Before the Health, Education, Labor & Pensions Committee
United States Senate

"Who's the Boss? The 'Joint Employer' Standard and Business Ownership"

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I would like to start by thanking the Chairman of the Committee, Senator Alexander, ranking member, Senator Murray, and the other members of the Committee for this opportunity to testify on this important workplace law issue. My testimony will focus on: the process by which the joint employer doctrine is currently being re-examined by the National Labor Relations Board; the importance of this question given the underlying purposes of the National Labor Relations Act; the similarity of the joint employer test under the NLRA to how this same issue has been treated under related federal labor and employment law statutes; and finally to stress to the Committee that nothing has been decided yet in the underlying case, *Browning-Ferris Industries*, Case 32-RC-109684 (or for that matter in the pending complaint against McDonalds). The Board is following its usual and ordinary adjudicatory process to ascertain whether employees in certain economic structures are able to properly exercise their organizational, collective bargaining, and concerted activity rights under the Act. The fact-intensive, complex nature of the joint employer question in *Browning-Ferris* will help me underscore for the Committee the need for a case-by-case approach which considers a number of relevant factors concerning who controls important terms and condition of employment.

Employment relationships are dynamic, and the mix of jobs and relationships in our economy shifts over time. The Board is simply re-examining its joint employer standard to ensure that it properly effectuates the purposes of the Act. As the agency charged with administering the NLRA, the NLRB must ensure that it is fulfilling its statutory mandate by protecting employees' rights to engage in concerted activity and to bargain collectively with their employers. To be clear, and to restate what I have already said once: the Board has not yet decided what actions to take. In the *Browning-Ferris* case, the Board has done what it has done many times before -- it has asked for amicus briefs from all interested parties based on the facts of the case. The Board has expressed a desire to hear from as many voices as possible as it deliberates over this significant workplace issue. There is nothing extraordinary or unusual about the adjudicatory process that the Board is following in re-examining its joint employer test. The Board, unlike other federal agencies, generally does not engage in rule-making and instead develops the "common law of the shop" through fact-intensive investigations of complex, individual cases.

As the Board makes its decision in *Browning-Ferris*, it will not be writing on a blank slate. The joint employer test under the National Labor Relations Act was set forth by the United States Supreme Court over fifty years ago in *Boire v. Greyhound Corp.*, 376 U.S. 473, 481 (1964). There, the question, broadly stated, was whether one employer "possesses sufficient control over the work of the employees to qualify as a 'joint employer' with [the actual employer]." In other words, joint employment occurs when "one employer, while contracting in good faith with an otherwise independent company, has retained for itself sufficient control of the terms and conditions of employment of the employees who are employed by the other employer." *NLRB v. Browning-Ferris of Pa., Inc.*, 691 F.2d 1117, 1123 (3d Cir. 1982).

The Board has continuously reconsidered and adjusted its joint employer standard based on experience. Starting in 1984, for example, the Board provided an additional gloss on this joint employer test in the cases of *Laerco Transportation*, 269 NLRB 324 (1984) and *TLI, Inc.*, 271 NLRB 798 (1984). In these cases, the Board stated that it would find joint employment, "where two separate entities share or codetermine those matters governing the essential terms and conditions of employment." In particular, an employer must "meaningfully affect[] matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction." *Laerco*, 269 NLRB at 325. In 2002, the Board restricted the joint employer test by stating: "The essential element in this analysis is whether a putative joint employer's control over employment matters is direct and immediate." *Airborne Freight Co.*, 338 NLRB 597, 597 n.1 (2002). Several parties in the *Browning-Ferris* case have urged the Board to reconsider these recent tightening of the joint employer test and return to the Board's traditional approach consistent with Supreme Court case law.

The express purpose of the Act is to ensure industrial peace through the process of collective bargaining over terms and conditions of employment. Industrial peace can only be fostered if employees have an opportunity to collective bargain with all parties that meaningful control workplace terms and conditions. Therefore, by re-examining its joint employer test, the Board is simply fulfilling the responsibility that the U.S. Supreme Court has entrusted to it: "adapt[ing] the [National Labor Relations Act] to changing patterns of industrial life." *NLRB v. Weingarten*, 420 U.S. 251, 266 (1975). *Browning-Ferris* does not represent the Board acting in an unusual or activist way in asking whether it should revise its joint employer test in any manner in light of evolving economic realities.

These evolving realities include the rapid expansion of precarious low-wage work and subcontracting that have fractured the 21st century workplace. Temporary staffing and franchising account for a disproportionate share of the economic growth following the recession of 2008. Between 1990 and 2008, employment in the temp services industry doubled, from 1.1 million to 2.3 million and temporary employees now represent a record share of the workforce at 2 percent. By 2013, staffing services generated $109 billion in sales and 2.8 million temp positions. In the first quarter of 2014, True Blue (formerly Labor Ready), the largest U.S. staffing agency, had a profit of $120 million on gross revenues of $453 million. Franchising is equally profitable as evidenced by the fast-food sector of the restaurant industry where in 2012 the ten largest franchises employed over 2.25 million workers and earned more than $7.4 billion in profits.

There are more than 3.5 million fast-food workers and more than 75 per cent of them work in franchised outlets. Numerous studies indicate that under-employment and poverty-inducing earnings are the norms. Households that include an employed, fast-food worker are four times as likely to live below the federal poverty level. The social costs of these conditions are born by U.S. taxpayers who shell out about $3.8 billion per year to cover the cost of public benefits received by fast-food workers employed at the top-ten fast-food franchises.

These trends are playing out in the other joint employer case receiving much recent media coverage, the McDonald's case. There, the NLRB's General Counsel, after an investigation, has issued several unfair labor practice complaints against McDonald's on grounds that McDonald's is a joint employer with its franchisees under the particular facts and circumstances presented in the case. Complaints have only recently been issued, and the cases are now before administrative law judges for hearings on the complaints. The cases are at the beginning of the adjudicatory process. It is too early to speculate on what the administrative law judges, and what the Board,

may decide in the cases. Importantly, the decision will be specific to the facts of that case, and will not be binding on all franchisor-franchisee relationships. To be clear, and so there is no misunderstanding on this point: no party has even proposed a universal rule that all franchisors and temp agencies from now on will be considered joint employers. Cases will turn on their particular facts.

Consistent with the standards set by the U.S. Supreme Court initially in 1964 and reiterated by the Board in 1984, joint employer doctrine under the NLRA turns on whether two separate employers "share or codetermine" terms and conditions of employment that "meaningfully affect" the employment relationship. A less restrictive definition might, for example, not define the "essential" terms and conditions of employment, might not limit such terms to only hiring, firing, and discipline," and would not require "direct and immediate control" over the employee, as the Board first adopted in 2002.

Several parties have also pointed out to the Board that its current, unduly restrictive approach definition is inconsistent with the joint employer test under other federal labor and employment law statues including: the Fair Labor Standards Act, Title VII of the Civil Rights Act of 1964, the Employee Retirement Income Security Act/Internal Revenue Code, and the Family and Medical Leave Act. All these statutes, in determining whether more than one employer should be treated as joint employers of the employee look at the "actual relationship between the employer and [the employees], rather than the reasons for the relationship." *Redichs Interstate, Inc*., 255 NLRB 1073, 1077 (1980). None attempts to define "essential terms of employment," "direct and immediate control over employees," or limit the analysis to ultimate employment decisions like hiring and firing. They consider *all* relevant terms and conditions of employment and ask whether the two employers control the meaningful aspects of the employment relationship.

The fact-specific nature of the joint-employer inquiry is well illustrated by the *Browning-Ferris* case itself. The record in that case reflects that Browning-Ferris operates a recycling facility in Milpitas, CA, where it directly employs approximately 60 workers at the facility, including loader operators, equipment operators, forklift operators, sort line equipment operators, spotters, and one sorter. These employees are all represented by Sanitary Truck Drivers and Helpers Local 350. Browning-Ferris also contracts with Leadpoint to supply mostly sorters for the facility and maintains that Leadpoint is these employees' sole employer. Leadpoint employs approximately 240 full-time, part-time, and on-call employees who work within the plant and are not part of any union.

Browning-Ferris maintains the entire physical plant, including the conveyors, screens, and motors that are used for the sorting operation. Browning-Ferris possesses and exercises significant authority over work hours, work days, and headcount. It sets the facility's hours of operation, including the start and end times of each of its three shifts, and controls the speed of the line and thus the speed at which the sorters must work.

Under the restrictive test the Board currently uses for determining joint employer status, Browning Ferris will have to establish that it has direct and immediate control over the Leadpoint workers' terms and conditions of employment. Frankly, it seems to me that this is a situation where Browning Ferris could and should be found a joint employer under the Board's current test because it exercises such substantial control over the Leadpoint workers' employment. The economic realities are such that Browning-Ferris is in charge, and if the Leadpoint workers are to unionize and bargain over their terms and conditions of employment, Browning-Ferris really needs to be at the table in order for meaningful bargaining to take place. The fact that an NLRB regional director applied the Board's current test and found Browning Ferris not to be a joint employer

demonstrates why the General Counsel is right to argue that the Board should reexamine and adjust its test to better reflect economic realities.

Again, the point I want to emphasize to the Committee is that under any joint employer test, the actual decision is incredibly fact-intensive. Many employers working together, in franchise and temp agency arrangements and other relationships, will not be considered joint employers. But where the facts show that both employers meaningfully affect the terms of workers' employment, they may be found to be joint employers with joint responsibilities to bargain with the workers and their representative over terms of employment.

In conclusion, the Board's decision to take a hard look at its joint employer standard is reasonable and practical as a means of considering whether the current test is effectuating the National Labor Relations Act's purpose of enabling workers to organize and collectively bargain with their employers to improve their lot in the workplace. By considering whether its existing joint employer standard is consistent with Congress' intent in light of changing employment practices, the Board is acting responsibly and well within its statutory authority. I ask that the Committee allow the administrative process to run its normal course before any conclusions about the impact of such a decision are reached.

I look forward to your questions. Thank you.