Stop Hamburglaring Our Wages: The Right of Franchise Employees to Union Representation

*Alisa Pinarbasi**

TABLE OF CONTENTS

* J.D. Candidate, University of the Pacific, McGeorge School of Law, to be conferred May 2016; B.A. Business Management Economics, University of California, Santa Cruz, 2012. I would like to thank Professor Kojo Yelpaala for his invaluable insight and advice, and my friends and family for their unwavering support. Additionally, I would like to thank the law review editors, whose dedication made the publication of this Comment possible.

I. INTRODUCTION

"Hey, hey, what do you say? We demand fair pay."[1] More than 200 fast food restaurant employees chanted this statement on November 29, 2012 in New York City in an attempt to raise awareness of their inability to live above the poverty line with their current wages.[2] The demonstration marked the beginning of a nationwide campaign to raise wages and obtain union rights for employees of franchises such as McDonald's and Burger King.[3] Employees of McDonald's franchisees made the company the center of current litigation, however, as employees alleged multiple instances of unfair labor practices against McDonald's in contravention of the National Labor Relations Act (NLRA).[4] Case precedent shows that only franchisees, as opposed to franchisors, could be responsible for unfair labor practices in any franchise agreement, as they exercise immediate control over their employees.[5] Such claims of franchisee control originally made the employees' cases against McDonald's as a franchise appear weak.[6] However, on July 29, 2014, the National Labor Relations Board (NLRB)

1. Steven Greenhouse, *With Day of Protests, Fast Food Workers Seek More Pay*, N.Y TIMES (Nov. 29, 2012), http://www.nytimes.com/2012/11/30/nyregion/fast-food-workers-in-new-york-city-rally-for-higher-wages.html?_r=0 (on file with the *University of the Pacific Law Review*).

2. *Id.*

3. Jay-Anne Casuga, *NLRB General Counsel Issues 13 Complaints Alleging McDonald's Jointly Liable for ULPs*, BLOOMBERG BNA (Jan. 2, 2015), http://0-laborandemploymentlaw.bna.com.gocat.law.pacific.edu/lerc/2445/split_display.adp?fedfid=60620598&vname=lecbnnews&wsn=499758500&searchid=24191921&doctypeid=5&type=date&mode=doc&split=0&scm=2445&pg=0 (on file with *The University of the Pacific Law Review*).

4. *See* MCDONALD'S FACT SHEET, NAT'L LAB. REL. BD., *available at* http://www.nlrb.gov/news-outreach/ fact-sheets/mcdonalds-fact-sheet (last visited Dec. 27, 2014) (on file with *The University of the Pacific Law Review)* (showing multiple complaints issued against McDonald's for violations of the NLRA).

5. *See* Amicus Brief of General Counsel, Browning-Ferris Indus. (N.L.R.B. 2014) (Case No. 32-RC-109684) [hereinafter Amicus Brief of General Counsel] (stating that under the current joint employer definition, franchisors are not held liable for labor violations of their franchisees employees).

6. *See* Allen Smith, *NLRB General Counsel: McDonald's is Joint Employer with Franchisees,* SOC'Y FOR HUMAN RES. MGMT. (July 30, 2014), http://www.shrm.org/legalissues/federalresources/pages/nlrb-joint-

ruled that for the purpose of the employees' cases, McDonald's should be considered a joint employer with its franchisees.[7] The decision brought about much controversy, especially in light of the fact that the NLRB did not give any legal justification[8] for its decision to make McDonald's a joint employer.[9]

The Service Employees International Union (SEIU) assisted in the execution of these protests and believes the NLRB decision to find McDonald's as a joint employer in cases associated with the protests will make it easier to unionize employees of franchisees.[10] It is possible for workers to unionize within their franchise against the respective franchise owners (the franchisee), but generally, this is not as effective for multiple reasons: (1) the strategies the SEIU uses are not as effective with small business owners; (2) with over 3,000 independently owned franchises, the cost of organizing each individual unit generally outweighs the benefits—there are over 3,000 independently owned franchises, generally making the cost of organizing each individual unit outweigh the benefits; and (3) because McDonald's exerts so much control over its franchisees, company protocol constrains management at local franchises and leaves them without discretion to change their employees' wages and benefits.[11] The SEIU stated that a broader definition of "joint employer" will make it easier to organize employees of franchises into unions.[12] The Board's recent holding in *Browning-*

employers.aspx (on file with *The University of the Pacific Law Review*) (The ruling by the NLRB's Division of Advice asserting that McDonald's Corp. is a 'joint employer' of its franchisees' employees overturns 30 years of established law regarding the franchise model in the United States.").

7. Office of Public Affairs, *NLRB Office of the General Counsel Authorizes Complaints against McDonald's Franchisees and Determines McDonald's, USA, LLC is a Joint Employer*, NAT'L LAB. REL. BD. (Jul. 29, 2014), *available at* http://www.nlrb.gov/news-outreach/news-story/nlrb-office-general-counsel-authorizes-complaints-against-mcdonalds [hereinafter *NLRB General Counsel Authorizes Complaints*] (on file with *The University of the Pacific Law Review*).

8. However, a recent opinion, *Browning-Ferris Industries,* __N.L.R.B.__, Case 32-RC-109684 (2015), held that it would be overruling the stricter definition of "joint employer" and implements a "joint employer" standard that is easier to fulfill. The decision outlines reasons for the return to a broader interpretation of "joint employer" and is discussed in Part IV.C of this Comment. *Browning-Ferris* came out approximately one year after the Board announced that it would hold McDonald's as a "joint employer" for the purposes of these decisions.

9. Jeffrey Dorfman, *McDonald's Ruling by NLRB Counsel Puts SEIU's Unionization Goal within Reach*, FORBES (July 30, 2014), *available at* http://www.forbes.com/sites/jeffreydorfman/2014/07/30/mcdonalds-ruling-by-nlrb-counsel-puts-seius-unionization-goal-within-reach/ (on file with *The University of the Pacific Law Review*); *see NLRB General Counsel Authorizes Complaints*, *supra* note 7 (stating that the NLRB will consider McDonald's a joint employer).

10. *Id.*

11. Amicus Brief of General Counsel, *supra* note 5, at 14–15; *See* James Sherk, *Unions for Big Businesses,* NAT'L REV. (Aug. 4, 2014), *available at* http://www.nationalreview.com/article/384453/unions-big-businesses-james-sherk (on file with *The University of the Pacific Law Review*) (explaining franchisees handle all hiring and employment).

12. *See* Ben Penn, *To Unions, McDonald's Joint Employer Status No Slam Dunk, as Fast Food Push Intensifies*, DAILY LAB. REP. (Sept. 18, 2014), *available at* http://www.bna.com/unions-mcdonalds-joint-n17179895030/ (on file with the *University of the Pacific Law Review*) (stating "[a] more liberal NLRB joint employer definition could put franchisors in the situation of having to bargain on behalf of franchisees," which the current standard does not require).

Ferris, which signaled the return of a broader joint employer standard, only reaffirmed the SEIU's hopes for unionization efforts.[13]

However, the SEIU's optimism is not well-founded. The joint employer analysis calls for a case-by-case examination[14] of the franchisor-franchisee relationship.[15] Because the definition of joint employer requires a case-by-case analysis of relevant facts, unions such as those the SEIU created will have to independently establish a joint employer relationship with each franchise before they can unionize all employees working for McDonald's.[16] Although McDonald's has uniform standardized contracts with its franchisees, case precedent does not make it easy for other franchisees to establish a joint employer relationship with their franchisors.[17] Unionizing employees will still have the burden of showing that there are no franchise-to-franchise distinctions large enough to warrant an individual review of the relationships between particular franchisees and McDonald's.[18] McDonald's has a substantial interest in preventing case precedent that establishes a joint employer relationship with a franchisee, and will work hard to prevent courts from recognizing that relationship.[19] The court's declaration of a joint employer relationship is important to unions because McDonald's is only legally bound by the provisions of the NLRA if they it is a joint employer with its franchisees.[20] Therefore, under any case-by-case analysis standard, the SEIU will not be able to effectively unionize McDonald's franchisee's employees; instead, courts should incorporate a new doctrine in which they perform a franchise-by-franchise analysis:[21] once a franchisor is determined to be a joint employer with any one of its franchisees, a joint employer relationship is established between the franchisor and *all* of its franchisees.

---

13. Noam Scheiber & Stephanie Strom, *Labor Board Ruling Eases Way for Fast-Food Union's Efforts*, N.Y. Times (Aug. 27, 2015), *available at* http://www.nytimes.com/2015/08/28/business/labor-board-says-franchise-workers-can-bargain-with-parent-company.html?_r=0 (on file with *The University of the Pacific Law Review*).

14. *See Browning-Ferris Industries*, __ N.L.R.B. __, Case 32-RC-109684, 1, 18–20 (stating that each case presents "material issues").

15. *Infra* Part IV.C.

16. *Infra* Part IV.C.

17. *Infra* Part IV.C.

18. *See* TLI, Inc., 271 N.L.R.B. 798 (1984) (requiring the moving party to establish a joint employer relationship).

19. *See* Melanie Trottman & Julie Jargon, *NLRB Names McDonald's as 'Joint-Employer' at Its Franchisees*, WALL ST. J. (Dec. 19, 2014), *available at* http://www.wsj.com/articles/nlrb-names-mcdonalds-as-joint-employer-of-workers-at-its-franchisees-1419018664 (stating that McDonald's plans to contest the joint employer allegations against them as they are improperly placed).

20. *See* Raymond G. McGuire, *The Labor Law Aspects of Franchising,* 13 B.C. INDUS. & COM. L. REV. 215, 239 (1972) ("Whether the franchisor will be characterized as an employer of the interest group which the union seeks to represent.").

21. *See infra* Part V.

This Comment will establish the necessity of a franchise-by-franchise doctrine by first analyzing the NLRA. Part II discusses the policy goals of the NLRA, both in its initial enactment and with the Taft-Hartley amendment.[22] Part III will explain the current business-format model of the franchise, whether employees of franchisees were a likely class of persons the NLRA meant to protect, and why the current business-format model does not allow employees to receive their established rights under the NLRA.[23] Part IV will develop the history of the term "joint employer" and conclude that despite a broader interpretation of the joint employer standard, the implementation of the current joint employer doctrine still does not adequately protect collective bargaining rights of employees of franchisees.[24] Part V will examine proposals sent to the Board by the General Counsel suggesting a return to the broader definition of joint employer developed in the 1950s.[25] This Comment will then conclude that the only way employees of franchisees' rights under the NLRA can be fully realized is through the courts' application of a franchise-by-franchise analysis.[26]

II. THE NATIONAL LABOR RELATIONS ACT

Congress enacted the NLRA—also known as the Wagner Act—in part to decrease the number of strikes[27] that were obstructing interstate commerce.[28] Congress believed that meaningful collective bargaining for employees would scale back the strikes—the larger an employee's voice in employment negotiations, the less reason they had to strike.[29] However, in 1947, the Taft-Hartley Act amended the NLRA and imposed restrictions on union practices, causing courts and the NLRB to question whether unions promoted or obstructed interstate commerce.[30] An in-depth analysis of the Taft-Hartley Act shows that the amendments do not change the original policy of the NLRA, and that meaningful collective bargaining is still an essential employee right.[31]

22. *Infra* Part II.

23. *Infra* Part III.

24. *Infra* Part IV.

25. *Id.*

26. *Infra* Part V.

27. The strikes were mainly to gain recognition of labor unions, which in turn would help end the deplorable working conditions during that time (low wages and long hours). Florence Peterson, *Review of Strikes in the United States*, 46 MONTHLY LAB. REV. 1047, 1059–60 (1938).

28. *See infra* Part II.B.

29. *See infra* Part II.B.

30. *See infra* Part II.C.1.

31. *See infra* Part II.C.2.

A. A Brief Overview of the NLRA

"Congress enacted the National Labor Relations Act in 1935 to protect the rights of employees and employers, to encourage collective bargaining, and to curtail certain private sector labor and management practices, which can harm the general welfare of workers, businesses and the U.S. economy."[32] Proponents of the NLRA envisioned that the Act would give employees means to collectively bargain with employers and create a system of self-governance.[33]

1. The Board and General Counsel

The NLRA established the National Labor Relations Board (the Board) to help enforce the NLRA.[34] The President appoints five members to the Board, and the Senate approves the President's selections.[35] The Board has the power to examine issues employees present alleging unfair labor practices.[36] After a hearing, if the Board finds that a preponderance of the evidence shows that the employer violated fair labor practices, it can issue an order requiring desistance of the behavior.[37] Non-compliance with board decisions triggers a review by the United States District Court or direct review by the United States Court of Appeals.[38]

32. *National Labor Relations Act*, NAT'L LAB. REL. BD., http://www.nlrb.gov/resources/national-labor-relations-act (last visited Dec. 30, 2014) [hereinafter *National Labor Relations Act*] (on file with *The University of the Pacific Law Review*).

33. *See* Leon H. Keyserling, *The Wagner Act: Its Origin and Current Significance*, 29 GEO. WASH. L. REV. 199, 218 (1960) (explaining that the NLRA meant more to Wagner than simply negating industrial strife).

34. 29 U.S.C. § 153 (2014).

35. *Id.*

36. *Id.* at § 160 (unfair labor practices include any violation listed in § 158); *see also id.* at § 158 (listing unfair labor practices such as: interfering with employees right to self-organization, join unions, or bargain collectively through representatives; interfering with the formation or administration of labor organizations; hiring employees on the basis of whether they are or are not in a union . . . etc.).

37. *Id.* at § 160.

38. The case can be brought "in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transactions business, or in the United States Court of Appeals for the District of Columbia." *Id.*

2. Rights of Employees and Employers and Unfair Labor Practices

The NLRA establishes the rights of employees[39] as follows:

> [e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted actives for the purpose of collective bargaining or other mutual aid or protection,[40] and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized [in section 158 of this title].[41]

The NLRA then lists five employer actions[42] that are considered unfair labor practices under the Act: (1) interfering with the employee's granted rights, as stated above; (2) interfering with "formation or administration of any labor organization or contribut[ing] financial or other support to it;" (3) "discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor

---

39. The NLRA defines "employee" as:

> [A]ny employee, and shall not be limited to the employees of a particular employer, unless the Act . . . explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an en employer subject to the Railway Labor Act . . . or by any other person who is not an employer as herein defined.

Id. at § 152. It is important to note that the Taft-Hartley Act restricted the definition of employee by adding "or any individual having the status of an independent contractor, or any individual employed as a supervisor" to those groups explicitly excluded from the definition of employer. Archibald Cox, *Some Aspects of the Labor Management Relations Act,* 61 HARV. L. REV. 1, 4 (1947). Others argue that courts had already dissociated these categories of employees from protection under the NLRA. Robert J. Rosenthal, *Exclusions of Employees under the Taft-Hartley Act*, 4 INDUS. & LAB. REL. REV. 556, 559, 565 (1951).

40. Under the Wagner Act, the text preceding this footnote represented the complete section of the Rights of Employees; the Taft-Hartley Act amended this section by adding the right to refrain from activities. *1947 Taft-Hartley Substantive Provisions*, NAT'L LAB. REL. BD., *available at* http://www.nlrb.gov/resources/national-labor-relations-act (last visited Jan. 1, 2014) [hereinafter *1947 Taft-Hartley Substantive Provisions*] (on file with *The University of Pacific Law Review*).

41. 29 U.S.C. § 157 (2014).

42. An employer is defined in the NLRA as "any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act." *Id.* at § 152. This comment analyzes the meaning of employer, more specifically of joint employer, in Part III, *infra*.

organization;"[43] (4) "to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act;" and (5) "refus[ing] to bargain collectively with the representatives of his employees."[44]

The NLRA also restricts "unfair labor practices by labor organization[s]."[45] There are seven practices that union organizations cannot engage in: (1) compelling employees to exercise rights guaranteed by the NLRA; (2) trying to make an employer discriminate against an employee because they are not part of a union; (3) "refus[ing] to bargain collectively with an employer;" (4) participating in or encouraging strikes; (5) requiring excessive payments by employees; (6) coercing employers to pay for services not received; and (7) negotiations must be with certified representatives when employees threaten to strike based on disregard of the representative by the employer.[46]

B. The National Industrial Recovery Act: The NLRA's Predecessor

The National Industrial Recovery Act (NIRA) was enacted before the NLRA, and Senator Wagner intended the NLRA to be modeled after the NIRA.[47] The NIRA's failures shaped the stated purpose of the NLRA.[48]

During the Great Depression, supporters of the New Deal undertook various means to help boost the economy.[49] Congress enacted the NLRA only after the Supreme Court found its predecessor, the NIRA, unconstitutional.[50] Although both the NIRA and the NLRA encourage union organizing, the Acts had different stated purposes.[51] Congress enacted the NIRA with the purpose of harmonizing a balance of production and consumption.[52] Proponents of the NIRA believed economic problems arose because workers who produced goods did not have enough money to purchase them.[53] This resulted in a market imbalance: a high

43. The Act makes various exceptions that allow employers to make agreements with unions under certain conditions. *Id.* at § 158.

44. *Id.*

45. It is important to note that these violations were not part of the original Wagner Act, but were added by the Taft Hartley Act. *1947 Taft-Hartley Substantive Provisions, supra* note 40. This is discussed in more detail in Part II.C of this comment.

46. 29 U.S.C. § 158.

47. *See* E.G. Latham, *Legislative Purpose and Administrative Policy under the National Labor Relations Act*, 4 GEO. WASH. L. REV. 433, 434–39 (1936) (discussing the history of legislation that led to the enactment of the NLRA).

48. *Id.*

49. *Id.*

50. *Id.* at 541–42, 549.

51. *Id.* at 443.

52. LEVERETT S. LYON, ET AL., THE NATIONAL RECOVERY ADMINISTRATION: AN ANALYSIS AND APPRAISAL 5 (1935).

53. *Id.* at 6.

number of goods available for purchase, but few consumers capable of purchasing the goods.[54]

Part of the NIRA was aimed at stabilizing this imbalance by giving workers broader collective bargaining rights, thereby giving them higher salaries and greater purchasing power.[55] However, *A.L.A. Schechter Poultry Corporation v. United States* found the NIRA unconstitutional because it granted legislative powers to the executive branch and extended federal power beyond that granted to Congress under the Commerce Clause.[56] The Supreme Court found the link between interstate commerce and the NIRA too attenuated and therefore outside the power of the Commerce Clause, making the NIRA unconstitutional.[57]

Congress enacted the NIRA with an expiration date and it contained many deficiencies[58] that prompted Senator Wagner to propose similar legislation—the NLRA.[59] Senator Wagner completed the legislation and presented it to Congress before the *Schechter* decision.[60] Wagner originally stated two purposes of the NLRA. The first and main purpose mirrored the NIRA: to keep balance in workers' wages and the amount of goods produced.[61] The second purpose was to limit strikes that obstructed interstate commerce.[62] However, in light of the *Schechter* decision and the NIRA's unconstitutionality, Congress shifted the primary focus of the NLRA to the second reason in order to demonstrate a more direct effect on interstate commerce and ensure the NLRA's constitutionality.[63] In 1937, the Supreme Court declared the NLRA constitutional in *N.L.R.B. v. Jones & Laughlin Steel Corp*.[64]

C. How the NIRA's Policy Affected the Purpose of the NLRA

Despite Congress stating the primary purpose of the NLRA was to prevent strikes, Wagner often said the purpose of the NLRA is "to make the worker a free man."[65] The NLRA enabled workers to live in an industrial democracy, bargain for rights, and establish alternatives other than compliance with decisions of the

54. *Id.*

55. *See* Latham, *supra* note 47, at 441 (explaining section 7(a) of the NLRA).

56. A.L.A. Schecter Poultry Corp. v. United States, 295 U.S. 495, 541–42, 549 (1935).

57. *Id.*

58. *See* Theda Skocpol et al., *Explaining New Deal Labor Policy*, 84 AM. POL. SCI. REV. 1297, 1301 (1990) (stating that NIRA policies were difficult to enforce).

59. *Id.*

60. Latham, *supra* note 47, at 440.

61. *Id.* at 442–43.

62. *Id.*

63. *Id.* at 443.

64. N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U.S. 1, 30–31(1937).

65. Keyserling, *supra* note 33, at 215.

industrialist bourgeoisie.[66] However, according to Leon Keyserling, Senator Wagner's legislative assistant, "[Wagner] never valued the [NLRA] primarily as a mere weapon for negating industrial strife, but rather as an affirmative vehicle for the economic and related social progress to which his life-long efforts were devoted."[67] This purpose aligns with that of the NIRA, and, despite the shortcomings that caused Congress to shift its primary purposes for enacting the NLRA, Wagner still believed in the original purpose of the NIRA and attributed its failures to faulty administration.[68]

Wagner and other NLRA drafters who had worked on the NIRA took many ideas that were not successfully executed under that legislation and inserted them into the NLRA.[69] The NLRA provided procedures for the Board to successfully enforce its decisions.[70] This demonstrates that Wagner's focus while securing the enactment of the NLRA centered on crafting a long-term solution to regulate interstate commerce by giving workers a voice in employment negotiations.[71] Empowering workers decreases the necessity for strikes that interrupt the flow of business. [72] Further by giving workers a voice in negotiations, their economic leverage is heightened, which helps balance consumer purchasing power with the amount of goods available on the market.[73] The remedy in section 10(a) of the NLRA furthers Wagner's view by empowering the Board "to prevent any person from engaging in any unfair labor practice [listed in the NLRA] affecting commerce."[74]

Therefore, it appears that the purpose of the NLRA is a combination of two goals. The first is to develop a self-governing industry, one where workers are not forced to work in an economy with employers fixing wages and benefits without representation of their employees' needs.[75] The second is to stabilize interstate commerce through means of ensuring communicative measures other

66. *See* Ellen Dannin, *NLRA Values, Labor Values, American Values*, 26 BERKELEY J. EMP. & LAB. L. 223, 229–30 (2005) ("NLRA policies set out steps to make workplaces more democratic and to empower workers by giving them the skills to be citizens of a democracy").

67. Keyserling, *supra* note 33, at 218.

68. *Id.* at 219.

69. *See* Skocpol, et al., *supra* note 58, at 1301 (stating that many legislators who worked on the NIRA also helped draft the NLRA, imposing many of the same ideals in both).

70. *See id.* (stating that NIRA policies were difficult to enforce).

71. *See* Keyserling, *supra* note 33, at 220–21 (stating that Wagner "foresaw that this process within our enterprise system could become an integral part of a . . . larger cooperative process guided by intelligence which would animate the whole economy).

72. *See* Cox, *supra* note 39, at 2–3 ("Employer interference with employee organization and denials of recognition were prime causes of industrial disputes.").

73. *See* Keyserling, *supra* note 33, at 218–19 (quoting Senator Wagner stating "[a]s profits rose faster than wages, the excess earnings were invested in more factories, turning out an ever-increasing volume of goods").

74. 29 U.S.C. § 160 (2014).

75. *Supra* Part II.A.

than strikes, and preserve harmony in the economy by keeping employee wages high enough to allow employees to purchase goods.[76]

D. The Taft-Hartley Amendment and its Effect on the NLRA

In 1947, Congress amended the NLRA by passing the Taft-Hartley Act.[77] The Taft-Hartley Act has created confusion regarding the purpose of the NLRA[78] because Congress enacted it with the intent of narrowing union organizations' power.[79] There are two major changes the Taft-Hartley Act made to the Wagner Act: first, the declaration of purpose, and second, the addition of unfair labor practices by labor organizations.[80]

1. Change in Declaration and Findings Clause

The Taft-Hartley Act did not change the original Wagner Act declaration stressing the importance of collective bargaining;[81] however, it did add additional findings that "certain practices by some labor organizations . . . have the intent or necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest."[82] The amendment further stated that "[t]he elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed."[83] Courts' confusion in interpreting the purpose of the NLRA stems from this addition to the findings clause.[84] Although the Taft-Hartley Act kept the findings of the importance of collective bargaining to prevent barriers to the stream of

---

76. *Supra* Part II.A.

77. *1947 Taft-Hartley Substantive Provisions*, *supra* note 40.

78. *See* James A. Gross, *Conflicting Statutory Purposes: Another Look at Fifty Years of NLRB Law Making*, 39 INDUS. & LAB. REL. REV. 7, 12–13 (1985) (describing the new purpose clause in the NLRA resulting from the Taft-Hartley amendment, and noting that "[a]s a consequence of all of this, the Taft-Hartley Act contains conflicting statements of purpose that open the national labor law to conflicting interpretations of congressional intent").

79. *Id.* at 11.

80. *Infra* Part II.C.1–2. It is important to note that the Taft-Harley Act brought other changes to the NLRA; however, they are not relevant to the discussion within this Comment.

81. The Wagner Act declaration stated in part:

> It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

29 U.S.C. § 151 (2014).

82. *Id.*

83. *Id.*

84. *See* Gross, *supra* note 78, at 13 (discussing how the different meanings of the purposes clauses in the Wagner Act and the Taft-Hartley Act have led to conflicting interpretations of the NLRA).

commerce, it appears to simultaneously discredit these findings by stating that labor organizations contribute to these obstructions.[85] This resulted in two interpretations of the NLRA's purpose: (1) to use unions as a means to encourage collective bargaining, and (2) to discourage the use of unions because they obstruct the stream of commerce.[86]

2. Addition of Unfair Labor Practices by Labor Organizations

The Taft-Hartley Act also extended potential liability to labor organizations for engaging in unfair labor practices.[87] Originally, the NLRA only contemplated unfair labor practices by employers.[88] The amendment made employers and unions equal under the NLRA.[89] Commentators believe the Wagner Act had not contemplated unfair labor practices by labor organizations because at the time, they had no power to implement them.[90] However, because Congress enacted the NLRA with the purpose of empowering unions, it seems likely that Congress considered the implications of the unions' potential new-found power.[91] Congress did in fact contemplate curtailing the power of unions, but "rejected this view . . . on the ground that since labor organizations exist for the purpose of organizing employees, while employers should not be concerned with questions of organization."[92]

Ultimately, the Taft-Hartley Act placed the process of collective bargaining under Board regulation.[93] Its enactment reflected the shift in view from a belief that unions help the "free flow of commerce," to the view that unions inhibit commerce and that their power needs to be restricted.[94] However, the NLRA as it stands today still states the original purpose of the Wagner Act—thus, courts should interpret the NLRA consistent with Congress' intent.[95] Courts should interpret the addition as simply stating that some labor organization practices may have the effect of obstructing commerce, resulting in Congress placing

85. 29 U.S.C. § 151.

86. *See* Gross, *supra* note 78, at 13.

87. 29 U.S.C. § 158.

88. Jerome S. Wohlmuth & Rhoda P. Krupka, *The Taft-Hartley Act and Collective Bargaining*, 9 MD. L. REV. 1, 6 (1948).

89. Guy Farmer, *The NLRB: Its Past, Present and Future*, 23 TENN. L. REV. 112, 113–14 (1954).

90. *Id.*

91. *See* Cox, *supra* note 39, at 24–25 ("[W]hen the Wagner bill was before Congress, it was argued that labor organizations should be prohibited to the same extent as employers from interfering with, coercing, and restraining employees in the exercise of their rights.").

92. *Id.*

93. Wohlmuth & Krupka, *supra* note 88, at 2.

94. *Supra* Part II.C.1.

95. Dannin, *supra* note 66, at 262–63.

limitations on labor practices by labor organizations.[96] This finding can coexist with Senator Wagner's policy goals, as Congress' preservation of the original purpose clause in the NLRA demonstrates.[97]

The Taft-Hartley Act changed courts' interpretation of the NLRA,[98] but the conservation of the original purpose clause demonstrates that meaningful collective bargaining is still an important policy behind the NLRA.[99] Taft-Hartley's NLRA purpose clause addition does not undermine the importance of collective bargaining and its necessity to keep the economy balanced.[100] The NLRA's purpose is to promote meaningful collective bargaining between employees and employers; this finding justifies the importance of empowering employees of franchisees with collective bargaining power.[101]

III. THE BUSINESS-FORMAT MODEL AND WHY IT SHOULD BE REGULATED UNDER THE NLRA

Two predominant franchise business models exist: (1) the traditional franchise and (2) the business-format franchise.[102] Generally, the traditional franchise involves sale of a final good from franchisors to franchisees.[103] Franchisors with a business-format franchise model offer an entire business-format to their franchisees.[104] Therefore, the two differ in how much guidance the franchisee gets from the franchisor when it purchases a franchise.[105] Because of the larger amount of guidance in the business-format franchise, franchisors directly and indirectly make employment decisions regarding the employees of the franchisees.[106] Thus, franchisors make these decisions without any legal

96. *See id.* at 262 (stating that the Taft-Hartley Act should be read as "exist[ing] within the framework of the NLRA rights").

97. *1947 Taft-Hartley Substantive Provisions*, *supra* note 40.

98. *See* Cox, *supra* note 39, at 45 (stating that "[t]he greatest danger in the amendments, however, lies less in the actual changes in the statute than in the philosophy on which they are based").

99. *See 1947 Taft-Hartley Substantive Provisions*, *supra* note 40 (demonstrating that the original findings clause is still intact).

100. *See* Dannin, *supra* note 66, at 262–63 (noting that the Taft-Hartley amendment should not be read as undermining the original policy goals of the NLRA).

101. *See infra* Part III.B.

102. Francine Lafontaine & Roger D. Blair, *Article: The Evolution of Franchising and Franchise Contracts: Evidence from the United States,* 3 ENTREPRENEURIAL BUS. L.J. 381, 383–84 (2009).

103. *Id.* at 385.

104. Byron E. Fox & Henry C. Su, *Franchise Regulation—Solutions in Search of Problems?*, 20 OKLA. CITY U. L. REV. 241, 249 (1995).

105. *See* Lafontaine & Blair, *supra* note 102, at 385 (2009) (describing a traditional franchise). *But see* Fox & Su, *supra* note 104, at 249 (1995) (describing a business-format franchise).

106. *See* Amicus Brief of General Counsel, *supra* note 5, at 14–15 (stating that franchises presently exercise more control over franchisees, such that they are a necessary party to meaningful collective bargaining).

responsibility for labor violations under the current joint employer doctrine.[107] Because franchisors are not considered employers of the franchisees' employees, the franchisee employees do not have a chance to discuss the parameters of their employment with the franchisors the parties that truly control the labor decisions.[108] Consequently, the franchisee employees are left without the ability to engage in meaningful collective bargaining that the NLRA guarantees to them.[109] This is why the design of business-format franchises warrants the judicial declaration such franchisors' statuses as joint employer.

A. The Business-Format Franchise

In the business-format franchise, "a franchisor, instead of merely licensing the right to distribute and sell a branded product, offers a complete 'business-format' to its franchisees for a substantial fee, with the franchisees bearing most of the business development costs."[110] The distinction between the traditional franchise and the business-format franchise is that franchisors of a traditional franchise simply offer a trademarked product, whereas business-format franchisors offer a product as well as the marketing and business scheme.[111] The business-format is advantageous to franchisees because it lowers the costs of entering the market.[112] Those who want to enter a franchise deal know that the public is familiar with the product or service they are going to offer.[113] The business-format franchise is also advantageous to franchisors because the franchisees are familiar with the local economy, which makes it more likely that the franchises will be profitable.[114] For example, McDonald's affords people the opportunity to enter the market with a product and service that has been successful with the public.[115] McDonald's, the franchisor, also benefits from the

107. *See id.* (noting that under the current joint employer definition, franchisors are not held liable for labor violations of their franchisees employees).

108. *See* Richard F. Griffin, Jr., Gen. Counsel, Nat'l Lab. Rel. Bd., Keynote Address at West Virginia University College of Law's Labor Law Conference: Zealous Advocacy for Social Change (Oct. 24, 2014), *available at* http://wvulaw.mediasite.com/Mediasite/Play/31e143f0990647558b0268e9086ca3e4 [hereinafter Keynote Address at WVU] (on file with *The University of Pacific Law Review*) (stating that McDonald's employees are sent home as a result of a decision made by franchisors).

109. *See* 29 U.S.C. § 151 (2014) (stating the findings clause of the NLRA and its purpose to promote meaningful collective bargaining).

110. Fox & Su, *supra* note 104, at 249.

111. *See* Lafontaine & Blair, *supra* note 102, at 385 (describing a traditional franchise). *But see* Fox & Su, *supra* note 104, at 249 (describing a business-format franchise).

112. Fox & Su, *supra* note 104, at 252.

113. *Id.* at 252 ("The business-format generally results in lower risks of small business failure because the franchisee establishes and operates his business in strict conformance with the format").

114. *Id.* at 251.

115. *See id.* at 252 (stating generally how business format franchises work and that McDonald's is an example of one).

franchisee's localized knowledge of the market.[116] This guaranteed profitability allows the franchise to expand rapidly.[117] The business-format model offers potential for large profits to both parties, which explains its growing popularity.[118]

B. The Business-Format Franchise and the NLRA

Though the concept for the business-format model developed in the 1890s, it did not become popular until the 1950s—fifteen years after Congress enacted the NLRA.[119] This begs the question of whether Congress would have intended the NLRA to cover modern business-format franchisors as employers had they existed in 1935.

Congress enacted the NLRA to provide workers with a way to collectively bargain with employers.[120] Wagner wanted the Act to adapt as the marketplace changed.[121] Even though labor problems today are not identical to those in the 1930s, the continuous strikes over the last two years by fast food workers demonstrate worker dissatisfaction resembling the industrial strife in existence when Congress enacted the NLRA: both stemming from a lack of worker recognition.[122] Therefore, it seems likely that Congress intended the NLRA to encompass the modern franchise because employees of franchisees should be enabled to collectively bargain with franchisors.

C. The Business-Format Franchise and the NLRA after the Taft-Hartley Act

Although courts began interpreting the NLRA as if the Taft-Hartley Act weakened the importance of collective bargaining, the amendment left the statement of the importance of collective bargaining in the NLRA.[123] The Taft-Hartley Act added that some labor organization practices negatively impact interstate commerce.[124] However, Congress knew and contemplated the fact that strikes obstruct interstate commerce.[125] In fact, NLRA legislators recognized collective bargaining as a solution to strikes.[126] Studies had shown that strikes

---

116. *Id.*

117. *Id.* at 251.

118. *See* Lafontaine & Blair, *supra* note 102, at 386 (stating that the business-format franchise became popular in the US and Canada, and eventually all over the world).

119. *Id.* at 385–86. *See also* National Labor Relations Act, *supra* note 32.

120. *Supra* Part II.

121. See *supra* note 33 and accompanying text.

122. *See* Cox, *supra* note 39, at 2 (noting that strikes resulted from a lack of collective bargaining and non-recognition by employers).

123. Gross, *supra* note 78, at 11.

124. *1947 Taft-Hartley Substantive Provisions*, *supra* note 40.

125. Cox, *supra* note 39, at 3.

126. *See id.* (stating that Congress had recognized through a study in 1894 that "interference with employee organization and denials of recognition were prime causes of industrial disputes").

resulted from workers frustrated by their lack of recognition from employers.[127] This is why NLRA legislators encouraged collective bargaining as a means to increase employers' worker recognition and, in turn, to reduce strikes.[128] Under this interpretation, the Taft-Hartley Act aligns perfectly with the original intent of the NRLA and the importance of collective bargaining still stands strong.[129]

D. Franchisors Manipulating the Business-Format Franchise to Avoid Labor Violations

The franchise business-format model promotes rapid expansion of companies.[130] The difference today is that the franchise model allegedly leaves all employment decisions to the franchisees.[131] Franchisors claim no legal responsibility to collectively bargain with employees of franchisees because they have no control over working conditions in the franchises.[132] The model only allows employees to produce a company's product and wear the company's symbols.[133] Franchisors state that franchisees make the employment decisions for their workers, and the franchisee's control is generally enough to separate liability of the franchisor.[134] This may be true of the traditional franchise, where franchisees are simply provided with a product; but with a business-format franchise where the franchisor provides a franchisee with an entire model of how to do business, the idea that the franchisor has no control over employment is far-fetched.[135] The General Counsel of the NLRB, Richard Griffin, confirmed this finding by stating that the modern franchises exert more control over their employees than franchisors exercised in previous decisions.[136] The level of control franchisors exert over franchisees and their employees is so great that franchisors have become an indispensable party to any.[137] Griffin also suggests that rapid expansion of the modern franchise model may be partially attributed to the fact that franchisors embraced the ability to indirectly control employment

127. *See* Keyserling, *supra* note 33, at 218 (explaining Wagner's intent when enacting the NLRA).

128. *See id.* (explaining Wagner's understanding of workers frustration with lack of recognition).

129. *See 1947 Taft-Hartley Substantive Provisions, supra* note 40 (stating the intent of the Taft-Hartley Act was to stop obstructive labor organization practices).

130. Fox & Su, *supra* note 104, at 251.

131. Amicus Brief of General Counsel, *supra* note 5, at 14.

132. *Id.* at 14–15.

133. Fox & Su, *supra* note 104, at 251.

134. *See* Amicus Brief of General Counsel, *supra* note 5, at 14–15 (stating that the General Counsel does not wish to overturn decisions where control of franchisors exercised over franchisees is to ensure brand quality).

135. *See id.* (recognizing they did not have the intent to overrule franchise decisions in which control was to protect brand quality). See Part IV.D.2 for a more in-depth analysis of a joint employer standard being applied to a traditional franchise.

136. *Id.*

137. *Id.*

matters without the liability of labor violations.[138] These findings solidify the conclusion that the enactors of the NLRA would have meant for the Act to encompass the modern business-format franchise.

E. The NLRB's Decision to Establish McDonald's as a Joint Employer Reflects the Original Intent of the NLRA

During a keynote speech to law students at West Virginia University, Griffin gave insight into the Board's decision to establish McDonald's as a joint employer.[139] He stated that McDonald's has more everyday involvement with its franchisees than most other franchises.[140] Software has made it possible to monitor various activities in the franchises at any given time.[141] Griffin gave an example of how McDonald's monitors the number of customers being served and employees working.[142] The software contains algorithms that tell the franchisor when a particular franchise is not cost efficient and the franchisee has "to start sending [employees] home."[143]

If an employee is sent home because the franchisor's software determined it was the most cost-effective way to do business that day, any negotiating the employee does with the franchisee will not affect that decision, because it was not the franchisees' decision—it was the franchisor's.[144] Senator Wagner often stated that the purpose of the NLRA was "to make the worker a free man."[145] When a worker is told to go home and is powerless to change the decision, Senator Wagner's goal, and the purpose of the NLRA, is not met.[146] Every worker deserves the opportunity to engage in collective bargaining and reserve some autonomy in the workplace.[147]

F. Why Franchises Do Not Want to be Held Jointly Liable for Labor Violations

Franchises fear the NLRB's decision finding McDonald's a joint employer with its franchisees, because of the consequences the decision brings to all

---

138. *Id.*

139. Keynote Address at WVU, *supra* note 108.

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *See* Amicus Brief of General Counsel, *supra* note 5, at 14–15 (stating that the franchise model exercises control over employees, but does not allow them to collectively bargain with those that are making their employment decisions).

145. Keyserling, *supra* note 33, at 215.

146. *Id.* at 215–16.

147. *See* Cox, *supra* note 39, at 3 (stating that strikes increase when workers are not recognized by employers).

modern business-format franchises.[148] If courts determine that McDonald's is a joint employer, then it will be held jointly liable for any labor violations the franchisees commit.[149] As a result, franchisors believe they will have to make business changes that will ultimately undermine the entire franchise model.[150] However, if the current franchise system developed to allow franchisors to retain control over franchisees' employees without being amenable to suits under the NLRA, as suggested above, workers' rights will better be protected if the franchise system operates differently.[151]

IV. THE DEVELOPMENT OF THE JOINT EMPLOYER DOCTRINE

The NLRA includes in its definition of employer, "any person acting as an agent of an employer."[152] Whether a franchisee is an agent of the franchisor is a complex question that has led courts to develop the joint employer doctrine.[153]

The Board would have to establish that the franchisor and franchisee are joint employers before a franchisor could be liable to franchise employees for alleged labor violations.[154] The National Labor Relations Board developed its current definition of 'joint employer' in both *TLI* and *Laerco*:[155]

> 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. Whether an employer possesses sufficient indicia of control over petitioned-for employees employed by another employer is essentially a factual issue. To establish joint employer status there must be a showing that the employer meaningfully affects matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction.[156]

148. *See* Trottman & Jargon, *supra* note 19 (stating that McDonald's plans to contest the joint employer allegations against them as they are improperly placed).

149. *See* 29 U.S.C. § 158 (2014) (stating the forbidden practices of employers).

150. Trottman & Jargon, *supra* note 19.

151. *See* Amicus Brief of General Counsel, *supra* note 5, at 5 (stating that there is a possibility the franchise model has developed into what it is today to avoid potential labor violations).

152. 29 U.S.C. § 152.

153. *See id.* (not defining joint employer); *see also* Laerco Transp. and Warehouse, 269 N.L.R.B. 324, 325 (1984) (referring to joint employer issue and not mentioning the NLRA).

154. *See* McGuire, *supra* note 20, at 238–39 (discussing the jurisdictional element of the NLRB's power to find a franchisor violated an employee of a franchisees rights under the NLRA requires a finding that the franchisee and the franchisor are joint employers).

155. TLI, Inc., 271 N.L.R.B. 798, 798 (1984); Laerco Transp. and Warehouse, 269 N.L.R.B. at 325.

156. Laerco Transp. and Warehouse, 269 N.L.R.B. at 324.

To be considered a joint employer, the narrow standard requires actual, direct control by both employers over the employees.[157] The General Counsel of the NLRB proposed a switch to an older definition of joint employer as an attempt to steer away from the new, stricter, standard of joint employer.[158] However, both definitions require a case-by-case analysis.[159]

A. Tracing the Roots of the Doctrine

The initial uses of the joint employer doctrine helped determine whether employees of franchises were able to effectively unionize, either at the term's inception, or under the traditional definition of joint employer. The Board has to find a franchisor to be a "'joint employer' within the meaning of the National Labor Relations Act [for the franchisor] to be liable for a violation of the NLRA."[160] The term, however, is not actually used in the NLRA.[161] The National Labor Relations Board developed its current definition of "joint employer" from two cases decided in 1984: *TLI* and *Laerco*.[162] In those two cases, the definition of joint employer was supported by multiple cases.[163] Two other decisions, *Condenser*[164] and *Hod Carriers*[165] have been cited as support for finding a joint employer relationship, but neither actually uses the term.[166] Therefore, it is likely that these two cases were decided before the term was popularly used to determine employer status under the NLRA.[167] *Condenser* and *Hod Carriers* help explain how courts initially examined factual situations that would trigger a joint employer analysis in courts today.[168]

---

157. *See id.* at 325 ("There must be a showing that the employer meaningfully affects matters relating to the employment relationship.").

158. Amicus Brief of General Counsel, *supra* note 5, at 16–17.

159. *See id.* at 4 ("determining joint-employer status has always been a factual issue regardless of how the Board has defined the standard.").

160. N.L.R.B. v. Browning-Ferris Indus., Inc., 691 F.2d 1117, 1119 (3d Cir. 1982).

161. 29 U.S.C. § 152.

162. *See* TLI, Inc., 271 N.L.R.B. 798 (1984) (stating the current definition of joint employer); *see also* Laerco Transp. and Warehouse, 269 N.L.R.B. 324 (1984) (stating the current definition of joint employer).

163. *See* TLI, Inc., 271 N.L.R.B. at 802 (citing N.L.R.B. v. Browning-Ferris Indus., Inc., 691 F.2d 1117, 1119 (3d Cir. 1982) and Laerco Transp. and Warehouse, 269 N.L.R.B. 324 (1984)) (using the standards created by the cited cases when stating its joint employer definition).

164. N.L.R.B. v. Condenser Corp. of Am., 128 F.2d 67, 71 (3d. Cir. 1942).

165. Hod Carriers Local 300 (Austin Co.), 101 N.L.R.B. 197 (1952).

166. *See Condenser Corp.*, 128 F.2d at 67 (not using the term joint-employer); *see also Hod Carriers*, 101 N.L.R.B. 197 (1952) (also not using the term joint-employer).

167. *See Condenser Corp.*, 128 F.2d at 67.

168. *See infra* Part IV.C.

B. Analyses of Condenser *and* Hod Carriers

In *Condenser*, the Third Circuit Court of Appeals confronted the problem of two separate corporations charged with violations under the NLRA.[169] The Board sought to enforce an earlier labor violation ruling against Condenser and Cornell—Condenser being a "wholly owned subsidiary of Cornell."[170] Cornell acquired materials and sold them to Condenser, who in turn produced goods that Cornell would purchase and sell on the market.[171] Cornell alleged that the corporation was not a proper target in the suit because they were "not an employer within the meaning of Section 2(2) of the Labor Relations Act."[172] The court disagreed with this argument.[173] The court found that because the company constituted one enterprise in the distribution of their products, the relative arrangement of the employees between the two corporations was irrelevant.[174] The two corporations simultaneously "[acted] as employers of those employees and together actively [dealt] with labor relations of those employees,'" and thus, both were liable under the NLRA.[175] However, this case was decided before courts drew the distinction between a "single employer" and a "joint employer."[176] The present day establishment of the "'single employer' relationship exists where two nominally separate entities are actually part of a single integrated enterprise so that, for all purposes, there is in fact only a 'single employer.'"[177] If that distinction existed at the time *Condenser* was decided, it would instead fall under a "single employer" rather than a "joint employer" analysis.[178]

In *Hod Carriers*, the Board found an independent company liable for violations of the NRLA.[179] Austin, a construction company, contracted with Pinkerton to supply guards for a construction project.[180] Employees of Austin, who were also members of the Local 300 union, objected to the presence of the guards because they were not a part of Local 300.[181] In response, Austin cancelled

169. *Condenser Corp.*, 128 F.2d at 71.

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.* (quoting N.L.R.B. v. Pennsylvania Greyhound Lines Inc., 303 U.S. 261, 263 (1938)).

176. *See* N.L.R.B. v. Browning-Ferris Indus., Inc., 691 F.2d 1117, 1122 (3d Cir. 1982) (noting that there has been "a blurring of concepts" regarding the concepts of 'single employer' and 'joint employer').

177. *Id.*

178. *See id.* (using the same language of 'single integrated enterprise' to describe 'single employer' as was used to describe the relationship between Condenser and Cornell); *see also* Condenser Corp. of Am., 128 F.2d at 71 (describing the relationship between Condenser and Cornell as one "where in fact the production and distribution of merchandise is one enterprise").

179. *Austin Co.*, 101 N.L.R.B. 1257, 1258 (1952).

180. *Id.*

181. *Id.*

the contract with Pinkerton.[182] The Pinkerton guards filed suit against Austin for violating the NLRA.[183] Austin responded that the NLRA only applied to them in relation to their own employees.[184] However, the Board looked at the construction of the NLRA and found to the contrary.[185] They held that while particular sections of the NLRA did restrict application to employers and their respective employees, section 8(a)(3) did not restrict application of the statute to employers in this manner; therefore, the NLRA was applicable, even though the guards were not employees of Austin.[186]

The Board recognized that Austin had to terminate the employment contract because the guards assigned were not affiliated with the Local 300 union.[187] In affirming the Trial Examiner's holding that Austin was amenable to suit under the NLRA, the Board "did not adopt his broad rationale to the effect that conduct of any employer which results in coercion of any employee necessarily constitutes unfair labor practice."[188] The Board restricted its finding to section (a)(3) because the statutory language does not include a restriction specific to "[the employer's] employees."[189] However, other sections, notably section (a)(5),[190] do limit application to "[the employer's] employees," making it unlikely that this case' would apply to those sections of the NLRA.[191]

The statutory construction analysis used in *Hod Carriers* would not turn out well for employees of franchisees attempting to unionize for the purpose of collective bargaining.[192] The Board specifically rejected the use of section (a)(5), which forbids employers "to refuse to bargain collectively with the representative of *his* employees."[193] The guards were not considered employees, so the Board would not honor a case where the Pinkerton guards tried to collectively bargain with Austin.[194] Presently, franchisors are not considered employers of their franchisees' employees.[195] Therefore, under *Hod Carrier's* reasoning, it would be

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.* at 1258–59.

186. *Id.* at 1259.

187. *Id.*

188. *Id.* at 1260.

189. *Id.* at 1259; 29 U.S.C. § 158 (a)(3) (2014).

190. 29 U.S.C. § 158 (a)(5) states "to refuse to bargain collectively with the representatives of his employees."

191. *Austin Co.*, 101 N.L.R.B. 1257, 1259 (1952) (noting that the Board was limiting the Trial Examiners decision).

192. *See id.* (finding Austin guilty of violation of NLRA because section 158 (a)(3) does not restrict violations to "[employer's employees]").

193. 29 U.S.C. § 158 (a)(5) (emphasis added); *Austin Co.*, 101 N.L.R.B. at 1259.

194. *See id.* (pointing out that 29 U.S.C. § 158 (a)(5) does restrict to "[employer's employees]," making it unlikely that it would extend their holding to a collective bargaining case).

195. *See* Daniel Fisher, *California Supreme Court Rejects Obama Administration Theory on Franchise Employees*, FORBES (Aug. 28, 2014), *available at* http://www.forbes.com/sites/danielfisher/2014/08/28/

impossible for employees of franchisees to collectively bargain with franchisors without a new definition of "joint employer."

C. Interim Developments: The Board's Decision in Browning-Ferris *and Why This Standard is Favorable, but Will Not Help Employees of Franchisees to Unionize*

Under the traditional standard, as set forth by the General Counsel of the National Labor Relations Board:

> [A]n entity was a joint employer where it exercised direct *or* indirect[196] control over significant terms and conditions of employment of another entity's employees; where it possessed the unexercised potential to control such terms and conditions of employment; or where 'industrial realities' otherwise made it an essential party to meaningful collective bargaining.[197]

The Board, in deciding *Browning-Ferris* in 2015, called for amici to brief on the question of whether the Board should return to the traditional standard, or continue to adhere to the standard as laid out in *TLI* and *Laerco*.[198] In his Amicus Brief to the Board, the General Counsel stated his intent to reinstate the traditional standard for determining joint employer status.[199] The traditional standard is relatively broad in comparison to the current standard.[200] Congress enacted the NLRA with the intent that courts would interpret the term "employer" broadly.[201] The General Counsel asserted that the best way to achieve these goals is to return to the traditional standard.[202]

The Brief addressed current problems in meaningful collective bargaining, one of which is the franchise model.[203] This showed that the General Counsel intends to allow collective bargaining between franchisees' employees and franchisors.[204] The Board appeared to adopt the General Counsel's position and

---

california-supreme-court-rejects-obama-administration-theory-on-franchise-employees/ (on file with *The University of the Pacific Law Review*) (discussing the California Supreme Court's recent rejection of the franchisor Domino's being responsible for the act of an employee of one of its franchisees).

196. Note that under the current definition, control must be direct. *See* Laerco Transp. and Warehouse, 269 N.L.R.B. at 325 (1984) ("There must be a showing that the employer meaningfully affects matters relating to the employment relationship.").

197. Amicus Brief of General Counsel, *supra* note 5, at 4–5.

198. *Browning-Ferris Industries*, __ N.L.R.B. __, Case 32-RC-109684, 1.

199. *Id.* at 17.

200. *See id.* at 4 (stating that the current definition is much narrower than the traditional approach).

201. *Id.* at 9–10.

202. *Id.* at 4.

203. *Id.* at 14.

204. *See* Amicus Brief of General Counsel, *supra* note 5, at 14–15 (stating that the current amount of control exerted over franchises essentially allows franchisors to control employees of franchisees).

found that the expansion of workplace arrangements warranted revisiting the joint employer standard.[205] The Board stated that it may find a joint employer relationship exists if "two or more entities are joint employers of a single work force if they are both employers within the meaning of the common law,[206] and if they share or codetermine those matters governing the essential terms and conditions of employment."[207] The Board detailed that it "will no longer require that a joint employer not only possess the authority to control employees' terms and conditions of employment, but must also exercise that authority, and do so directly, immediately, and not in a 'limited and routine' manner."[208] The Board then expressly stated that it overruled *TLI* and *Laerco*, as well as any other Board decisions to the extent that they are inconsistent with their current ruling.[209] However, the Board then stated, "[t]he existence, extent, and object of a putative joint employer's control, of course, all may present material issues."[210] The Board applied the new standard to the facts presented in the case.[211] This suggests that the Board will continue to use a case-by-case analysis.

Although the new broader standard will likely classify the McDonald's franchisor-franchisee relationship as a joint employer relationship, the case-by-case factual determination will make unionization efforts difficult for franchisee employees.[212] The problem with using a case-by-case analysis to establish a union is that before employees of a franchisee will be able to establish a legal right to collectively bargain with a franchisor, they will have to establish that the franchise they work for is a joint employer with the franchisor.[213] Most franchises use standardized contracts, with almost no difference in form from franchise to franchise.[214] The identical contracts may make it easier to present a case, but there are factors besides the contracts that are examined under the analysis as well.[215] When other factors are present, it will be easier for large franchisors to draw out

205. *Browning-Ferris Industries* at 11.

206. The opinion details that under common law standards, "the right to control is probative of an employment relationship—whether or not that right is exercised." *Id.* at 13. The opinion discusses several restatements, and then states that the courts, in imposing the traditional standards, have always imposed a common law employment relationship definition. *Id*. at 13–14.

207. *Id.* at 15.

208. *Id.* at 15–16.

209. *Id.* at 16.

210. *Id.*

211. *Id.* at 18–20.

212. *See id*. (stating that different cases present "material issues").

213. *See* McGuire, *supra* note 20, at 239 (explaining that the threshold question is "whether or not the franchisor will be characterized as an employer of the interest group which the union seeks to represent").

214. Lafontaine & Blair, *supra* note 102.

215. *See* Amicus Brief of General Counsel, *supra* note 5, at 16–17 (stating that to find joint employer status, the Board should look at "the totality of the circumstances, including the way the separate entities have structured their commercial relationship").

litigation using minor discrepancies between franchises.[216] Therefore, any definition of joint employer that involves a case-by-case analysis will make unionizing unnecessarily difficult for employees of all franchisees.[217]

V. THE NEED FOR A FRANCHISE-BY-FRANCHISE DOCTRINE

Part III of this Comment established that, under the original intent of the NLRA, meaningful collective bargaining needs to take place between franchisors and employees of franchisees in modern franchises.[218] The traditional standard the General Counsel presented as the solution to foster collective bargaining is not sufficient because it does not allow union formation.[219] Unions and labor organizations are vital for employees engaging in the collective bargaining process.[220] The joint employer definition should still be based on the totality of the circumstances and indirect effect tests, but instead of requiring a case-by-case analysis, the definition should require a franchise-by-franchise analysis. This Part will define the franchise-by-franchise doctrine and then apply it to a traditional franchise, a business-format franchise, and a distributorship.[221]

A. The Franchise-by-Franchise Analysis Doctrine

The franchise-by-franchise doctrine will encompass the same factors used in the *Browning-Ferris* decision: (1) whether the franchisors are exercising any kind of control over the employees of franchisees and (2) whether there is "potential to control terms and conditions of employment."[222] Employees will have the burden to show that the franchisor exercises enough control such that meaningful collective bargaining cannot occur without the involvement of the franchisor.[223] If the employees are able to prove control is strong enough to establish a joint employer relationship, the joint employer relationship will be applied throughout the entire franchise. This means that every franchisee in the franchise would be considered a joint employer with the franchisor.

---

216. *See* Trottman & Jargon, *supra* note 19 (stating that McDonald's plans to contest the joint employer allegations against them, as they are improperly placed).

217. *See supra* Part IV.C.

218. *Supra* Part III.C.

219. *Supra* Part IV.C.

220. Dannin, *supra* note 66, at 251.

221. *Infra* Part V.A.

222. *Browning-Ferris Industries*, __ N.L.R.B. __, Case 32-RC-109684, 1, 13–15.

223. Application of a three-factor test will demonstrate how much control is necessary to develop a joint employer relationship. *See infra* Part V.B.

B. Applying the Franchise-By-Franchise Doctrine

The franchise-by-franchise doctrine will be applied to three different types of franchises: a traditional franchise, a business-format franchise, and a distributorship. The doctrine applied to a traditional franchise demonstrates a middle-ground where a joint employer designation will depend on the factual scenario.[224] The doctrine applied to a business-format franchise will generally return a joint employer finding.[225] The doctrine applied to a distributorship, a franchise that typically has no contractual support or training from its franchisor,[226] generally will not result in a joint employer relationship.[227]

1. Application of the Doctrine to a Traditional Franchise

A car dealership is the quintessential traditional franchise.[228] In the traditional franchise, "the franchisor is a manufacturer who sells finished or semi-finished products to its franchisees . . . [i]n turn, the franchisees resell these products to consumers or other firms in the distribution chain."[229] Franchisors retain control over various elements of the business, such as requiring a certain number of cars to be sold, requiring only parts from the manufacturer to be stocked at the dealership, and the overall appearance of the franchised store.[230] However, because the dealership is receiving a final product, the necessity for franchisors to control aspects of the franchisee dealership is minimal.[231] Brand quality is assured because the franchisor manufactures the product.[232]

Applying the first factor of the proposed joint employer test, which questions whether the franchisor has exercised any control over the franchisee, demonstrates a low level of control. The franchisor does not control the employees at the dealership; it merely maintains control over the appearance of

---

224. *See infra* Part V.B.1.

225. *See infra* Part V.B.2.

226. *See* BARBARA BESHEL, IFA EDUC. FOUND., AN INTRODUCTION TO FRANCHISING (2010), *available at* http://www.franchise.org/uploadedFiles/Franchise_Industry/Resources/Education_Foundation/introtofranchising_final.pdf (on file with *The University of the Pacific Law Review*) (stating that a distributorship is an alternative to franchising).

227. *See infra* Part V.B.3.

228. *See* Lafontaine & Blair, *supra* note 102, at 385 ("[T]raditional franchising in the United States is comprised largely of automobile dealerships, gasoline service stations, and soft-drink bottlers).

229. *Id.*

230. *See* Friedrich Kessler, *Automobile Dealer Franchises: Vertical Integration by Contract*, 66 YALE L. J. 1135, 1140–45 (discussing the amount of control that franchisors used to have over automobile dealerships, and how that amount has decreased).

231. *See* Lafontaine & Blair, *supra* note 102, at 385 (stating that traditional franchises typically receive the final product from the franchisor).

232. *See* Robert W. Emerson, *Franchising and the Collective Rights of Franchisees*, 43 VAND. L. REV. 1203, 1528 (1990) (stating that brand quality is still a legitimate reason for franchisors to direct control over franchisees).

the dealership.[233] Applying the second factor, regarding the capability of the franchisor to exercise control over the employees of the franchisee, weighs against a joint employer finding as well. Generally, dealership contracts do not contain clauses allowing the franchisor to control any aspect of employment.[234] In fact, franchisors intentionally keep clauses giving a franchisors' right to control franchisees' employees out of the contracts because they do not want to be responsible for labor violations.[235] Although it is unlikely that any franchise contract, including business-format contracts, contain such a clause,[236] the relevant distinction lies in the control necessary to maintain brand quality. In the traditional franchise, the need is low because the product has already been made.[237]

Employees may bring in evidence showing the way the entities have chosen to structure their relationship as well.[238] If there is sufficient evidence that the franchisor controls aspects of franchise employee's employment, the franchise will be deemed a joint employer. Once this declaration is made, the franchisor will be a joint employer with all of its franchisees. Therefore, under a broad definition of joint employer combined with application of the franchise-by-franchise doctrine, all employees of a traditional franchise will be able to unionize and collectively bargain with the franchisor.

2. Application of these Factors to the McDonald's Cases

The application of the first factor of the test comes out strongly in favor of the employees in the McDonald's cases. The General Counsel unearthed evidence that McDonald's would monitor business in real time and tell franchisees immediately how many employees to have on duty when business was slow.[239] This is a perfect example of a franchisor exercising control over the employment of franchisees' employees. The second factor, as stated above, will generally come out in favor of the franchise.[240] The franchise will always shy away from including any kind of contract clause that grants them control over

233. *See* BESHEL, *supra* note 226; s*ee also* Amicus Brief of General Counsel, *supra* note 5, at 4–5 (stating what traditional franchises typically exert control over).

234. Kessler, *supra* note 230, at 1140–45.

235. *See* Lafontaine & Blair, *supra* note 102, at 385 (stating that franchises know that clauses directly affecting employment of employees of franchisees will make them liable for employment violations).

236. *Id.*

237. *See* BESHEL, *supra* note 226 (stating that product distribution franchises, another common name for traditional franchises, simply distribute the franchisors finished product).

238. *Browning-Ferris Industries*, __ N.L.R.B. __, Case 32-RC-109684, 1, 13, n. 68.

239. *See* Keynote Address at WVU, *supra* note 108 (stating that McDonald's employees are sent home as a result of a decision made by franchisors).

240. *See supra* Part IV.D.2.

aspects of franchise employment because they are aware this may expose them to liability.[241]

However, due to the structure of the arrangement, it is clear that the franchisor has the opportunity to exercise control over the franchisees employees. McDonald's, the franchisor, called franchisees and told them to send some of their employees home.[242] Franchise owners then sent their employees home.[243] These employees cannot meaningfully bargain with franchisee owners to change this practice because it is not the franchisee owner making the decision, it is the franchisor.[244] The only way these employees can change the conditions of their employment is to negotiate with the franchisors. Therefore, McDonald's should be designated as a joint employer with all of its franchisees.

McDonald's is now clearly established as a joint employer with the franchisees that brought these cases under the franchise-by-franchise doctrine. The joint employer designation is justified here because McDonald's demonstrated its ability to control aspects of franchise employment decisions. This control needs to be balanced with the employees' ability to collectively bargain with the franchisor. Because McDonald's ability to control has been established, the workers' right to be protected through union representation need to be established. Thus, all employees of McDonald's franchisees will be able to collectively bargain with the franchisor.

3. Application to a Distributorship

A distributorship is a franchise that generally has no contractual support or training from its franchisor.[245] Because distributorships do not require a storefront, they generally do not need as much guidance as a traditional or business-format franchise.[246] Distributorship contracts between the franchisor and the franchisee only specify amounts of goods to be purchased.[247] Because franchisors do not exercise control over franchisees in distributorship contracts, there is no joint employer relationship.

---

241. *See* Trottman & Jargon, *supra* note 19 (stating that McDonald's plans to contest the joint employer allegations against them as they are improperly placed, demonstrating their fear of being held liable for labor violations).

242. *See* Keynote Address at WVU, *supra* note 108.

243. *Id.*

244. *See supra* Part III.D.

245. *See* BESHEL, *supra* note 226 (stating that a distributorship is an alternative to franchising).

246. *See id.* (stating that distributorships are generally companies such as Amway and Color Me Beautiful Cosmetics).

247. *See* Mack Mitsheva, *Difference Between a Franchise & a Distribution Agreement*, HOUSTON CHRON., *available at* http://smallbusiness.chron.com/difference-between-franchise-distribution-agreement-41153.html (last visited Feb. 5, 2015) (on file with *The University of the Pacific Law Review*) (stating that distributorships do not have control over the way products are sold).

VI. CONCLUSION

There is clearly worker dissatisfaction under the current franchise model; there have been multiple strikes in the last few years because of employment conditions.[248] The strikers are not just demanding higher wages; they are demanding the ability to unionize.[249] Congress enacted the NLRA to grant these rights to employees.[250]

The General Counsel's intent to allow collective bargaining for franchisee employees is clear.[251] This is further reflected in the Board's new decision in *Browning-Ferris*, which emphasized that one of the reasons for a broader joint employer standard is the ever evolving structure of workplace arrangements.[252] The only problem in its effort to empower workers of franchises is that the new definition of joint employer will make it difficult for franchisee employee's to unionize.[253] Any definition that continues to use a factual determination of joint employer status that will be ineffective in unionization efforts because of the difficulty posed by individually labeling each franchise a joint employer with its franchise. With the franchise-by-franchise doctrine, the goal of unionization is within reach. Once the ability to control is demonstrated over one franchisee, the franchisors' ability to control all of their franchisees is apparent. The franchise-by-franchise doctrine compensates for this ability to control by empowering employees of franchisees to unionize, and thus, to collectively bargain with their respective franchisors.

248. Greenhouse, *supra* note 1.

249. *Id.*

250. *Supra* Part III.

251. *Browning-Ferris Industries*, __ N.L.R.B. __, Case 32-RC-109684, 1, 11.

252. *Id.*

253. *Supra* Part IV.D.