University of Pennsylvania Carey Law School
Penn Carey Law: Legal Scholarship Repository

Prize Winning Papers Student Papers

2024

Amazon's Yellow Dog Contract: The Malbaff rule, the fissured workplace, and the Labor Board's benign neglect of powerful client companies

Dermot Delude-Dix

Follow this and additional works at: https://scholarship.law.upenn.edu/prize_papers

Dermot Delude-Dix
Labor Law – 509-001
Prof. Sean Burke
5/19/22

AMAZON'S YELLOW DOG CONTRACT:
The Malbaff *rule, the fissured workplace, and the Labor Board's benign neglect of powerful client companies*

I. Introduction

Contrary to popular belief, Amazon is not in the business of delivering packages. While the e-commerce giant shipped over 4 billion packages to consumers in 2020[1], none of those packages were delivered by Amazon employees.[2] Instead, Amazon relies on an army of contractors who perform the "last mile" delivery services that bring products to consumers' doors. In the past, Amazon relied on shipping companies like UPS, but by 2013 Amazon's growth was beginning to outstrip the capacity of third-party shippers, and the company resolved to create a logistics network of its own.[3] Rather than bringing that network fully in house, however, in 2018, Amazon launched its "Delivery Service Partner" (DSP) program[4] and began "inviting entrepreneurs to form small delivery companies" which it could hire to deliver its packages.[5] DSPs are independent businesses that operate local delivery routes. The program is now global—there are more than 3,000 DSPs, employing more than a quarter million delivery

[1] Michael Waters, *Amazon now ships more parcels than FedEx*, Modern Retail (September 17, 2021), https://www.modernretail.co/platforms/amazon-now-ships-more-parcels-than-fedex/
[2] Josh Eidelson and Matt Day, *Amazon Work Rules Govern Tweets, Body Odor of Contract Drivers*, Bloomberg (May 5, 2021), https://www.bloomberg.com/news/articles/2021-05-05/amazon-work-rules-govern-tweets-body-odor-of-contract-drivers?sref=ZvMMMOkz
[3] Laura Stevens, *Amazon Drives Deeper Into Package Delivery*, Wall Street Journal (June 28, 2018), https://www.wsj.com/articles/amazon-drives-deeper-into-package-delivery-1530158460?mod=hp_lead_pos4&mod=djem10point
[4] Amazon, *Amazon Delivery Service Partners making an impact*, (January 25, 2022). https://www.aboutamazon.com/news/operations/amazon-delivered-delivery-service-partners-making-an-impact
[5] Stevens, *supra* note 3.

drivers in North and South America, Europe and India.[6] While Amazon still uses UPS and others to handle some of its packages, two thirds are delivered by Amazon contractors and that number is growing every year.[7]

As a practical matter, Amazon dominates the relationship with its Delivery Service Partners. Amazon decides who is eligible to own a DSP (prospective owners have to apply for the right to set up a business), furnishes necessary equipment and technology, and assigns or removes delivery routes, controlling the size of the operation. Amazon also reserves the right to veto legal settlements entered into by the DSP and requires the DSP to indemnify Amazon from all legal liabilities to the extent permitted by law. Amazon thus reaps the benefits of controlling the DSPs' operations while simultaneously shielding itself from much of the risk of carrying out the delivery work itself. In this respect the arrangement is typical of what has become known as the "fissured workplace." The term was coined by David Weil to describe the trend of corporate restructuring in which many large companies shed their direct employees by outsourcing the production of goods and services to other firms with whom they contract to carry out activities which were once core aspects of their business.[8]

The ironic result of this practice is that the aspect of Amazon's business which is most visible to the public—the ubiquitous navy-blue cargo vans and the drivers who drop packages at the customer's front door—is actually performed by companies other than Amazon. This contradiction is experienced most acutely by the DSPs' employees, who drive Amazon-branded vans and wear Amazon uniforms, working all the time under tremendous pressure to meet

---

[6] Amazon, *Logistics FAQ*, https://logistics.amazon.com/marketing/faq (last visited May 19, 2022).
[7] Annie Palmer, *Amazon poised to pass UPS and FedEx to become largest U.S. delivery service by early 2022, exec says*, CNBC (Novemb
https://www.cnbc.com/2021/11/29/amazon-on-track-to-be-largest-us-delivery-service-by-2022-exec-says.html
[8] David Weil. *The Fissured Workplace: Why Work Became So Bad for So Many and What Can Be Done to Improve It*, Harvard University Press, at 4 (2014).

delivery quotas set by Amazon. DSP drivers often skip meals, urinate in bottles rather than stop to use the bathroom, and even avoid wearing seatbelts in efforts to improve delivery times.[9]

Amazon exercises extensive indirect control over the working conditions of the drivers through its contracts with the DSPs. These contracts govern everything from the content of DSP employees' social media posts to the length of their fingernails.[10] The contract also requires that DSP employees be employed on an "at-will" basis, meaning they can be fired for any lawful reason (or no reason at all). As private sector workers covered by the National Labor Relations Act (NLRA), DSP employees have the right to form a union,[11] however, if the drivers were to unionize and their collective bargaining agreement (CBA) contained a just cause provision,[12] Amazon could terminate its contract with the DSP. Because DSPs contract exclusively with Amazon, terminating the contract would effectively shut down the business, giving Amazon significant power to frustrate any organizing efforts undertaken by DSP employees. The contract between Amazon and the DSP doesn't ban unionization per se—it is technically possible to have a CBA under which union members continue to be employed at-will. In practice, however, a CBA without a just cause provision is vanishingly rare. Protection from arbitrary discipline and termination is nearly synonymous with the notion of having a union contract. The DSP's promise therefore functions as a sword of Damocles; Amazon ensures that the delivery drivers continued employment is made contingent on their at-will status.

---

[9] Caroline O'Donovan and Ken Bensinger, *Amazon's Next-Day Delivery Has Brought Chaos And Carnage To America's Streets — But The World's Biggest Retailer Has A System To Escape The Blame*, Buzzfeed (September 9, 2019), https://www.buzzfeednews.com/article/carolineodonovan/amazon-next-day-delivery-deaths

[10] Eidelson and Day, *supra* note 2.

[11] There is no question that the DSP's delivery drivers are employees under the NLRA. Amazon does have a separate program called Amazon Flex which hires independent contractors to deliver packages. Like other app-based gig work, Amazon Flex workers fall close to the line between employees and independent contractors and the NLRB or other agencies may classify these workers as employees in the future, but this issue does not concern DSP employees and is beyond the scope of this paper.

[12] E.g. stating that the employer may not discipline or terminate any member of the bargaining unit without "just cause."

So called "yellow dog" contracts—where an employee agrees not to join a union as a condition of employment—were outlawed by the Norris LaGuardia Act (NLA). The contract between Amazon and the DSP takes the logic of the yellow dog contract and transposes it onto the fissured workplace. Amazon is effectively contracting around the NLA by hiring the DSPs on terms that it could never impose directly on its own employees. This paper will explore the legal questions posed by such an arrangement. Part II considers whether Amazon's contracts with the DSPs violate the NLA. Part III discusses the National Labor Relations Board's (the Board) 1968 decision *Malbaff Landscape Constr.*,[13] which insulates certain companies from liability under the NLRA when they cancel a contract with another employer based on the other employer's employees' union activities and argues that the *Malbaff* rule should be reconsidered. Parts IV examines how Amazon's liability for antiunion discrimination would depend on a finding that it was a joint employer and of the drivers, and Part V concludes that, under current law, Amazon is not a joint employer, meaning that the DSP contract is not unlawful.

II. A 21st Century Yellow Dog Contract

Although the contract between Amazon and the DSP resembles the yellow dog contracts that antiunion employers historically imposed on their employees, the NLA does not offer the DSP drivers a promising avenue to address their predicament. Not only has the NLA never been used to invalidate an agreement between two employers, it lacks a private right of action, and because the DSP drivers are not a party to the contract they cannot challenge its provisions.

A. Congress's purpose in enacting the Norris LaGuardia Act's ban on yellow dog contracts

---

[13] 172 NLRB 128.

Yellow dog contracts were a common practice in the 19th and early 20th centuries until they were banned by the Norris LaGuardia Act in 1932. The name was pejorative and most often referred to an agreement in which an employee pledged not to join a labor union as a condition of employment. In practice, however, these contracts took a wide variety of forms. Agreements to "adjust all differences by means of individual bargaining," forgo any "concerted action" with coworkers, or "arbitrate all differences" through a system set up by the company were all understood to be yellow dog contracts.[14] The term was even used to describe a lease agreement in a company town that prohibited tenants from allowing union organizers onto their property.[15] The language of the NLA was written broadly to account for this diversity.[16] The drafters attempted to proscribe any agreement that conditioned a worker's continued employment on a promise that Congress felt was contrary to the United States' newly emerging national labor policy.

Specifically, Section 102 of the NLA declared that every worker shall have the right "to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents… in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."[17] Furthermore, Section 103, holds that "[a]ny undertaking or promise… in conflict with the public policy declared in section 102 of this title… shall not be enforceable in any court of the United States."[18] By its plain language, the statute voids the enforceability of a myriad of contracts—not just those where an employee promises an employer not to join a union. The

[14] Matthew W. Finkin, *The Meaning and Contemporary Vitality of the Norris-LaGuardia Act*, 93 Neb. L. Rev. 6, 16-16 (2014).
[15] *Id.*
[16] *Id.*
[17] 29 U.S.C. § 102.
[18] 29 U.S.C. § 103.

question, in determining whether a contract violates the NLA, therefore entails an evaluation of the effect of the agreement in light of the public policy set forth in the Act. Agreements contrary to the public policy set forth by Congress in Section 102 are unenforceable in federal court.[19]

B. Although the DSP contract conflicts with the purpose of the NLA, the drivers would face several obstacles in using the law to challenge the contract

While the DSP's promise that its employees will remain at-will is arguably a "promise… in conflict with the public policy" of the United States insofar as it interferes with the drivers' ability to organize, the drivers would face several challenges if they sought to invalidate Amazon's agreement with the DSP as an illegal yellow dog contract.

The first hurdle for DSP drivers is that, not being parties to the contract, they lack recourse to challenge the offending provision. The common law doctrine of privity of contract bars those not party to an agreement from litigating its provisions. [20] While there is an exception to the privity rule for some third-party *beneficiaries* of a contract (whereby a third party, named in the contract, is able to enforce her rights under certain circumstances), the common law recognizes no corresponding exception for third parties who are *harmed* by an agreement.[21] Moreover, the NLA itself contains no private right of action; it merely states that yellow dog contracts are unenforceable. Therefore, because there is no privity of contract between Amazon and the drivers, the drivers would need the DSP to cooperate in any attack on the enforceability of the promise to employ the drivers at-will.

---

[19] Many states have adopted similar laws, known as "little Norris LaGuardia Acts," which prohibit the enforcement of yellow dog contracts in state courts.

[20] "Only those parties to the contract are bound by the terms of the contract and can enforce the contractual obligations under the contract. A third party that is not a party to the contract does not have privity of contract and cannot enforce the obligations under the contract." Privity of Contract, Westlaw Practical Law Glossary Item, 6-503-8127, Westlaw, https://uk.practicallaw.thomsonreuters.com/6-503-8127?transitionType=Default&contextData=(sc.Default)&firstPage=true (last visited May 19, 2022).

[21] *See* Porat, Benjamin, *Contracts to the Detriment of a Third Party: Developing a Model Inspired by Jewish Law.* 62 U. Toronto L. J. 347, 357-58 (2012).

While the DSP itself might have a colorable argument that Amazon's reserved right to cancel the contract is unenforceable in federal court, it would be unprecedented to apply Section 103 of the NLA to a contract between two businesses.[22] The NLA has never been used to invalidate an agreement between two employers.[23] A contract between an employee and her employer where the employer reserved the right to terminate the employee if she broke her promise to remain at-will would be unenforceable under the NLA's broad language.[24] It follows that if an agreement conflicts with the public policy of the NLA when imposed *directly*, an agreement which achieves the same outcome *indirectly* might also violate the Act. After all, the text of the NLA does not limit the ban on yellow dog contracts to agreements between employees and employers but rather covers "[a]ny undertaking or promise… in conflict with the public policy declared in… this Act."[25] However, given the dearth of cases applying the NLA under analogous circumstances it would be a stretch to say the least for a court to hold the DSP contract unenforceable on these grounds. The more natural route would be to argue that the contract violates the NLRA's protections of concerted activity, which were themselves derived from Section 102 of the NLA.

III. The* Malbaff *rule and the Board's decision to shield client companies from liability for discriminating against their contractors' employees

Insofar as Amazon's contract with the DSP enables it to frustrate the drivers' Section 7 rights by forcing the business to close if the employees unionize, it would seem to violate Sections 8(a)(3) and 8(a)(1) of the NLRA, which prohibit employers from discriminating against

---

[22] Author reviewed all federal court decisions in reported in Westlaw which Section 103 of the NLA as of May 19, 2022.
[23] *Id.*
[24] Such an agreement would also be unenforceable under *J.I. Case Co. v National Labor Relations Board,* 321 US 332 (1944) where the Supreme Court held that the terms of individual employment contracts are superseded by the collective bargaining agreement.
[25] 29 U.S.C. § 103.

employees because of their union activity and restraining employees from exercising their protected rights respectively. However, such an argument would run up against a longstanding Board decision *Plumbers Loc. 447 (Malbaff Landscape Constr.)* (1968), which held that one company may terminate a contract with another based solely on the union activity of the latter's employees.[26] In other words, while the drivers can bring claims against the DSP for any unfair labor practices it commits, the Board has interpreted the NLRA to insulate a company like Amazon from liability where it terminates its contract with the DSP with a discriminatory purpose (absent a showing that Amazon is a joint employer).

The significance of the *Malbaff* decision for employees working in a "fissured workplace," is that their ability to organize may hinge on proof that the client company meets the Board's exacting definition of a joint employer. As Weil explained, our economy is increasingly characterized by firms' attempts to avoid the legal obligations associated with employment:

> By shedding direct employment, lead business enterprises select from among multiple providers of those activities and services formerly done inside the organization, thereby substantially reducing costs and dispatching the many responsibilities connected to being the employer of record."[27]

The contracting firm, or "lead business enterprise," thereby becomes a client of the contractor, and the contractor hires employees to perform services previously done by the client's own employees. Under *Malbaff*, absent a showing that the client company is a joint employer of the contractor's employees, the client is free to rid itself of any threat or nuisance posed by the union activity of its contractor's employees by simply severing the contract.

---

[26] 172 NLRB 128 (1968).
[27] Weil, *supra* note 8 at 4.

The current legal landscape thus incentivizes companies like Amazon to interpose intermediary employers between themselves and their workers. Because powerful client companies are able to retain pervasive control over a contractor's operations while simultaneously structuring the relationship so as to avoid triggering a determination that they are joint employers, the rights of employees in fissured workplaces can be easily frustrated. In the case of Amazon's delivery drivers, this dynamic is pushed to an extreme. Amazon creates the DSPs, controls and monitors almost every aspect of their operations, and requires the DSPs to work exclusively for Amazon, but as long as Amazon escapes liability as a joint employer, the company is permitted to discriminate against the drivers for unionizing, using a 21st century version of the yellow dog contract.

A. Section 8(a)(3)—a range of permissible interpretations

The Board, since 1968, has interpreted Section 8(a)(3) not to apply in situations where a client ceases to do business with a contractor for antiunion reasons. As some Board members and commentators have pointed out, this particular interpretation of 8(a)(3) is not required—either by the language of the statute, or by the precedents of the federal courts—and it presents a persistent and growing problem in an economy increasingly characterized by contracted work arrangements because it allows for powerful client companies to circumvent the purpose of the Act.

Both the Board and the Supreme Court have considered and rejected the proposition that the NLRA itself categorically precludes a finding that an employer violated the rights of an employee other than its own. In the 1952 case *Austin Co.* the Board declined to read Section 8(a)(3) as proscribing only discrimination by an employer against its own employees.[28] The

[28] *Hod Carriers Loc. 300 (Austin Co.)*, 101 NLRB 1257 (1952).

Austin Company was a builder which hired a security contractor to supply guards to watch the construction site overnight.[29] Austin subsequently cancelled the contract because of a jurisdictional dispute involving the union to which the security guards belonged.[30] Austin argued that it could not have committed an unfair labor practice with respect to the security guards as a matter of law because it was not the guards' employer.[31] The Board rejected this argument, noting that "the statute, read literally, precludes *any employer* from discriminating with respect to *any employee*, for Section 8(a)(3) does not limit its prohibitions to acts of an employer vis-à-vis his own employees."[32] Contrasting Section 8(a)(3)'s capacious language with the narrower scope of Section 8(a)(5), which only bars an employer from refusing to bargain with "his employees," the Board concluded that "the omission of qualifying language in Section 8(a)(3) cannot be called accidental."[33] Noting that the two employers shared a "community of interests," the Board ultimately found that Austin had violated Sections 8(a)(3) and 8(a)(1)[34] by dismissing the security company because of the guards' union membership.[35]

The Supreme Court has also endorsed the view that employers can commit unfair labor practices against employees they do not themselves employ.[36] When the owner of a shopping center threatened to have a group of union members arrested for picketing one of his tenants, the Board found that, although he did not employ the picketing workers, he had violated Section

---

[29] *Id.* at 1264.
[30] *Id.*
[31] *Id.* at 1258.
[32] *Id.* at 1258-59 (emphasis added).
[33] *Id.* at 1259.
[34] The 8(a)(1) violation was simply derivative of the 8(a)(3) violation.
[35] *Id.* at 1259.
[36] Terry A. Bethel, *Profiting from Unfair Labor Practices: A Proposal to Regulate Management Representatives,* 79 Nw. U.L. Rev. 506, 537 (1984).

8(a)(1).[37] The Supreme Court agreed, noting that "[t]he Board has held that a statutory 'employer' may violate s 8(a)(1) with respect to employees other than his own. *See Austin Co.*"[38]

While *Austin Co.* made clear that employers could be held liable for unfair labor practices committed against the employees of other employers, it left many substantial questions about the scope of this liability unanswered. The *Austin Co.* Board declined to "delineate the extent of the area in which a respondent employer's conduct may violate the prohibition of Section 8(a)(3) despite the absence of a direct employer-employee relationship…."[39]

Insofar as *Austin Co.* stands for the proposition that it is possible for an employer to violate 8(a)(3) and 8(a)(1) with respect to employees other than its own, it remains good law. However, based on the facts presented in the case—i.e. cancelling the contract for security services based on the union membership of the security company's employees—under today's Board law, Austin would not have committed an unfair labor practice. This is because the Board has come to distinguish situations in which a client company discriminates (or forces its contractor to discriminate) against *individual employees* from situations where a client company ceases to do business entirely *with another employer* based on the union activity of that employers' employees. As explained below, the Board ruled in *Malbaff* that the latter does not violate the Act.

B. Unlawful discrimination against employees versus lawful discrimination against employers

Malbaff overturned a 1957 decision *Northern California Chapter, Association of General Contractors (St. Maurice, Helinkamp & Musser)* (known as *Musser*).[40] *Musser* was heard by the

[37] *Scott Hudgens*, 192 N.L.R.B. 671 (1971).
[38] *Hudgens v. NLRB*, 424 U.S. 507, 510 n. 3 (1976).
[39] 101 NLRB 1257, 1259-60.
[40] 119 NLRB 1026 (1957).

full five-member board and generated a split decision. Three members of the Board agreed that a general contractor illegally discriminated against a subcontractors' employees by dismissing the subcontractor from the job site due to a jurisdictional dispute between the unions representing the general contractor and the subcontractor.[41] However, one of those three wrote a concurring opinion clarifying that while he agreed that the general contractor could discriminate against a subcontractor's employees within the meaning of 8(a)(3) by *terminating* a contract, a general contractor should not be held liable for *refusing to hire* a prospective subcontractor in the first place because of its employees' union membership or activity.[42] The opinion written by the other two members in the majority cited the Board's expansive interpretation of 8(a)(3) in *Austin Co.*,[43] to hold that a client company need not be a joint employer to illegally discriminate against its contractor's employees by ceasing to do business with their employer:

> As we see it, the question of legal responsibility for such discrimination does not, and cannot be made to, depend upon whether an employer has, by reason of his business relationship with another employer, such "contractual control" over the employees involved as to render them his own, for all practical purposes. To us, the relevant questions are whether an employer had the *power* to effectuate the removal of employees, whether he proceeded to do so, and thus, as a result, whether he thereby caused a discrimination with respect to their tenure of employment because of their union activities or lack thereof…. It is the discrimination that encourages or discourages union membership that is of primary concern for determining the issue and not the specific

[41] *Id.* at 1029.
[42] *Id.* at 1041. On this point, which pertained to the master agreement signed by the union and the general contractor, a different majority agreed with the concurring member.
[43] *Id.* at 1031 ("[T]he statute, read literally precludes any employer from discriminating with respect to any employee.").

> relationship between the discriminating "employer" and the discriminated against "employees." It is sufficient that the discriminatee be a member of the working class in general and that the "employer" be any employer who has any interest, direct or indirect, in the conditions of employment of the discriminatee or has any control, direct or indirect, over the terms of his employment.[44]

Two members dissented, arguing that the majority's reasoning twisted the meaning of 8(a)(3) by confusing an employer's discrimination against another employer with unlawful discrimination against that employer's employees: "[b]y holding that discrimination against *employers* is equal to and a substitute for discrimination against *employees* two of our colleagues, in our opinion, have bridged a gap deliberately left open by Congress."[45] For the dissent, holding a general contractor liable for discrimination merely because it ceased doing business with a subcontractor, stretched 8(a)(3) beyond any reasonable interpretation. But on appeal, the D.C. Circuit enforced the Board's order, noting that "[t]he terms used in the applicable provision bear an interpretation which reaches discrimination as to employees of another employer."[46]

The dissenters were vindicated, however, when the Board overturned *Musser* eleven years later. In *Malbaff* the Board significantly rolled back the scope of liability for a company which is not a direct or joint employer of the employees who were allegedly discriminated against. *Malbaff* did not actually involve an 8(a)(3) charge but rather an 8(b)(2) charge against a union for "causing or attempting to cause" a general contractor to discriminate against a

[44] *Id.* at 1031-32.
[45] *Id.* at 1038.
[46] *Operating Engineers Loc. Union No. 3 of Int'l Union of Operating Engineers, AFL-CIO v. NLRB*, 266 F.2d 905, 909 (D.C. Cir. 1959).

subcontractor's employees because they were not union members.[47] Nevertheless, the Board took the occasion to revisit the holding in *Musser*:

> It was found by the majority in *Musser* that an employer-employee relationship was not a prerequisite to a conclusion that an employee had been discriminated against in violation of Section 8(a)(3)…. Like the dissenting members in *Musser*, and in accord with Board decisions which preceded *Musser*, we do not hold to these views.
>
> Section 8(a)(3) outlaws employer discrimination against employees. But an employer does not discriminate against employees within the meaning of Section 8(a)(3) by ceasing to do business with another employer because of the union or nonunion activity of the latter's employees. While, in such situations, and in this very case, there may be employer discrimination against employer, we find no justification in the Act itself or in its legislative history for concluding that it was the purpose of Congress under Section 8(a)(3) to protect employers as well as employees from employer discrimination.[48]

The *Malbaff* majority thereby jettisoned the analysis applied in *Musser*, which focused on the client company's power to effectively terminate the contractor's employees and whether the client exercised that power with a discriminatory purpose.[49] In its place the Board adopted a bright line rule that an employer cannot be held liable for discrimination against another employer's employees when it ceases to do business with that employer because of its employees' union activities.[50]

C. The scope of a client's liability after *Malbaff*

---

[47] 172 NLRB 128, 136 (1968).
[48] *Id*. at 129.
[49] 119 NLRB 1026, 1032.
[50] 172 NLRB 128, 129.

The *Malbaff* rule has proved quite durable and it remains the law today,[51] however, it was not a total repudiation of the notion that employers may discriminate against others employer's employees within the meaning of 8(a)(3). When a client company discriminates against a contractor's employee while continuing to do business with the contractor, the Board will still find a violation.[52] In other words, when a client uses the contract as leverage to force the contractor to discriminate, it violates the law, but if it terminates the relationship with the contractor entirely it cannot be held liable. For example, in *Georgia-Pac. Corp.* (1975),[53] an employee who was on strike from the Georgia Pacific Corporation at one location was hired by a firm who had a contract to perform work at a different plant also owned by Georgia Pacific. Georgia Pacific threatened to terminate its contract with the striker's new employer if he reappeared at the workplace. The contractor complied and the Board found that Georgia Pacific had violated 8(a)(3) by forcing the contractor to terminate its employee.[54]

Similarly, when a client directly instructs a contractor to retaliate against its employee, the client violates 8(a)(3). In *Dews Const. Corp.* (1977),[55] the Board found that a general contractor violated 8(a)(3) and 8(a)(1) when it forced a painting subcontractor to lay off one of its two employees after learning they had both attended a union meeting. The Board adopted the ALJ's conclusion that "[a]n employer violates the Act when it directs, instructs, or orders another

---

[51] *See Hy-Brand Indus. Contractors, Ltd.*, 365 NLRB No. 156 at *34 (Dec. 14, 2017), quoting the "well established" rule from *Malbaff*.
[52] *See Airborne Freight Co.*, 338 NLRB 597, 603–04 (2002) ("Moreover, this situation [where there was no liability under the *Malbaff* rule] is distinguishable from that in which employer A, *while retaining its contractual relationship with employer B*, has been found to have violated 8(a)(3) with respect to employees not its own, when it urged or caused employer B to discharge specific individuals who were engaged in union activity. *Holly Manor Nursing Home*, 235 NLRB 426, 428 fn. 4 (1978), *Central Transport, Inc*, 244 NLRB 656, 658-659 (1979), and *Georgia-Pacific Corp.*, 221 NLRB 982, 986 (1975).").
[53] 221 NLRB 982
[54] 221 NLRB 982, 985-86. The employer argued that it had a right to exclude striking workers from its property but the Board adopted the ALJ's conclusion that there is "no untrammeled right that a respondent has to keep strikers from one separate unit of a company off of its premises when they are employees of an independent contractor who happens to have work at another unrelated and unconnected premises owned by the parent company."
[55] 231 NLRB 182 (1977), enf'd. 578 F.2d 1374 (3d Cir. 1978).

employer with whom it has business dealings to discharge, layoff, transfer, or otherwise affects the working conditions of the latter's employees because of the union activities of said employees."[56] Although the painting contract required that the work be done nonunion, because the business relationship was never terminated, the general contractor was held liable for causing the retaliatory discharge. If it had dismissed the subcontractor entirely, however, it presumably would not have been held liable.

The Board has repeatedly emphasized it is not necessary to determine whether the client is a joint employer in order to find that it discriminated against its contractor's employee. In *Cent. Transp., Inc*. (1979), the Board found that it was unnecessary to decide whether a trucking company was a joint employer because "[e]ven if there would have been no direct employer-employee relationship…, the association between the Company and the Ayers brothers [the contractor] 'had an intimate business character.' [citing *Austin Company*]."[57] The Board also found that the client and its contractor shared a "community of interests," echoing the language in *Austin Co*. In *Int'l Shipping Ass'n*, the Board found that although the client was not a joint employer, it had discriminated against its contractor's employees by demanding that a successor contractor not rehire a group of employees who had attempted to organize a union.[58] *Int'l Shipping Ass'n* underscored the point that "[t]he Board consistently has held that an employer. . . may violate Section 8(a) not only with respect to its own employees but also by actions affecting employees who do not stand in such an immediate employer/employee relationship."[59]

The distinction between a client *terminating a contract* for discriminatory reasons and *using its power under the contract* to induce the contractor to discriminate continues to

---

[56] 231 NLRB 182, 183 n. 4.
[57] 244 NLRB 656, 658–59 (1979).
[58] 297 NLRB 1059, 1068 (1990).
[59] *Id*. at 1059.

demarcate the line between permissible conduct and an unfair labor practice. For instance in *Hy-Brand Indus. Contractors, Ltd.* (2017) the Board reiterated the view that "'[f]inding a violation of Section 8(a)(3) on the basis of an employer's decision to substitute one independent contractor for another because of the union or nonunion status of the latter's employees is inconsistent with [] the language of Section 8(a)(3).'" [60] And on the other hand, in a 2017 letter of advice to a regional director the general counsel affirmed that: "when one employer directs another employer 'with whom it has business dealings' to discharge, discipline, or otherwise affect the working conditions of employees because of their union or other protected activities, both employers are jointly and severally liable for the statutory violation. This rule applies even if the employers are separate employers."[61]

D. The case to revisit *Malbaff*

Although the *Malbaff* rule has not gotten as much attention as the Board's joint employer test, it has been the subject of some critical commentary. The two issues are closely related. Both concern the applicability of the NLRA's prohibitions on employer conduct to companies other than the direct employer. But whereas the joint employer inquiry focuses on whether the client possesses (and exercises) sufficient control such that it "share[s] or co-determine[s] those matters governing essential terms and conditions of employment,"[62] *Malbaff* answers the question posed by the Board in *Austin Co.* about the "extent of the area in which a respondent employer's conduct may violate the prohibition of Section 8(a)(3) despite the absence of a direct employer-employee relationship."[63] In *Austin Co.*, the Board found that the "intimate business character"

---

[60] 365 NLRB No. 156 at *34, n. 72, *vacated* 366 NLRB No. 26 (2018), *quoting Computer Associates International, Inc.*, 324 NLRB 285, 286 (1997).
[61] NLRB GC Letter to Region 28. *Subject: Doctor's Assocs., Inc. d/b/a Subway*, No. Case 28-CA-196084, 2017 WL 7693467, at *2 (Sept. 21, 2017).
[62] *Browning-Ferris Indus. of Pennsylvania, Inc.*, 691 F.2d at 1124.
[63] 101 NLRB 1257, 1259-60.

of the relationship between client and contractor and their shared "community of interests, as employers," was enough to justify a finding of discrimination when a client cancelled its contract.[64] In *Musser*, the Board found that the "power to effectuate the removal of employees [by cancelling the contract]… thereby caus[ing] a discrimination with respect to their tenure of employment" was sufficient to find the same.[65] *Malbaff* foreclosed any factual inquiry into the client's power and its relationship with the contractor by laying down a rule that a client company can never commit an unfair labor practice by cancelling its contract with another employer as a matter of law.

There is a spectrum of degrees of control which clients can exert over their contractors' terms and conditions of employment. Some clients exercise so much control that they are deemed joint employers; others have virtually no influence. In *Airborne Express*, a 2002 case where the Board revisited the joint employer test, two members of the panel reaffirmed the *Malbaff* rule but Member Liebman disagreed, arguing that:

> The Board should also reconsider *Plumbers Local 447 (Malbaff)*, 172 NLRB 128 (1968), and its progeny, which hold that "an employer does not discriminate against employees within the meaning of Sec. 8(a)(3) by ceasing to do business with another employer because of the union or nonunion activity of the latter's employees." 172 NLRB at 129. Coupled with the Board's strict test for joint-employer status, *Malbaff* makes it easy to frustrate the Sec. 7 rights of employees who work for a contractor dependent on an antiunion client.[66]

---

[64] 101 NLRB 1257, 1259.
[65] 119 NLRB 1026, 1032.
[66] 338 NLRB 597 at 599.

Insofar as the joint employer test imposes a binary yes/no result on a gradation of contractual relationships, there will necessarily be some clients who fall close to the line, but just short of the Board's definition of joint employer. (In practice, whether some of these clients are treated as joint employers may simply depend on which party has most recently appointed a majority of the Board.) These clients may wield significant power vis-à-vis a contractor's employees, and they will often have a strong incentive to prevent them from unionizing. As Member Liebman points out, this creates a situation where some powerful clients are able to purposefully retaliate against a contractor's employees for exercising their Section 7 rights without facing any liability. They accomplish this not by firing individual employees, but by terminating the workplace itself. In an industry where a contractor can be easily replaced, there is no reason for a client to engage in the kind of discrimination that remains unlawful under *Georgia-Pac. Corp.*, *Dews Const. Corp.*, *Cent. Transp., Inc*., and related cases. A powerful client in one of these industries need only avoid being labeled a joint employer and it is free to engage in the kind of arbitrary and discriminatory conduct that the NLRA, and indeed the Norris LaGuardia Act, were designed to prevent.

Furthermore, as Craig Becker notes in his article *Labor Law Outside the Employment Relation*, even when a contractor's employees have successfully unionized and are protected by a collective bargaining agreement, a client is free to "exploit the limits of the successorship doctrine" by simply replacing a unionized contractor with a nonunion company and new employees, thereby preventing the union from maintaining its status as the workers' exclusive representative.[67] For Becker, the *Malbaff* rule represents an outmoded way of thinking about the workplace. By exempting clients from liability under 8(a)(3) when they cancel a contract for

[67] Craig Becker, *Labor Law Outside the Employment Relation*, 74 Tex. L. Rev. 1527, 1551 (1996).

antiunion reasons, the Board injects the privity doctrine into US labor law in a manner that is anathema to the purpose of the Act. As Becker explains, "[t]he expansive definition of employee was intended to bring relations between employers and employees other than those standing in privity of contract within the ambit of the NLRA."

The practical effect for the thousands of drivers who deliver billions of Amazon packages each year is that their right to a union is more theoretical than real. By controlling the life of the DSP enterprise from cradle to grave, Amazon retains the power to shut down any DSP which violates its commitments and simply reassign its routes to a competing contractor. The cost to Amazon is minimal, but the consequences for the DSP and its employees are severe. By ignoring the ability of powerful client companies to discriminate against their contractors' employees in this manner, the Board lets these workers fall into the gap in the law that lies between the joint employer standard and the privity requirement in *Malbaff*.

IV. Amazon's liability for effecting a retaliatory closure of the DSP's business would depend on a finding that it was a joint employer

An employer may not discriminate against its employees for organizing by partially closing its operations, however, an employer may lawfully shut down completely in retaliation, as long as it is a bona fide and permanent closure. If Amazon is a joint employer of the drivers then it would violate Section 8(a)(3) if it were to close down one DSP when its employees unionized and reassign its routes to other, nonunion, DSPs. If Amazon is not a joint employer of the DSP drivers then it does not necessarily violate the Act when it ceases to do business with a DSP, forcing it to close down. If the DSP itself is the drivers' sole employer, it would most likely not violate the Act if it closed down in retaliation (especially if it could show that it also closed for economic reasons), but there are dicta from the Supreme Court suggesting that an employer

may violate the Act if the closure is part of an agreement with other employers to discourage their employees from organizing.

As a general rule, an employer may shutter its business for any reason, even if the closure is motivated by purely antiunion animus, without violating the NLRA.[68] In *Textile Workers Union of Am. v. Darlington Mfg. Co*, the Supreme Court confronted a situation where the owner of a textile mill closed down its business after the employees voted to form a union. Because the record showed that the owner closed the mill to simply to punish the employees for organizing, the Board held that the employer violated Sections 8(a)(3) and 8(a)(1) of the NLRA. The Court disagreed, reasoning that the Board did not have the power to force an employer to stay in business against its will:

> A proposition that a single businessman cannot choose to go out of business if he wants to would represent such a startling innovation that it should not be entertained without the clearest manifestation of legislative intent or unequivocal judicial precedent so construing the Labor Relations Act.[69]

The safe harbor from liability for a retaliatory closure recognized in *Darlington* was limited to the facts of the case, however. Anything less than a complete and permanent closure of a business might still be an unfair labor practice. Partial closures, temporary closures, "runaway shops" (where a business closes and reopens in a new location on a nonunion basis), and subcontracting decisions may all be illegal insofar as the employer is shown to be acting with antiunion animus. So while the NLRA does not proscribe bona fide closures, it does prohibit an

[68] 380 U.S. 263, 272 (1965) ("[a closure] may be motivated more by spite against the union than by business reasons, but it is not the type of discrimination which is prohibited by the Act.").
[69] *Id.* at 270.

employer from curtailing his operations if "his motive [is] to chill unionism in other areas of his enterprise."[70]

Darlington was also limited to a scenario where the employer acted unilaterally, without coordinating with other firms. In a footnote, Justice Brennan remarked that: "[d]ifferent considerations would arise were it made to appear that the closing employer was acting pursuant to some arrangement or understanding with other employers to discourage employee organizational activities in their businesses."[71] The closure of a DSP in response to its employees forming a union could present such a situation.

If Amazon exercised its right to cancel the contract because the DSP violated its promise to employ its drivers on an "at-will" basis it would presumably cause the DSP to shut down. (Not only do DSPs contract exclusively with Amazon, they are heavily dependent on Amazon's equipment and technical support). Were it not for the agreement between the two firms, the DSP would likely not commit an unfair labor practice if it closed down after losing its contract with Amazon. (However, the footnote in *Darlington* hints that an agreement between employers to close a business in order to discourage workers at other workplaces from organizing might violate the NLRA. Unfortunately, this area of the law remains largely undeveloped.) If Amazon were shown to be a joint employer, it is clear that shutting down one part of its operation in response to a group of its employees unionizing would be an illegal partial closure designed to "chill unionism in other areas of [its] enterprise."[72] However, if Amazon were not a joint employer, the Board's decision in *Malbaff* would shield it from liability for illegal discrimination if it ceased doing business with the DSP due to the DSP employees' union activities.

---

[70] *Id.* at 274-275.
[71] *Id*. at 272 n. 15.
[72] *Id.* at 274-275.

V. Under the test currently applied by the Board, Amazon is not a joint employer of the DSP drivers

Amazon would not meet the Board's current definition of a joint employer because it does not exercise direct and immediate control over the DSP's terms and conditions of employment. Although Amazon dictates significant aspects of the DSP's business practices, the Board's joint employer inquiry does not recognize these factors as probative of a client's joint employer status. Instead, the Board focuses on matters which Amazon leaves largely under the control of the DSP such as the direct supervision, hiring, firing and discipline of the DSP drivers.

A. The evolution of Board's joint employer test

The test for determining whether two firms are "joint employers" under the NLRA has a somewhat convoluted history, and it remains an unsettled area of law. In 1964 the Supreme Court framed the inquiry by asking whether the client company "possessed sufficient control over the work of the employees to qualify as a joint employer."[73] Taking up the issue on remand in 1965, the Board wrote that two companies are joint employers when they "share, or codetermine, those matters governing essential terms and conditions of employment."[74]

The next significant development in the joint employer analysis came in 1982 when the Third Circuit issued its opinion in *NLRB v. Browning-Ferris Industries of Pennsylvania, Inc*.[75] After surveying the differing standards used in various Board cases and other Circuit Court decisions, the court observed that:

> 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

---

[73] *Boire v. Greyhound Corp*., 376 U.S. 473, 481 (1964).
[74] *Greyhound Corp*., 153 NLRB 1488, 1495 (1965).
[75] 691 F.2d 1117 (3d Cir. 1982).

> control of the terms and conditions of employment of the employees who are employed by the other employer. *Walter B. Cooke,* 262 NLRB No. 74 (1982) (slip op. at 31). 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.[76]

The Third Circuit then formulated the joint employer test as follows:

> [W]here two or more employers exert significant control over the same employees—where from the evidence it can be shown that they share or co-determine those matters governing essential terms and conditions of employment—they constitute 'joint employers' within the meaning of the NLRA.[77]

What happened next is the subject of some historical controversy. While both sides agree that the Board adopted the Third Circuit's test as its own in two 1984 decisions, *TLI, Inc.*[78] and *Laerco Transp. & Warehouse*,[79] Democratic appointees to the Board have argued that the Board's joint employer standard became increasingly demanding over the next 30 years, drifting away from the Third Circuit's test without ever explicitly rejecting it.[80] For their part, Republican appointees have rejected this account,[81] arguing that the test had been consistently applied up until the Board abandoned it in its 2015 decision *Browning-Ferris Indus. of*

---

[76] *Id.* at 1123.
[77] *Id.* at 1124.
[78] 271 N.L.R.B. 798, 798 (1984).
[79] 269 N.L.R.B. 324, 325 (1984).
[80] *Browning-Ferris Indus. of California, Inc.*, 362 NLRB 1599, 1608 (2015) ("The Board subsequently embraced the Third Circuit's decision, but simultaneously took Board law in a new and different direction. *Laerco* and *TLI*, both decided in 1984, marked the beginning of a 30-year period during which the Board—without any explanation or even acknowledgement and without overruling a single prior decision--imposed additional requirements that effectively narrowed the joint-employer standard.").
[81] *Hy-Brand Indus. Contractors, Ltd*., 365 NLRB No. 156, at 25 (Dec. 14, 2017) ("The [2015] *Browning-Ferris* majority claimed that 30 years ago the Board departed without explanation from prior precedent by drastically restricting its test in a way that denies many workers their Section 7 rights. However, the absence of any judicial criticism of the 'direct and immediate control' test undermines this claim. It is simply impossible that all the courts of appeals would have missed this train wreck, had there been one.")

California, Inc.[82] (not to be confused with the 1982 *Browning-Ferris Indus. of Pennsylvania, Inc*. case). In any case, the 2015 *Browning-Ferris* decision did mark a sharp break with preceding cases applying the joint employer test. In 2015, the Board relaxed its joint employer standard by allowing evidence of *indirect* control or a contractual *right to control* to support a showing that a client company was a joint employer of its contractor's employees.[83] Previously the Board had emphasized in *Airborne Express* (2002)[84] that "[t]he essential element in this [joint employer] analysis is whether a putative joint employer's control over employment matters is *direct and immediate*" (emphasis added). Similarly, in *AM Property Holding Corp.* (2007) the Board made clear that a contractual right to control (without evidence of actual control being exercised) was not probative of joint employer status:

> Under our law, moreover, it is *not* enough that AM had the contractual right to approve PBS hires. That rule is open to question— surely the existence of contractual authority, whether or not it is actually exercised, demonstrates AM's superior role in the workplace—but the Board follows it."[85]

The 2015 *Browning-Ferris* decision thus marked an abrupt departure from the Board's previous requirement that a client exert actual and direct control over the terms and conditions of its contractor's employees, but its application was short lived. In 2017, the Board, now once again composed of a Republican majority, returned to its previous, more exacting, standard in *Hy-Brand Industrial Contractors, Ltd.*[86] *Hy-Brand* was quickly vacated, [87] however, following a report by the Inspector General finding that one of the Board members should have recused

---

[82] 362 NLRB 1599.
[83] *Browning-Ferris Indus. of California, Inc. v. NLRB*, 911 F.3d 1195, 1201 (D.C. Cir. 2018).
[84] 338 NLRB. 597, 597 n.1.
[85] 350 NLRB 998, 1012.
[86] 365 NLRB No. 156.
[87] *Hy-Brand Industrial Contractors, Ltd.*, 366 N.L.R.B. No. 26 (Feb. 26 2018).

himself due to a conflict of interest.[88] Undeterred, the Board then set out to undo the 2015 *Browning-Ferris* decision through an act of administrative rulemaking. A final rule, requiring that a joint employer "possess and exercise [] substantial direct and immediate control over one or more essential terms or conditions of their [contractor's employees'] employment" was published in 2020.[89] This rule represents the current state of the law. (This may not be the case for long, however; in December 2021 the Board announced that it would revisit the joint employer standard through another act of rulemaking).[90]

B. Amazon is not a joint employer of the DSP drivers

Under current Board law, Amazon would not be considered a joint employer of the DSP's employees. In the final rule published in 2020 the Board revived the pre-*Browning-Ferris* (2015) precedents, including *Airborne Express*, which held that "the essential element" in the joint employer test "is whether a putative joint employer's control over employment matters is direct and immediate."[91] *Airborne Express* involved a client-contractor relationship which strongly resembles Amazon and its DSPs. Airborne was a shipping company which delivered packages directly to customers' addresses.[92] Airborne maintained its own fleet of airplanes and employees to transport the packages between airports, but in many parts of the country Airborne contracted out the local delivery services to various logistics firms.[93] These contractors hired their own employees who were responsible for picking up and dropping off packages along set

[88] Memorandum of NLRB Inspector General David P. Berry (Feb. 9, 2018), available at https://www.nlrb.gov/sites/default/files/attachments/pages/node-290/oig-report-regarding-hybrand-deliberations.pdf
[89] Joint Employer Status Under the National Labor Relations Act, 85 Fed. Reg. 50,379 (Feb. 6, 1995) (to be codified at 29 CFR § 103.40).
[90] Robert Iafolla, *NLRB's 'Joint Employer' Standard Set for Regulatory Revamp*, Bloomberg Law, Dec. 10, 2021, https://news.bloomberglaw.com/daily-labor-report/nlrbs-joint-employer-standard-set-for-regulatory-revamp
[91] 338 NLRB 597 n.1 (2002).
[92] *Id.* at 602.
[93] *Id.* at 598.

routes.[94] In her concurring opinion, Member Liebman (a Democratic appointee) agreed that Airborne was not a joint employer under the Board's established test at the time. She also highlighted the facts that, while not sufficient to demonstrate joint employer status, illustrated the pervasive *indirect* control Airborne exercised over its contractors' employees:

> Airborne imposes its own, highly standardized operational requirements on the Respondent local carriers at every stage, and monitors and retains effective control over those operations. Airborne owns the terminals the local carriers use, and the onsite equipment used at those terminals. Although Airborne rarely participates in the local carriers' hiring of employees, it has ongoing input into the required number and allocation of each carrier's trucks, substantially affecting hiring and route assignments. All the local carriers' drivers, like Airborne's own drivers, are given copies of Airborne's lengthy handbook of operational procedures; are taught by Airborne trainers to perform their work the "Airborne Way"; wear Airborne uniforms; drive trucks with Airborne logos; use scanners and other equipment owned by Airborne; and follow Airborne's reporting and documentation requirements on the road.[95]

Amazon stands in almost exactly the same relationship to the DSPs as Airborne did to its contractors according to this description. DSP employees wear Amazon uniforms, drive Amazon branded vans, pick up packages at Amazon warehouses, use equipment provided by Amazon and are required to abide by numerous work rules imposed by the retailer. Amazon controls the size of the DSP's routes, assigns deliveries and subjects the entire operation to close and constant monitoring. Amazon also makes suggestions about how many employees the DSP should hire and helps provide training to those employees.

---

[94] *Id.* at 598.
[95] *Id.* at 598.

The Board determined that Airborne was not a joint employer because "[t]he undisputed facts show that Airborne has entered into contracts which, by their terms, carefully and deliberately define a cartage company as an independent contractor who is to have full and complete control over the hiring, firing, discipline, work assignments, and all other terms and conditions of employment of its own employees," and "[t]here is… no evidence to suggest that the hiring, disciplining, or firing of a contractor's employees was in any way under the control or even the suggestion of Airborne."[96] According to the facts as reported by Bloomberg and other outlets, Amazon similarly leaves issues like hiring, disciplining and firing up to the DSPs.

In many ways the *Airborne Express* case highlights the challenges to labor law posed by the fissured workplace. Airborne was an early adopter of the practices that businesses like Amazon have perfected and augmented to a monumental scale. By focusing the joint employer inquiry on the narrow question of whether the client exercises direct and immediate control over the contractor's employees, the Board may be missing the forest for the trees. Member Liebman made this argument explicitly in her concurring opinion:

> Today, increased competition drives businesses to become more flexible, adopting strategies that seek to maintain leaner product inventories and shorter product lifecycles, relying on "just in time" delivery of goods and materials. As a result, national and international "expedited-transportation" carriers like Airborne, which move an increasing share of the nation's freight, are required to guarantee deliveries on a much shorter time frame than was formerly acceptable. This requirement impels them to exert control at every stage, including the local pickup and delivery components that are contracted out. They consequently exercise much more control over their local contractors'

---

[96] *Id.* at 605-06.

> operations, and more effective control over the contractors' terms of employment, than their trucking predecessors did. They do not always exercise this control through direct "hiring, firing, discipline, supervision and direction" of the local contractor's employees—the focus of the Board's inquiry—but rather through their pervasive domination of the local carrier's operations.[97]

When Airborne cancelled its contract with a delivery company after its employees unionized, the Board held that it had not committed an unfair labor practice. The general counsel at the time conceded that, under the Board's *Malbaff* rule, unless Airborne was a joint employer, it was not an unfair labor practice to cancel the contract in response to the contractor's employees' union activities.[98]

VI. Conclusion

Although Amazon's contract with the DSP is reminiscent of a yellow dog contract, the Norris LaGuardia Act has never been used to invalidate an agreement between two employers. Without being party to the contract, the drivers are not in privity with Amazon, and therefore lack a means to attack the enforceability of the agreement.

While the Board could decide that Amazon violated 8(a)(3) if it caused the DSP to shut down when its employees organized, under current Board precedent, it would not be unlawful for Amazon to cancel its contract with a DSP in retaliation for the drivers' union activity because Amazon is not a joint employer. While many would argue this result speaks to the need for the Board to revise its joint employer test, it also presents a strong case to revisit the Board's holding in *Malbaff*. The reality is that many powerful clients have the means and motivation to frustrate a

---

[97] *Id.* at 598.

[98] *Id.* at 603-04. ("Notwithstanding other evidence that may support an assertion that Airborne may have made a decision to cancel Interstate's contract if the employees of that company chose union representation, the General Counsel does *not* contend that the cancellation of the agreement, by itself, is a violation of the Act.").

contractor's employees' Section 7 rights even when they do not control the contractor's terms and conditions of employment. This would be the case even if the Board had maintained its *Browning-Ferris* joint employer standard from 2015 (although the problem is certainly exacerbated by the strict test adopted in the Board's 2020 rule). In a world where the lines between employer, client, and contractor continue to blur,[99] the privity requirement adopted in *Malbaff* stands as a serious barrier to workers' ability to exercise their rights as Congress intended. As historian Gabriel Winant observed, today "profits accrue increasingly to firms that do not generate mass employment, while labor simultaneously accumulates in low-margin industries far from profits."[100] By refusing to act in the face of these historical trends, the Board neglects its duty to "adapt [its] rules and policies to the demands of changing circumstances."[101]

What then should be the limits of Section 8(a)(3)'s prohibitions when it comes to companies who procure the services of other employers? As the Board noted in *Austin Co.* the text of the provision is broad enough to embrace "any employer" that discriminates against "any employee,"[102] but it would be prudent to develop a more nuanced policy. For example, if a client is negatively affected by frequent labor disputes involving its contractor, it should not necessarily be unlawful for the client to switch contractors, even if the labor troubles are the sole reason for the client's decision. Building on *Austin Co.* and *Musser*, the Board could determine whether the relationship between client and contractor has an "intimate business character" and whether they share a "community of interests, as employers."[103] Additionally the Board could investigate whether the client has the "power to effectuate" the termination of a contractor's employees

[99] Weil, *supra* note 8 at 4.
[100] Gabriel Winant, *The Next Shift: The Fall of Industry and the Rise of Health Care in Rust Belt America*, Harvard University Press, at 2 (2014).
[101] M. Liebman, concurring, *In Re Airborne Freight Co.*, 338 NLRB 597, 599, *quoting Permian Basin Area Rate Cases,* 390 U.S. 747, 784 (1968).
[102] 101 NLRB 1257, 1258-59.
[103] *Id.* at 1259.

when it ceases to do business with the contractor (which would weigh in favor of finding the client liable for an 8(a)(3) violation), or whether the affected employees will simply continue working for the contractor on behalf of other clients (which would weigh against liability).[104] Other factors the Board should consider include whether the client has made a significant investment of capital in the contractor's operations,[105] and whether the contractor works exclusively for the client.[106]

The Federal Courts have affirmed that there is a range of permissible interpretations of Section 8(a)(3) that the Board could adopt,[107] so the Board should be entitled to Chevron deference if it were to discard the *Malbaff* rule. Given the recent history of labor activism in Amazon's supply chain, perhaps the organizing of Amazon's Delivery Service Partners will provide the Board with an opportunity to address this long-neglected gap in US labor law.

---

[104] *See* 119 NLRB 1026, 1032 (1957).
[105] *See* Michael Harper, *Defining the Economic Relationship Appropriate for Collective Bargaining*, 39 Boston College L. Rev. 329, 348 (1998).
[106] *See* ALJ's opinion in *Airborne Express*, 338 NLRB 597, 606, conceding that a client might be said to have "de facto" control over a contractor if the contractor worked exclusively for the client and there was no other competition of the contractor's services.
[107] *See Hudgens v. NLRB*, 424 U.S. 507, 510 n. 3 (1976); *see also Northern California Chapter, Association of General Contractors (St. Maurice, Helinkamp & Musser),* 119 NLRB 1026 (1957), enf. 266 F.2d 905, 909 (D.C. Cir. 1959); *see also Dews Const. Corp.* (1977), 231 NLRB 182 (1977), enf. 578 F.2d 1374 (3d Cir. 1978).