Before the Committee on Small Business & Entrepreneurship
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"Keeping the American Dream Alive:
The Challenge to Create Jobs under the NLRB's New Joint Employer Standard"

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I thank Chairman Vitter, Ranking Member Shaheen, and distinguished Members of this Committee for providing me with this opportunity to testify about the National Labor Relations Board's new joint employer standard. My name is Keith Bolek and I am a partner at the law firm of O'Donoghue & O'Donoghue LLP. For nearly eighteen years, I have practiced traditional labor law, representing labor organizations in every aspect of their work, from organizing to collective bargaining, contract administration, arbitrations and unfair labor practice litigation.

The title of today's hearing – namely, "[t]he Challenge to Create Jobs under the NLRB's New Joint Employer Standard – implies that this new standard, which the Board announced in its most recent *Browning-Ferris* decision,[1] will make it more difficult for small businesses to create jobs. This is certainly not the case. In *Browning-Ferris*, the National Labor Relations Board ("NLRB" or "Board") issued a modest, carefully crafted decision that keeps pace with the evolving nature of employer and employee relationships. The Board's decision also furthers the fundamental purposes of the National Labor Relations Act by encouraging collective bargaining and protecting workers' rights to organize for the purpose of negotiating over the terms and conditions of their employment.

The most appropriate starting point for any discussion of *Browning-Ferris* begins with the facts of that case. The reason is simple: the Board has always determined the existence of a joint employer relationship on a case-by-case basis. There have never been any bright line rules. Rather, each case turned, and continues to turn, on the unique facts of the business relationship between the two putative joint employers. This case-by-case approach is proper for an adjudicatory agency like the NLRB.

In the *Browning Ferris* case, Browning Ferris Industries (or "BFI") operated a recycling facility in Milpitas, California. Nearly 300 employees worked at that facility. However, BFI directly employed only 60 of those employees. These 60 employees primarily worked outside of the facility, loading materials into the plant for sorting and removing them after the sorting. The actual sorting was performed by the remaining 240 employees who worked inside the facility.

[1] *Browning-Ferris Indus. of Cal.*, 362 NLRB No. 186 (Aug. 27, 2015).

These employees sort mixed materials into separate commodities that were eventually sold to other businesses. BFI did not directly employ these 240 workers; instead, it contracted with a temporary employment agency called Leadpoint to supply these individuals.

Nevertheless, BFI exercised significant control over the Leadpoint employees' day-to-day terms of employment. BFI established the work stations along the material lines where these employees worked. It also determined the priority for sorting on each line, how fast each line would run, and how many Leadpoint employees would work on each line. BFI representatives met with Leadpoint supervisors each morning to dictate which lines would run and the work priorities for the day. BFI also decided which days its facility would operate, as well as the start and end times of each shift. It also determined when the lines would stop for breaks and whether the lines would continue beyond the end of the shift, requiring the Leadpoint employees to work overtime.

BFI also reserved control over other terms of employment through its contract with Leadpoint. The contract empowered BFI to reject any Leadpoint employee at any time and to "discontinue the use of any personnel for any or no reason." [2] The contract also required Leadpoint to administer drug and alcohol testing on its employees who worked at the BFI facility. With respect to wages, the contract prohibited Leadpoint from paying a wage rate in excess of the rates paid to full-time BFI employees without BFI's approval. Finally, the contract required Leadpoint employees to comply with BFI's safety policies, procedures and training requirements. It further reserved the right to BFI to enforce is safety policy with respect to Leadpoint personnel.

With that general recitation of the facts, let us turn to the NLRB's joint employer standard. That standard is over 50 years old, originating with the Board's decision in *Greyhound Corporation.*[3] That case involved the subcontracting of porter, janitor and maid work by Greyhound to Floors, Inc. Based upon the facts in that case, the NLRB concluded that "the evidence cogently demonstrates that Greyhound and Floors share, or codetermine, those matters governing essential terms and conditions of employment of porters, janitors, and maids herein in such a manner to support our finding that their status is that of joint employers."[4] The NLRB added that, "it is clear from the circumstances of this case that, whatever Floors' status as an independent contractor with Greyhound, Greyhound reserved to itself, *both as a matter of express contractual agreement and in actual practice,* rights over these employees which are consistent with its status as their employer along with Floors."[5] The Board's decision was enforced by the United States Court of Appeals for the Fifth Circuit.

This standard – that two or more employers share or codetermine those matters governing essential terms and conditions of employment – was later embraced by the United States Court

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[2] *Browning-Ferris Indus. of Cal.*, 362 NLRB No. 186, slip. op. at 4 (Aug. 27, 2015).

[3] *Greyhound Corp.*, 153 NLRB 1488 (1965), *enforced*, 368 F.2d 778 (5th Cir. 1966).

[4] *Id.* at 1495.

[5] *Id.* (emphasis added).

of Appeals for the Third Circuit in *NLRB v. Browning-Ferris of Pennsylvania, Inc.*,[6] which was issued in 1982. It was also embraced two years later by the NLRB in *TLI, Inc.*[7]

Despite embracing the "share or codetermine" standard, the NLRB stated in *TLI, Inc.* that, to establish a joint employer relationship, "there must be a showing that the employer meaningfully affects matters relating to the employment relationship such as hiring, firing, discipline, supervision and direction."[8] The Board found that the General Counsel failed to make that showing in *TLI, Inc.*, because the evidence showed that the supervision and direction by the putative joint employer was "limited and routine."[9]

Over the years, the Board's decision in *TLI, Inc.*, as well as an earlier decision in *Laerco Transportation*,[10] have been interpreted as narrowing the joint employer standard. By the time that the Board issued its decision in *Browning-Ferris* in August 2015, the Board's standard narrowed the analysis in two ways. First, it limited probative evidence of joint employer status to exclude reserved authority possessed by a putative joint employer. Second, it required evidence of authority exercised in a direct and immediate fashion, and not in a limited or routine manner.[11] These limitations led the Regional Director in the *Browning-Ferris* case to conclude that BFI was not a joint employer with Leadpoint because the control reserved to the putative joint employer was either reserved or exercised through an intermediary, namely, Leadpoint.

The NLRB undertook an extensive review of its joint employer standard in *Browning-Ferris*. Based on that review, the Board concluded that it would return to its traditional test for finding a joint employer relationship: namely, whether two employers "are both employers within the meaning of the common law, and if they share, or codetermine, those matters governing the essential terms and conditions of employment."[12] The Board reiterated its "inclusive approach" to defining the "essential terms and conditions of employment." These terms and conditions include more than just hiring, firing, discipline, supervision, and direction.[13] They also include dictating the number of employees to be supplied, controlling the scheduling of the employees, controlling the performance of overtime work, assigning work, and the direction of the employees in the "manner and method of work performance."[14]

In restating the standard, the NLRB eliminated the previous restrictions that grew out of decisions such as *TLI, Inc.* and *Laerco Transp.* These restrictions could not be justified under

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[6] *NLRB v. Browning-Ferris Industries of Pennsylvania, Inc.*, 691 F.2d 1117 (3d Cir. 1982).

[7] *TLI, Inc.*, 271 NLRB 798 (1984).

[8] *Id.* at 798.

[9] *Id.*

[10] *Laerco Transp.*, 269 NLRB 324 (1984).

[11] *See, e.g., Airborne Express*, 338 NLRB 597 (2002).

[12] *Browning-Ferris Indus. of California, Inc.*, 362 NLRB No. 186, slip op. at 15 (Aug. 27, 2015).

[13] *Id.*

[14] *Id.*

the common law agency test, which the Supreme Court has used to resolve issues relating to the definition of "employee" under the National Labor Relations Act.[15] For example, the Board found no support for the requirement that a putative joint employer actually exercise its control over terms and conditions of employment. The common law focuses on control or right to control. In other words, the right to control is relevant regardless of whether that right has ever been exercised.[16] As for the other restriction, the Board found that the requirement of direct and immediate control has no basis in the common law, which recognizes that control may be indirect and exercised through an intermediary.[17]

The elimination of these restrictions restores the ability of the NLRB to evaluate all of the facts and circumstances of a joint employer case in accordance with the common law. It reopens areas of inquiry, namely, reserved control and indirect control, that were foreclosed by the Board in prior decisions without any adequate or reasoned explanation.

By contrast, what should stand out about the NLRB's decision in *Browning-Ferris* is that the Board made a reasoned decision based on common law principles and the purposes of the National Labor Relations Act. The *Browning-Ferris* decision provides more guidance and clarity regarding the application of the joint employer standard than in prior decisions. The Board articulated the types of evidence that will be probative of a joint employment relationship – those recognized as probative under common law – as it undertakes factual analyses on a case-by-case basis. The Board did not state that any of these types of evidence would be determinative of joint employer status. Instead, it simply stated that these are the types of evidence that the Board would examine in each case. This type of administrative decision-making should be applauded.

Practically speaking, *Browning-Ferris* better effectuates the purposes of the Act by allowing workers to bargain collectively with all employers who control their terms and conditions of employment. As the NLRB clearly stated in its decision, "a joint employer will be required to bargain only with respect to those terms and conditions which it possesses sufficient control for bargaining to be meaningful."[18] Thus, Browning-Ferris is required to bargain over not only those matters over which it exerts actual control, such as the hours of work and the pace of work, but also those matters over which it reserves control. In this regard, the Board's analysis is right on point: "[w]here a user has reserved authority, we assume that it has rationally chosen to do so, in its own interest. There is no unfairness, then, in holding that legal consequences may follow from this choice."[19] Browning-Ferris will also be required to bargain

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[15] *NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85, 92-95 (1995) (stating, where Congress uses "employee" in a statute without a clear definition, the Court assumes Congress "intended to describe the conventional master-servant relationship as understood by common-law agency doctrine"), *cited and quoted in Browning-Ferris of California, Inc.*, 362 NLRB No. 186, slip op. at 12, n.62. (Aug. 27, 2015).

[16] *Browning-Ferris of California, Inc.*, 362 NLRB No. 186, slip op. at 13.

[17] *Id.* at 14.

[18] *Id.* at 2, n.7.

[19] *Id.* at 14.

over its exercise of indirect control over employees' terms of employment. Once again, the Board correctly recognized that, in cases where a putative employer exercises indirect control through an intermediary, the employees' terms and conditions of employment are "a byproduct of two layers of control."[20] It is fair and reasonable to require the employers responsible for each such layer of control to bargain over the exercise of that control.

Much has been made of the potential impact of *Browning-Ferris* on various employer relationships other than the one at issue in that case. This fear is enormously overblown. The Board expressly stated that it was not addressing relationships such as contractor-subcontractor and franchisor-franchisee.[21] Moreover, even under the standard prior to *Browning-Ferris*, the General Counsel of the NLRB issued a complaint against McDonalds (that is, the franchisor) and several of its franchisees as joint employers because the evidence adduced during the investigation revealed that McDonalds controlled the terms and conditions of employment for its franchisees' employees to an extraordinary degree. Such control goes far beyond the typical franchisor-franchisee relationship. In this regard, the General Counsel refused to issue a complaint in a case involving Freshii.[22] The General Counsel found that the franchisor did not exert sufficient control over the terms and conditions of employment of the franchisee's employees. The General Counsel further observed that he would have reached the same decision under a broader joint employer standard. The differing treatment of McDonald's and Freshii shows that the NLRB is not looking to upend the traditional franchise model, but to ensure that workers that choose to organize can meaningfully engage in collective bargaining where a franchisor decides to go beyond the traditional franchise model and exert control over the wages, hours, and working conditions of its franchisees.

In the end, the NLRB's new employment standard does not present any challenges when it comes to job creation; instead, it provides new opportunities. The goal is not simply to create jobs, but it is to create *good jobs*. Jobs that pay a sustaining wage or salary that allows employees to provide for themselves and their families. Jobs that provide the rights and protections guaranteed not only by federal laws, such as the right to overtime pay and jobsite safety, but also by state laws and local ordinances. Too often, large employers seek to shift the burden of complying with those laws to smaller businesses, like suppliers or franchisees, who may not have the resources or experience to handle those matters. The Board's new joint employer standard in *Browning-Ferris* ensures that each employer, large or small, will be responsible for the control it exercises, direct or indirect, actual or reserved, over the employees' terms and conditions of employment. Each employer will be brought to the table to negotiate with the employees and their collective bargaining representative over the terms and conditions of employment within that employer's control. The result will be a collective bargaining agreement that establishes the wages, hours and other working conditions. Studies and research show employees covered by collective bargaining agreements have better wages, fringe benefits and working conditions than non-represented employees. This outcome not only benefits

[20] *Id.*

[21] *Id.* at 20, n.120.

[22] Advice Memorandum, Nutritionality, Inc. d/b/a Freshii, 2015 WL 2357682 (NLRB Div. of Adv. April 28, 2015).

employers and employees, but also the public interest by promoting collective bargaining and protecting employees' rights to organize.

Thank you for considering this testimony.