TESTIMONY OF MARSHALL B. BABSON BEFORE THE SENATE COMMITTEE ON HEALTH, EDUCATION, LABOR & PENSIONS

ON

WHO'S THE BOSS? THE "JOINT EMPLOYER" STANDARD AND BUSINESS OWNERSHIP

Chairman Alexander, Ranking Member Murray, and distinguished Members of the Committee, thank you for giving me the opportunity to testify before you today.

My name is Marshall Bruce Babson. I have been practicing labor law since 1975. In 1985, President Reagan appointed me to serve as one of two Democrats on the National Labor Relations Board ("NLRB" or "Board"). I was confirmed by the U.S. Senate and served on the NLRB until August 1988. While on the NLRB, I participated in a number of significant decisions, including, *e.g.*, *John Deklewa & Sons*, which set forth new rules for pre-hire agreements in the construction industry, *Indiana and Michigan Electric Co.*, which established guidelines regarding an employer's duty to arbitrate post-contract expiration grievances, and *Fairmont Hotel*, a union access case which involved clarifying the balance between private property rights and Section 7 rights under the National Labor Relations Act. I have devoted the majority of my career to traditional labor relations and to issues under the National Labor Relations Act ("NLRA" or the "Act").

Since serving on the Board, I have been engaged in private practice with a focus on traditional labor law and specializing in NLRB proceedings, negotiating collective bargaining agreements, participating in arbitration proceedings and various other personnel matters. Throughout my career, I have authored numerous articles and commentaries regarding labor law and the NLRA as well as the 1984 book, *Developments Under the 1974 Health Care Amendments to the National Labor Relations Act*. I have previously testified before Congress

regarding proposed labor and employment legislation, testified before President Clinton's Dunlop Commission regarding the status of United States labor laws. I am a member of the Board of Directors of the U.S. Chamber Litigation Center, the U.S. Chamber of Commerce's public policy law firm, serve on the Litigation Center's Labor Law Advisory Committee. I am also on the Board of Advisors of the Institute for Law and Economics at the University of Pennsylvania. Currently, I hold the position of Counsel at Seyfarth Shaw LLP, a global law firm of over 800 attorneys, over 350 of whom specialize in providing labor and employment counsel to companies of all sizes. I serve as an Adjunct Professor of Law at George Washington University Law School where I teach labor law. I appear before you today as an individual practitioner and not on behalf of any particular organization or company.

INTRODUCTION

Issues surrounding who is an "employee" and who is an "employer" are fundamental to the administration of the National Labor Relations Act ("NLRA" or "Act"). The common law of agency provides the legal framework that underpins the Act's entire structure, both creating bargaining obligations for an "employer" and boundary conditions that bar secondary activity directed against entities not properly deemed a primary "employer." Congress directed in 1935 and again in 1947, via the Taft-Hartley Amendments, that "employee" and "employer" status under the NLRA *must be* determined in accordance with the common law of agency. Accordingly, before a separate entity may be deemed a "joint-employer," there is a clear and unambiguous Congressional mandate in the statute that requires that the entity first be an "employer" under common law agency principles.

The joint-employer concept recognizes that "two or more business entities are in fact separate, but that they share or codetermine those matters governing the essential terms and conditions of employment." *Laerco Transportation*, 269 NLRB 324, 325 (1984) ("*Laerco*");

TLI, 271 NLRB 798, 803 (1984) (same); *see also, e.g., Boire v. Greyhound Corp.*, 376 U.S. 473, 475 (1964) (noting joint-employer status turns on whether the entities "exercised common control over the employees" at issue). Applying the familiar framework derived from the common law, for more than 30 years the Board has recognized that joint-employer status turns on the extent to which the purported employer determines matters governing the essential terms and conditions of employment, including right to hire and fire, set work hours, determine start and end times of shift, uniforms, directions, compensation, day to day supervision, record keeping, approve drivers and devise rules under which drivers were to operate. *NLRB v. Browning-Ferris Indus. of Pa.*, 691 F.2d 1117, 1122-25 (3d Cir. 1982). The "essential element in [each such] analysis is whether a putative joint employer's control over employment matters is *direct and immediate*." *Airborne,* 338 NLRB 597, 597 n.1 (2002) (the "indirect control" test was "abandoned" two decades earlier) (emphasis added).

No one factor in the analysis is dispositive; consistent with the common law, the question is fact specific that must be determined "on the totality of the facts of the particular case." *Southern Cal. Gas Co.*, 302 NLRB 456, 461 (1991); *Laerco,* 269 NLRB at 325; *Boire,* 376 U.S. at 475; *NLRB v. United Ins. Co. of Am.*, 390 U.S. 254, 258 (1968) ("there is no shorthand formula or magic phrase that can be applied to find the answer, [] all of the incidents of the relationship must be assessed and weighted with no one factor being decisive. What is important is that the total factual context is assessed in light of the pertinent common-law agency principles"); *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 324 (1992) (same).

The NLRB's General Counsel now advocates a new joint-employer standard that includes employers who are "essential for meaningful collective bargaining," a test implicitly, if not explicitly, rejected outright by Congress in 1947 and by decades of Board precedent as

wholly untethered to the common law of agency. Under the General Counsel's proposed standard, adapted perhaps from former Member Liebman's concurrence in *Airborne Freight Co.*, an entity would be deemed an "employer" or a "joint-employer" if it "exercised direct *or* indirect control over working conditions, had the *unexercised* potential to control working conditions, or where 'industrial realities' otherwise made it essential to meaningful bargaining." *See, e.g.*, *Amicus Brief of the General Counsel*, Case 32-RC-109684 (June 26, 2014) at 2, 4-5, 16-17 (emphasis added) ("GC *Amicus*"); *Airborne,* 338 NLRB at 597-99. This is not, and should not be construed as mere "policy choice," and cannot be squared with an Act that is rooted in, and bounded by, the common law definitions of employer and employee.[1] Congress and the United States Supreme Court have repeatedly instructed that determinations of employee, employer and, by extension, joint-employer status under the Act must be bound by the common law of agency. *See, e.g., Town & Country Elec., Inc.*, 516 U.S. 85, 94 (1995) (citing *United Ins. Co.*, 390 U.S. at 256) (NLRB may not "depart[] from the common law of agency" in determining employee status). It is through this analytical lens that this issue must be viewed.

I. THE NLRB IS CONSTRAINED TO ADHERE TO THE CURRENT STANDARD WHICH COMPORTS WITH THE COMMON LAW OF AGENCY

Congress and the Supreme Court explicitly have directed the Board to rely upon common law agency principles in determining who is an employee and who is an employer under the Act.

[1] The Board itself has repeatedly rejected efforts to deviate from the long-standing joint-employer doctrine rooted in the text of the Act and in the common law of agency. For example, in *Roadway Package Sys., Inc. & Teamsters Local 63*, 326 NLRB 842 (1998), the Board declined to deviate from its well-established joint-employer test rooted in the common law of agency, finding, the "common law of agency is the standard to measure employee status [and] . . . [the Board has] no authority to change it." *Id.* at 849. A decade later in 2002, the Board again declined to deviate from the current legal framework for joint-employers. *See, e.g., Airborne Freight Co.*, 338 NLRB at 597 n.1 (noting, "indirect control" test was "abandoned" two decades earlier, and refusing to "disturb settled law" by reverting back to such a test).

Congressional intention is clear both in the plain text of the Act as well as in the 1947 Taft-Hartley amendments, and accompanying Congressional record.

First, as to the Act itself, where, as here Congress uses the terms "employee" and "employer" in a statute but does not explain the terms' origins or bases, Congress "means to incorporate the established meaning of th[at] ter[m]," and as the Supreme Court has concluded, "'Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine.'" *Town & Country Elec., Inc.*, 516 U.S. at 94 (quoting *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322-23 (1992), in turn quoting *Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 739-40 (1989)). The NLRB may not unreasonably "depart[] from the common law of agency." *Town & Country Elec., Inc.*, 516 U.S. at 94 (citing *United Ins. Co.*, 390 U.S. at 256).

Secondly, in 1947 the Congress unambiguously directed in the Taft-Hartley Amendments to the NLRA that the Board is constrained by common law principles of agency when determining who is an employee and, consequently, who is an employer.[2] *See, e.g.*, H.R. Rep. No. 510, at 36, 80th Cong., 1st Sess. (1947); *United Ins. Co. of Am.*, 390 U.S. at 256 (the "obvious purpose of [the 1947] amendment was to have the Board and the courts apply general agency principles in distinguishing between employees and independent contractors under the Act"). The House Committee Report accompanying the 1947 amendments harshly criticized the Board's then recent determination that independent contractors were "employees" within the meaning of the Act, noting the term "employee":

[2] Among other changes, the 1947 revisions narrowed the definition of "employee" to exclude independent contractors. This amendment was designed to overrule the Supreme Court's earlier decision in *NLRB v. Hearst Publications, Inc.* ("*Hearst*"), 322 U.S. 111 (1944), which disregarded common law principles of agency in favor of an analysis of "economic facts" to find that "independent contractors" could be treated as "employees" under the Act. *See, e.g.*, 61 Stat. 137-38 (1947), 29 U.S.C. § 152(3).

> according to all standard dictionaries, according to the law as the courts have stated it, and according to the understanding of almost everyone, with the exception of members of the National Labor Relations Board, means someone who works for another for hire. . . [and who] work for wages or salaries under *direct* supervision.
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> It must be presumed that when Congress passed the Labor Act, it intended words it used [such as "employee"] to have the meanings that they had when Congress passed the act, not new meanings that, 9 years later, the Labor Board might think up. . . . It is inconceivable that Congress, when it passed the act, authorized the board to give to every word in the act whatever meaning it wished.

H.R. Rep. No. 245, at 18, 80th Cong., 1st Sess. (1947) (emphasis added); *Allied Chem. & Alkali Workers, Local Union No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 167 (1971) (quoting the same report).

The 1947 amendments also narrowed the definition of "employer" to encompass only those persons who are "acting as an *agent* of an employer," 29 U.S.C. § 152(2) (emphasis added), rather than any individual "acting in the *interest* of any employer" as the statute previously read. This change was similarly intended to reinforce the applicability of agency law to the determination of who is an employer under the Act. *See, e.g.,* H.R. Rep. No. 245, at 11, 80th Congress, 1st Sess. (1947) (observing the modified definition "makes employers responsible for what people say or do only when it is within the actual or apparent scope of their authority, and thereby makes the ordinary rules of the law of agency equally applicable to employers and to unions"); H.R. Rep. No. 245, at 68; 93 Cong. Rec. 6654, at 6672 (1947) ("[n]ow[,] before the employer can be held responsible for a wrong to labor[,] the man who does the wrong must be specifically an agent or come within the technical definition of an agent").

Consistent with the Taft-Hartley Amendments, the Supreme Court has repeatedly instructed that common law principles of agency determine who is an employee, and consequently, who is an employer under the Act. *See, e.g., Town & Country, Elec., Inc.*, 516

U.S. at 90 (applying common law of agency to determine who is an "employee" within the meaning of Act); *Allied Chem.*, 404 U.S. at 168 ("1947 Taft-Hartley revision made clear that general agency principles could not be ignored in distinguishing 'employees' from independent contractors"); *United Ins. Co. of Am.*, 390 U.S. at 256-57 (utilizing common-law agency principles to distinguish between employee and independent contractor). *See also, e.g., Carbon Fuel Co. v. United Mine Workers of Am.*, 444 U.S. 212, 216-18 (1979) (applying "the common law of agency" to determine "whether any person is acting as an 'agent' of another person" under Labor Management Relations Act to determine liability of international union for "wildcat" strikes).

Simply put, Congress has unequivocally directed that the NLRB must rely upon common law agency principles in determining who is an employee and who is an employer, and the NLRB has no authority to deviate from this standard. *See, e.g., Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984) (an "agency[] must give effect to the unambiguously expressed intent of Congress"). The proposed departure from the long standing joint-employer framework would burden companies that are not employers with bargaining obligations, enmesh them in ever-widening industrial disputes and deprive them of the protections against secondary activity afforded under Section 8(b)(4) of the Act. Such an unwarranted change would also force non-employer entities to participate in collective bargaining where they have no control to set or negotiate terms and conditions of employment and would have no authority to remedy unfair labor practices, bringing multiple parties with widely disparate interests to the bargaining table, frustrating the purposes of the Act.

II. THE NEW, EXPANDED "INDIRECT CONTROL" TEST URGED BY THE BOARD'S GENERAL COUNSEL IMPERMISSIBLY DEVIATES FROM TRADITIONAL AGENCY PRINCIPLES AND EXCEEDS BOARD AUTHORITY

Under the General Counsel's proposed standard, an entity would be deemed an "employer" or "joint-employer" if it "exercised direct *or* indirect control over the working conditions, had the unexercised potential to control working conditions, or where "industrial realities" otherwise made it essential to meaningful collective bargaining." *See* GC *Amicus* at 2, 4-5, 16-17 (advocating what misleadingly is described as a return to the Board's "traditional" standard, making no distinction "between direct, indirect, and potential control over working conditions" and finding "joint employee status where 'industrial realities' make an entity essential for meaningful bargaining"). As a consequence of this broad, unbounded standard, a business could be deemed a joint-employer even though it freely contracts at arm's length only for the *ends* to be achieved at a given cost, not the *means* by which the ends are achieved, and notwithstanding that the business eschews any role in hiring, firing, directing employees, or determining the terms and conditions of their employment.

Such a drastic shift in the current law is manifestly unwarranted, ignores common law agency principles prescribed by Congress, and would stifle innovation in the marketplace. Without question, cost, efficiency, and quality are at the heart of every owner-contractor or contractor-subcontractor arrangement. The owner will seek out low-cost, highly efficient providers, and the subcontractor will seek to maximize economic gains under their contract. Similarly, franchisors will seek out efficient high quality franchisees who can grow the business to maximize gains. Either party may refuse to enter into an agreement on the terms offered by the other. This is true in *every* owner-subcontractor agreement and may not be used as a basis to render one such entity as an employer absent other indicia of a traditional master-servant employment relationship unquestionably required under the NLRA. Even the imposition of a

limit on costs related to a contract, such as the maximum amount of wages which the owner will reimburse under a cost-plus agreement, is "no different from the right of any commercial client to continue to accept, or to reject, a supplier of goods or services based on the consideration of price," which is not a sufficient basis to impute an employer relationship. *See, e.g., Hychem Constructors, Inc.*, 169 NLRB 274, 276 n.4 (1968) (rejecting argument that Texas Eastman's ability to approve any wage increase gives it a veto power over any collecting bargaining negotiations between contractor and its employees). As the Board held: "[w]hile a determination by the client to continue the business arrangement, because the price is favorable to him, might remotely benefit the supplier's work force, the exercise of this right by the client would not establish an employment relationship between the client and the supplier's employees." *Id.*

Board precedent has rejected the contention that any time a subcontractor "has the ability to convince the contractor to renegotiate the terms of their contract, particularly if the subcontractor's cost are affected by collective bargaining, this means that the general contractor is the one having the *de facto* control over the subcontractor's labor relations," and has observed that "if extended to its logical conclusion, [this] would mean that in virtually all contractor-subcontractor relationships, the two companies involved should necessarily be construed as joint employers whenever the employees of the subcontractor are unionized." *Airborne Freight Co.*, 338 NLRB at 606 (decision of the ALJ); *see also, e.g., TLI*, 271 NLRB at 799.

The very nature of free competition means that there is always some market force or entity making a demand on the price and terms of services. What the General Counsel seeks through adoption of a grossly expanded "joint-employer" standard is the right to negotiate how an owner runs its business, *not* how the subcontractor pays or manages its employees. However, by mandating that bargaining obligations attach *only* where employer status exists under

common law agency principles, Congress has structured the Act to limit the expansion of industrial disputes in ever widening circles.

The "industrial realities" test articulated by Member Liebman[3] and reformulated by the General Counsel, implies an assessment of the degree of "economic dependence" in the owner-subcontractor relationship based on the Board's evaluation of the owner's relative economic power to set price and terms in its negotiations with the subcontractor, thereby exerting -- in varying degrees -- an "indirect" influence on wages, terms and conditions of employment which the subcontractor negotiates for its employees. Adoption of such a test will require a lengthy, fact-intensive, and often subjective inquiry into not only the relationship between the nominal joint-employers and the putative employees, but also the market relationship between the two purported employers. This would result in Board decisions turning, not on the common law of agency, but rather on an investigation of industry economics and the market for a subcontractor's services.

This new analytical framework would quickly devolve into an expensive and time-consuming war of economic experts involving a scrutiny of market forces, pricing structures, price elasticity, barriers to entry and alternatives to the subcontractor's services, all under the vague umbrella of "industrial realities." In the end, a putative employer's bargaining obligations under the Act would depend on an assessment of industry and market forces, rather than on the direct, immediate control required to establish an employer-employee relationship under the

[3] There is an uncomfortable irony in Member Liebman's and the Board's new found advocacy for "meaningful collective bargaining" in *Airborne Freight Co.*, whereas such "meaningful collective bargaining" apparently was of little or no concern to the NLRB in *Management Training Corp.*, 317 NLRB 1355 (1995) which overturned a requirement of "meaningful collective bargaining" in *Res-Care, Inc.*, 280 NLRB 670 (1986). The only consistency between these polar positions is that in each instance the Board compelled collective bargaining without regard to who is in fact the employer.

common law. Congress already has rejected such an approach *both* by demanding a common law agency analysis in determining employment status and by *specifically prohibiting* the NLRB from employing any individuals for economic analysis or from resurrecting the now, long defunct, Division of Economic Research. *See, e.g.*, 29 U.S.C. § 154(a); 93 Cong. Rec. 4136, at 4158 (1947). The Board's early penchant for regulation based on economic analysis from 1935 to 1940 by the soon-to-be discredited Division of Economic Research resulted in vigorous and outspoken opposition in Congress regularly from 1940 to 1947 when Congress once and for all capped its opposition to "regulation by economic analysis" by specifically prohibiting it in the Taft-Hartley Amendments.

The myriad and complexity of business relationships further underscores the impracticality and unwieldy character of such an inquiry. Manufacturers contract with a shipping company for distribution. Automakers strictly control prices and costs for their tier two and three suppliers. Companies utilize vendors to supply non-core services such as catering, janitorial and maintenance. General contractors routinely subcontract with a dozen or more subcontractors on a single building site. The opportunity to create multiple, unworkable bargaining obligations where the contracting party has no direct relationship with the terms and conditions of the subcontractor's employees is unbounded and inconsistent with the Congressional purposes of the NLRA which were to remove the burdens and obstructions that were "impairing the efficiency, safety or operation of the instrumentalities of commerce." Such an untoward regime should be avoided at all costs.

CONCLUSION

Time and again Congress and the Supreme Court have directed that the Board must rely upon the common law of agency in making determinations with respect to who is an employee and who is an employer under the Act. The current joint-employer standard promotes stability

and predictability in business relationships and collective bargaining which allows for corporate efficiency and innovation. Any modification to the longstanding principles which are grounded in the Act's text are unwarranted and will have deleterious consequences which are both extensive and far reaching.