised authority to hold meetings with Leadpoint employees to direct them to improve their performance. There is insufficient evidence in the record to establish that ACECO possessed or exercised comparable authority. Instead, the record shows that employee-wide meetings were held for orientation purposes, and these trainings were run by the general contractor, and not ACECO.

Campos testified that ACECO supervisors assign his daily tasks. However, the record fails to show that ACECO's supervision includes showing the GJW employees how to work. Unlike the *BFI* decision, in which the Board found clear evidence of direct and constant oversight, the instant record shows that ACECO exercised minimal supervision over GJW employees. The general contractor and hygienist had more supervisory authority than ACECO supervisors. For example, Citren testified that the day-to-day schedule was set by the general contractor, and not ACECO. Even ACECO employees were not authorized to be on jobsites without permission the general contractor.

In contrast, in *BFI*, the managers exercised "near-constant oversight" over Leadpoint employees. BFI supervisors assigned employees to specific tasks and counseled them about their job performance as needed. There is little indication that ACECO exercised this level of oversight over GJW employees directly or indirectly. During his testimony, Campos indicated that he largely worked autonomously on ACECO jobsites, given his level of experience. The

varying element of control exercised by BFI and ACECO over the leased employees further cuts against a finding of joint employer.

#### 4. The Appropriateness of ACECO's Participation in Bargaining

Petitioner argues that ACECO is a necessary party to any collective-bargaining discussions because ACECO exerts so much influence over GJW employees. In contrast, ACECO argues that Petitioner failed to meet its burden of showing that ACECO had sufficient control over the employees to allow "meaningful collective bargaining." ACECO draws a distinction between the facts of *BFI* and the record evidence on ACECO's level of control over "bargainable issues." In *BFI*, the Board determined that BFI had ultimate control over bargainable issues such as break times, safety, the speed of work, and the productivity of Leadpoint employees. ACECO argues that there is clear evidence in the record to establish that ACECO does not have control over any of these issues regarding GJW employees.

I find that ACECO is correct in this regard. The record evidence indicates that the schedule is set by the general contractor, who has ultimate control over the work sites. Regarding safety issues, the record demonstrates that the hygienist, rather than ACECO, has more input on safety measures. According to Citren, the general contractor hires the hygienist for some site, and that occasionally ACECO hires a hygienist as an independent contractor. ACECO supervisors defer to the hygienist regarding safety concerns on the work site. As for the breaks and the productivity of GJW employees, the MLSA between ACECO and GJW assigns that power to lead GJW employees, rather than ACECO. As such, there is little record support for the argument that ACECO has ultimate control that is probative of an employment relationship such that it would warrant ACECO's involvement in collective-bargaining.

Accordingly, I find that the Petitioner did not meet its burden of establishing by specific, detailed evidence that ACECO is a joint employer of the GJW employees. Nevertheless, for reasons set forth below, I find that an alternative unit of workers solely employed by GJW at ACECO sites is an appropriate unit.

### B. There Is Sufficient Evidence To Demonstrate That The Alternative Petitioned-For Unit Of Solely Green JobWorks Employees At ACECO Work sites Share A Community Of Interest, And Is Thus An Appropriate Unit.

I find that a petitioned-for unit,[10] modified to include GJW as the sole employer, and limited in scope to those GJW employees assigned to ACECO work sites is an appropriate unit.

The Board's procedure for determining an appropriate unit under Section 9(b) is to examine first the petitioned-for unit. If that unit is appropriate, then the inquiry into the

[10] At hearing, Petitioner indicated it was willing to proceed to an election for an alternative unit.

appropriate unit ends. *Overnite Transp. Co.*, 331 NLRB 662, 663 (2000). The petitioned-for unit does not need to be the *only* appropriate unit, or even the *most* appropriate unit, but merely *an* appropriate unit. *See Overnite Transportation Co.*, 322 NLRB 723, 723 (1996).

To determine whether the proposed unit is an appropriate unit, the Board's focus is on whether the employees share a "community of interest." *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB No. 83, slip op. at 14 (2011), citing *NLRB v. Action Automotive, Inc.*, 469 U.S. 490, 491 (1985). In determining whether employees in a proposed unit share a community of interest, the Board examines:

> [W]hether 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.

*Id.* at 9. "[T]he manner in which a particular employer has organized his plant and utilizes the skills of his labor force has a direct bearing on the community of interest among various groups of employees in the plant and is thus an important consideration in any unit determination." *International Paper Co.*, 96 NLRB 295, 298, n.7 (1951).

An appropriate unit is not rendered inappropriate by the mere fact that its employees share a community of interest with additional employees outside the unit. *Specialty Healthcare*, supra, at slip op. 15 (Aug. 26, 2011). Thus, "demonstrating that another unit containing the employees in the proposed unit plus others is appropriate, or even that it is more appropriate, is not sufficient to demonstrate that the proposed unit is inappropriate." *Id.* Instead, "both the Board and courts of appeals have necessarily required *a heightened showing* to demonstrate that the proposed unit is nevertheless inappropriate because it does not include additional employees." *Id*. (emphasis added). Specifically, the employer must show, using the traditional community-of-interest factors, "that employees in the larger unit share an overwhelming community of interest with those in the petitioned-for unit." *Id*. at slip op. 17.

Here, I find that a unit of GJW employees working at ACECO sites is an appropriate unit because the employees are a readily-identifiable group and share a community of interest. That the unit is readily identifiable is self-evident—it is all of GJW's employees working for a particular contractor. Furthermore, no party contends that such a unit is not readily identifiable. As for the second portion of the inquiry, the record evidence is sufficient for me to find that these employees have a community of interest. They are all licensed asbestos-abatement workers that work for GJW on ACECO projects.

Pursuant to the MLSA supervisory structure, GJW employees at ACECO sites are supervised by GJW lead workers who all report to a GJW representative, Juan Rodriguez. The

record demonstrates that the recently-memorialized arrangement in which GJW lead workers are paid an additional wage is currently limited to employees at ACECO sites. Therefore, there appears to be a common supervisory structure in place, meeting that community of interest factor. Employees at ACECO sites share common skills and job duties, common work sites and working conditions, as well as common supervision. I thus find that GJW employees working at ACECO sites constitute an appropriate unit.

As GJW is engaged in the construction industry and the record reflects that the number of unit employees varies from time to time, the eligibility of voters will be determined by the formula set forth in *Daniel Construction Co.*, 133 NLRB 264 (1961) and *Steiny & Co.*, 308 NLRB 1323 (1992).

### C. There Is Insufficient Evidence To Demonstrate An Overwhelming Community Of Interest Among All GJW Employees That Warrants An Expansion Of the Petitioned-For Unit.

When a petition seeks 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 employees in the group share a community of interest under the traditional criteria, the burden of proof is on the proponent of a larger unit to demonstrate that the additional employees it 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 larger unit because the traditional community-of-interest factors "overlap almost completely." *Odwalla, Inc.* 357 NLRB No. 132, slip op. at 4 (December 9, 2011); *Specialty Healthcare*, supra, slip op. at 11-13 and fn. 28. The crux of the argument as to why the GJW employees working at non-ACECO work sites share an overwhelming community of interest with the GJW working at ACECO sites is that there is no record evidence indicating that the included employees have any skills, training, or other terms and conditions of employment that is at all distinct from the excluded employees.

As discussed above, pursuant to the MLSA, the GJW employees at ACECO sites now have a formally-designated lead worker who acts as the point of contact to Juan Rodriguez, the GJW field supervisor. The lead workers are specially trained for the position and paid more money than the other employees. These employees submit daily timesheets to GJW at the end of each shift, and work with the client's job site supervisors to direct the GJW workforce. While GJW maintains that the position is not new, the records shows that there are some variations in the responsibilities of the formalized team leaders, and the informal team leaders. The record also shows that six of GJW's seven other work sites do not yet have a formal lead worker system as memorialized in the MLSA. Therefore, the supervisory structure for GJW employees at ACECO sites varies from the supervisory structure for GJW employees at other client sites.

Additionally, GJW pays its employees working at ACECO sites based on the negotiated contract rates with ACECO. As such, the wages GJW employees receive while on ACECO sites

may vary from what they are paid for working on other GJW client sites, even while performing the same type of work. These variations in supervisory structure and potential wage for similar work cut against the argument of an overwhelming community of interest demanding inclusion in the readily identifiable unit. Further, there is insufficient evidence to demonstrate an overwhelming community of interest among all GJW employees that necessitates expanding the unit that I find to be appropriate. As discussed above, it is not necessary for a unit to be the most appropriate unit, it must simply be an appropriate unit.

## IV. CONCLUSIONS AND FINDINGS

Based on the entire record in this matter, and in accordance with the discussion above, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. Green JobWorks, LLC has been a limited liability company with an office and place of business in Baltimore, Maryland, and has been engaged in business as a temporary staffing agency engaged in the business of demolition and environmental remediation, including asbestos remediation. In conducting its operations during the 12-month period ending June 30, 2015, Green JobWorks, LLC performed services valued in excess of $50,000 in states other than the State of Maryland.

3. ACECO, LLC has been a limited liability company with an office and place of business in Silver Spring, Maryland and has been engaged in the business of providing demolition, environmental remediation and renovation services to private and governmental entities in Maryland, Washington, D.C. and Virginia. In conducting its operations during the 12-month period ending June 30, 2015, ACECO, LLC performed services valued in excess of $50,000 in states other than the State of Maryland.

4. Green JobWorks, LLC and ACECO, LLC are each an employer as defined in Section 2(2) of the Act and are each engaged in commerce within the meaning of Sections 2(6) and (7) of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.

5. Petitioner is a labor organization as defined in Section 2(5) of the Act.

6. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

7. I find the following employees of Green JobWorks constitute a unit appropriate for the

purpose of collective-bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time laborers, including demolition and asbestos removal workers, and lead employees employed by Green JobWorks, LLC, and assigned to ACECO, LLC work sites, but excluding office clericals, professionals, confidential employees, managerial employees, guards, and supervisors as defined by the Act.

## V. DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by the Construction and Master Laborers' Local Union 11, affiliated with Laborers' International Union of North America.

### A. Election Details

I have determined that a mail ballot election will be held. Mail balloting may be used in certain circumstances, such as where the eligible voters are scattered because of their duties or work schedules. In such situations, I may conduct an election by mail ballot, taking into consideration the desires of the parties, the ability of voters to understand mail ballots, and the efficient use of personnel. *San Diego Gas & Electric*, 325 NLRB 1143 (1998). GJW employees are scattered over numerous worksites, and a mail-ballot election is most likely to maximize eligible voter participation in this case.

The election will be conducted by mail. The mail ballots will be mailed to employees employed in the appropriate collective-bargaining unit from the office of the National Labor Relations Board, Region 05, on **November 3, 2015**.

If any eligible voter does not receive a mail ballot or otherwise requires a duplicate mail ballot kit, he or she should contact the Region 05 office at 410-962-2219 by no later than 4:45 p.m. on **November 10, 2015** in order to arrange for another mail ballot kit to be sent to that employee. Voters must return their mail ballots so that they will be received in the National Labor Relations Board, Region 05 office by close of business on **November 23, 2015**.

The mail ballots will be counted at the Region 05 office located at Bank of America Center, Tower II, 100 S. Charles Street, Suite 600, Baltimore, MD 21201 at **2:00 p.m**. on **November 24, 2015.**

### B. Voting Eligibility

Eligible to vote are those in the unit who were employed during the payroll period ending who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off.

Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Also eligible to vote are those GJW employees who have been employed for a total of 30 working days or more at an ACECO site within the period of 12 months immediately preceding the eligibility date for the election, or who have some employment in that period and have been employed by GJW for 45 working days or more at an ACECO site within the 24 months immediately preceding the eligibility date for the election, and who have not been terminated for cause or quit voluntarily prior to the completion of the last job for which they were employed.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

### C. Voter List

As required by Section 102.67(l) of the Board's Rules and Regulations, the Employer must provide the Regional Director and parties named in this decision a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cell telephone numbers) of all eligible voters.

To be timely filed and served, the list must be *received* by the Regional Director and the parties by **TWO business days after the date of issuance**. The list must be accompanied by a certificate of service showing service on all parties. **The Region will no longer serve the voter list.**

Unless the Employer certifies that it does not possess the capacity to produce the list in the required form, the list must be provided in a table in a Microsoft Word file (.doc or docx) or a file that is compatible with Microsoft Word (.doc or docx). The first column of the list must begin with each employee's last name and the list must be alphabetized (overall or by department) by last name. Because the list will be used during the election, the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at www.nlrb.gov/what-we-do/conduct-elections/representation-case-rules-effective-April-14-2015.

When feasible, the list shall be filed electronically with the Region and served electronically on the other parties name in this decision. The list may be electronically filed with the Region by using the E-filing system on the Agency's website at www.nlrb.gov. Once the website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions.

Failure to comply with the above requirements will be grounds for setting aside the election whenever proper and timely objections are filed. However, the Employer may not object to the failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure.

No party shall use the voter list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

### D. Posting of Notices of Election

Pursuant to Section 102.67(k) of the Board's Rules, the Employer must post copies of the Notice of Election accompanying this Decision in conspicuous places, including all places where notices to employees in the unit found appropriate are customarily posted. The Notice must be posted so all pages of the Notice are simultaneously visible. In addition, if the Employer customarily communicates electronically with some or all of the employees in the unit found appropriate, the Employer must also distribute the Notice of Election electronically to those employees. The Employer must post copies of the Notice at least 3 full working days prior to 12:01 a.m. of the day of the election and copies must remain posted until the end of the election. For purposes of posting, working day means an entire 24-hour period excluding Saturdays, Sundays, and holidays. However, a party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution.

Failure to follow the posting requirements set forth above will be grounds for setting aside the election if proper and timely objections are filed.

## RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67 of the Board's Rules and Regulations, a request for review may be filed with the Board at any time following the issuance of this Decision until 14 days after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not precluded from filing a request for review of this decision after the election on the grounds that it did not file a request for review of this Decision prior to the election. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations.

A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to www.nlrb.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request

for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Neither the filing of a request for review nor the Board's granting a request for review will stay the election in this matter unless specifically ordered by the Board.

(SEAL)

Dated: October 21, 2015

/s/ Charles L. Posner

Charles L. Posner, Regional Director
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