Franchise Law Journal

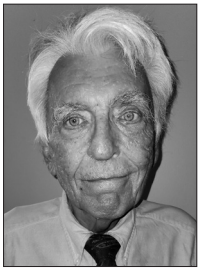
Published by the American Bar Association
Forum on Franchising

Volume 40, Number 1 Summer 2020

Joint Employers and the National Labor Relations Board: McDonald's Wins a Food Fight

Thomas L. Gravelle & Nicolas Guibert de Bruet

Foreword by Sally Lee Foley



Mr. Gravelle

Mr. Guibert de Bruet

Ms. Foley

Foreword

Franchising has been a significant presence in my professional career as a legal counselor. As the first woman editor of the *Franchise Law Journal*, its second Editor-in-Chief, and an American Bar Association Forum on Franchising leader multiple times, I feel that I must give back to the Forum on Franchising. In the spirit of Thomas Jefferson, who chose to memorialize at

Thomas L. Gravelle is an attorney and an arbitrator in Bloomfield Hills, Michigan. Nicolas Guibert de Bruet is a business and technology sectors attorney in Birmingham, Michigan. *The authors would like to thank Sally Lee Foley for the opportunity to write in the Fortieth Edition Symposium issue of the American Bar Association* Franchise Law Journal. *Her constant support and guidance in the production of this article were invaluable.*

Sally Lee Foley is a retired attorney in Bloomfield Hills, Michigan. From 1973 to 1975, she championed consumer protection laws as Assistant Attorney General in the Consumer Protection Anti-Trust Division of the Department of the Attorney General of the State of Michigan. Subsequently, she advocated for clients in private practice. She has previously served as Editor-in-Chief of the Franchise Law Journal *(then known as the* American Bar Association (ABA) Journal of the Forum Committee on Franchising*) from 1982 to 1984, member of the Governing Committee of the ABA Forum Committee on Franchising, co-chair of the fourth (1981, Chicago, Illinois) and tenth (1987, Tucson, Arizona) Annual Meetings of the ABA Forum Committee on Franchising and president of the National Association of Women Lawyers.*

Monticello his achievements for his fellow Americans and Virginians over the illustrious honors and gifts conferred upon him by those very same groups, I am choosing to introduce to the *Franchise Law Journal* the work of Thomas L. Gravelle and Nicolas Guibert de Bruet, rather than write about the history of the Forum on Franchising. These are men of extraordinary intellect and skill. This and their future contributions to the *Franchise Law Journal* will be a legacy that I will be sure to relish as time marches on. Appropriately, they had chosen some time ago to share with me, and now with the rest of the *Franchise Law Journal* readers of this Fortieth Edition Symposium issue, an article on the monumental co-employment ruling of the National Labor Relations Board in the case of *McDonald's USA, LLC, a joint employer, et al.*

Introduction

In 2015, McDonald's USA, LLC (McDonald's USA), arguably as a proxy for the entire franchising industry in the United States, found itself in the crosshairs of the United States National Labor Relations Board (NLRB or Board).[1] One of the primary duties of a franchisor is to protect its trademarks and service marks, which entails oversight of its franchisees.

In 2012, a group called the "Fast Food Workers Committee" (the Committee) had begun a campaign against McDonald's USA (and others) to unionize the employees of McDonald's franchisees. The Committee's efforts were supported by the Service Employees International Union (SEIU) and the NLRB General Counsel, an appointee of President Barack Obama. The NLRB General Counsel's goal was to have the NLRB designate McDonald's USA as a "joint employer" with its franchisees, under the National Labor Relations Act (hereafter, NLRA). If so, a franchisor would be vicariously liable to its franchisees' employees. For example, if the franchisee committed an unfair labor practice (ULP), or, if in privity with the labor union of those same employees, employees of the franchisee campaigned to be represented by a labor organization in the United States, then the franchisor could face potential additional liability.[2]

The following discussion addresses how, in 2015, McDonald's USA found itself charged by the NLRB, in what may likely be the largest case in the

1. The NLRB was created by the National Labor Relations Act (NLRA), 49 Stat. 449 (1935); 29 U.S.C. §§ 151–69.

2. The National Labor Relations Act, § 2(5), 29 U.S.C. § 152(5), broadly defines a "labor organization" as "any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers, concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work." 29 U.S.C. § 158(a) defines the ULP that an employer may solely commit. 29 U.S.C. § 159 outlines the NLRB's power to investigate and prosecute an ULP. Repeat ULP violators may be subject to contempt charges per the NLRB *Casehandling Manual for Unfair Labor Practice Proceedings* (Part 1, 10052.10, published December 2009). Additionally, the NLRB may impose unusual or far more burdensome penalties to repeat or flagrant ULP violators. *HTH Corp.*, 361 NLRB No. 65 (2014).

history of the NLRB, and how franchisors and franchisees thus far have avoided a significant expansion of the legal meaning of "joint employer." Partisanship among the Board members at the NLRB has long been noted.[3] The prosecution of McDonald's USA is a major example of partisanship at the NLRB.

I. The Campaign to Organize Franchisees from the Top Down

In the private sector of the United States economy, labor unions now represent about 6.2% of active employees across all industries.[4] This amounts to a decline of 4.5 million labor union members from 16.8% in 1983, a period of time in which the number of private sector wage earners increased from 71 million to over 120 million.[5] In the private sector, organized labor has been seeking ways to reverse these membership declines, and it has looked at the NLRB for support. Organized labor is active in politics and has predominantly contributed to the Democratic Party for many years.[6]

In 2012, the Fast Food Workers Committee began its "Fight for $15," a nationwide organizing campaign for higher wages. A major target of the campaign has been the McDonald's franchise system in the United States, for which McDonald's USA is the franchisor entity. A goal of the campaign was for the NLRB to rule that McDonald's USA is a joint employer with its franchisees. The dissenting NLRB member in the *McDonald's USA, LLC, a joint employer, et al.* case (*McDonald's*) explained the importance of the issue:

> The heart of this proceeding is the allegation that McDonald's [USA] is a joint employer with certain franchisees. A finding of joint-employer status, of course, would have important collateral consequences for McDonald's [USA], in both unfair labor practice proceedings involving its franchisees and in possible representation cases, if workers employed at McDonald's franchisees sought to organize. The prospect of such consequences makes this a case with very high stakes.[7]

---

3. *See, e.g.*, Julius G. Getman & Bertrand B. Pogrebin, Labor Relations: The Basic Processes, Law and Practice 6 (1988):

> B. The Disappointing Performance of the NLRB
>
> The vision of labor law policy established through the vehicle of an expert Board knowledgeable about labor relations and supportive of collective bargaining has never been realized. There are a variety of reasons why the Board so little resembles the vision of its earliest advocates. One is the political nature of the appointments process, which sometimes has been used to reward labor for its support and sometimes has been used as a way of punishing labor for opposing the President's policies. . . . Those with reputations as neutral experts have rarely been asked, and when asked, have generally declined.

4. U.S. Bureau of Labor Statistics News Release USDL-20-0108 (Jan. 22, 2020) (providing 2019 union membership statistics).

5. Megan Dunn & James Walker, *Spotlight on Statistics: Union Membership in the United States*, U.S. Bureau of Labor Statistics (Sept. 2016).

6. *See, e.g.*, Brody Mullins, Rebecca Ballhaus & Michelle Hackman, *Labor Unions Step up Presidential-Election Spending*, Wall St. J., Oct. 18, 2016, http://www.wsj.com/articles/big-labor-unions-step-up-presidential-election-spending-1476783002

7. McDonald's USA. LLC, 368 N.L.R.B. No. 134 (Dec. 12, 2019) (Board order remanding to ALJ with instructions to approve settlement agreements) [hereinafter Order Remanding].

II. President Barack Obama's NLRB General Counsel Appointee Joins the Campaign

The NLRB General Counsel is "appointed by the President, by and with the advice and consent of the Senate, for a term of four years."[8] The position includes the following powers:

> The General Counsel of the Board shall exercise general supervision over all attorneys employed by the Board (other than administrative law judges and legal assistants to Board members) and over the officers and employees in the regional offices. He shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of [unfair labor practice] complaints under section 160 of this title, and in respect of the prosecution of such complaints before the Board, and shall have such other duties as the Board may prescribe or as may be provided by law.[9]

In turn, Regional Directors are appointed by the NLRB.[10] On December 19, 2014, six Regional Directors under the direction of General Counsel Richard F. Griffin, Jr., issued six separate complaints against McDonald's USA, McDonald's Restaurants of Illinois, and twenty-nine franchisees in six major American cities. The complaints alleged that McDonald's franchisees had committed 181 unfair labor practices, "including three discharges, suspensions, reduction of hours, surveillance, threats, promises of benefits, and interrogation, among others."[11] The complaints also alleged that McDonald's USA was equally liable, even though McDonald's USA had committed no violations. The December 2019 Order of the NLRB majority explains:

> Although the complaints do not allege that McDonald's [USA] independently violated the Act, they allege that McDonald's [USA] "possessed and/or exercised" sufficient control over the labor relations policies of the [f]ranchisees that it is a joint employer with the [f]ranchisees and, as such, can be held jointly and severally liable for unfair labor practices committed by the [f]ranchisees.[12]

In October 2017, General Counsel Richard F. Griffin, Jr.'s term ended; he was succeeded by a new General Counsel, Peter B. Robb, appointed by President Donald Trump. Further, the Obama majority Board was succeeded by the Trump majority Board.

III. The Hearing Before the NLRB Administrative Law Judge

At the onset of the case, the *McDonald's* Respondents submitted proposed full settlements of the ULP charges, with the proviso that McDonald's USA was not liable as a joint employer. The General Counsel Richard F. Griffin, Jr. and the Charging Parties rejected the proposed settlements because they

8. National Labor Relations Act, § 3(d); 29 U.S.C. §153(d).
9. *Id.*
10. *Id.* § 4(a).
11. Order Remanding, *supra* note 7
12. *Id.*

wanted to resolve the joint employer issue. The complaints then proceeded to hearing before the NLRB Administrative Law Judge (ALJ).

The hearing before the ALJ opened on March 30, 2015. In the following years, numerous hearing days were held, focusing primarily on McDonald's USA's alleged status as a joint employer. The ALJ explained:

> The parties gave their opening statements on March 10, 2016, and General Counsel began presenting witnesses on March 14, 2016. General Counsel called 52 current and former McDonald's [USA] employees to testify regarding various aspects of the relationship between McDonald's [USA] and its franchisees, including the Franchisee Respondents, over 78 days, concluding on January 26, 2017. General Counsel then called 34 witnesses in connection with the New York and Philadelphia unfair labor practice allegations, who testified over 24 days, concluding on May 23, 2017.
>
> . . . .
>
> On May 25, 2017, the New York Franchisees began presenting their direct case. The New York Franchisees presented 35 witnesses over 22 days, concluding on October 24, 2017.
>
> . . . .
>
> McDonald's [USA] began presenting its direct witnesses on October 30, 2017, and 15 of its witnesses had testified when the hearing adjourned on December 13, 2017.
>
> . . . .
>
> General Counsel presented 52 witnesses primarily addressing the joint employer issue over a ten month [sic] period. These witnesses testified for 78 days, and were [re]presented by seven attorneys for General Counsel. McDonald's [USA] presented 15 witnesses who testified for 14 days. These case presentations comprise the bulk of *the largest case ever adjudicated by this agency, and the longest hearing the agency has ever conducted.*[13]

After conducting the longest hearing on record, and spending years litigating the joint-employer question, on March 19, 2018, the new NLRB General Counsel and the Respondents submitted settlement proposals resolving all the cases, including the proviso that McDonald's USA was not a joint employer.

The settlement proposals were about the same as what the Respondents had offered at the commencement of this extraordinary labor case.[14] The difference? A new NLRB General Counsel appointed by President Donald Trump.

IV. The Decision of the ALJ Relies on an Expanded Definition of Joint Employer

On July 17, 2018, the ALJ issued an Order Denying Motions to Approve Settlement Agreements. The ALJ found the proposed agreements

13. App., Order Remanding, ALJ Order Denying Motions to Approve Settlement Agreements (July 17, 2018), *supra* note 7.

14. App., Order Remanding, *supra* note 7 (noting that "the Settlement Agreements . . . provide relief that largely could have been obtained in 2015").

unreasonable in large part because they did not include joint employer status for McDonald's USA.

A basis for this ruling was the novel formula of the previously composed NLRB, later overruled by the NLRB members appointed by President Donald Trump.[15] The short litigation history is described in a recent publication of the ABA's Forum on Franchising:[16]

In denying the proposed settlement agreements, the ALJ wrote:

> On August 27, 2015, the Board issued its *Browning-Ferris* decision. Thus, General Counsel *was no longer required to prove McDonald's [USA's] actual exercise*, as opposed to possession, of authority over terms and conditions of employment at the Franchisee Respondent locations, and was *no longer required to demonstrate McDonald's [USA's]* "*direct and immediate control*" over the work of employees at Franchisee Respondent locations in order to establish joint employer status.
>
> . . . .
>
> On December 14, 2017, the Board issued its decision in *Hy-Brand Industrial Contractors, Ltd.*, overruling *Browning-Ferris* and returning "to the principles governing joint employer status that existed prior to that decision"—the legal standard applicable when General Counsel issued the Consolidated Complaint herein. . . . . [On February 26, 2018,] the Board vacated its decision in *Hy-Brand Industrial Contractors, Ltd.*, reinstating the *Browning-Ferris* standard which would presumably be more advantageous to General Counsel.[17]

Hy-Brand was not reversed on the merits, but rather was vacated because one member of the 3-2 majority was recused, resulting in a 2-2 tie (which served to revive the 3-2 NLRB decision in *Browning-Ferris*). Accordingly, the ALJ rejected the settlement based on the *Browning-Ferris* standard.

V. The New NLRB Engages in Rulemaking to Restore and Clarify the Meaning of Joint Employer

The NLRA authorizes the NLRB to engage in rulemaking.[18] On September 14, 2018, following the circuitous procedural history in the *McDonald's* case, the NLRB issued its Notice of Proposed Rulemaking regarding the

15. *Compare* Browning-Ferris Indus. of Cal., Inc., 362 N.L.R.B. No. 186 (Aug. 27, 2015) (3-2 decision expanding meaning of joint employer), *with* Hy-Brand Indus. Contractors, Ltd., 365 N.L.R.B. No. 156 (Dec. 14, 2017) (3-2 decision expressly overruling *Browning-Ferris* and restoring less expansive meaning of joint employer). *Hy-Brand* was later vacated because one member had failed to recuse himself.

16. Heather Carson-Perkins & Trishanda Treadwell, Annual Franchise & Distrib. L. Devs. 2019, at 354–61 (2019) (In *Browning-Ferris*, the panel majority stated that "an entity could be considered a joint employer even if it did not exercise direct or immediate control and regardless of whether it exercised authority over the employees, so long as it possessed the authority to control them.").

17. App., Order Remanding, *supra* note 7.

18. National Labor Relations Act, § 6 ("The Board shall have authority from time to time to make, amend, and rescind, in the manner prescribed by subchapter II of chapter 5 of Title 5 [the Administrative Procedure Act], such rules and regulations as may be necessary to carry out the provisions of this subchapter.").

Standard for Determining Joint-Employer Status.[19] The proposal amended 29 C.F.R. pt. 103 as follows:

> § **103.40: Joint employers.**
>
> An employer, as defined by Section 2(2) of the National Labor Relations Act (the Act), may be considered a joint employer of a separate employer's employees only if the two employers share or codetermine the employees' essential terms and conditions of employment, such as hiring, firing, discipline, supervision, and direction. A putative joint employer must possess and actually exercise substantial direct and immediate control over the employees' essential terms and conditions of employment in a manner that is not limited or routine.
>
> . . . .
>
> Example 5 to § 103.40. Under the terms of a franchise agreement, Franchisor requires Franchisee to operate Franchisee's store between the hours of 6:00 a.m. and 11:00 p.m. Franchisor does not participate in individual scheduling assignments or preclude Franchisee from selecting shift durations. Franchisor has not exercised direct and immediate control over essential terms and conditions of employment of Franchisee's employees.
>
> Example 6 to § 103.40. Under the terms of a franchise agreement, Franchisor and Franchisee agree to the particular health insurance plan and 401(k) plan that the Franchisee must make available to its workers. Franchisor has exercised direct and immediate control over essential employment terms and conditions of Franchisee's employees.

After satisfying the notice and comment period for rulemaking, the NLRB joint employer rule officially became effective on April 27, 2020, thereby overruling the *Browning-Ferris* standard.

VI. The New NLRB Reverses the ALJ

By reason of the United States presidential appointment process, by late 2017 the Obama Board majority had been succeeded by the Trump Board majority. On December 12, 2019, while the rulemaking was pending before the NLRB, a panel majority reversed the ALJ and accepted the settlements agreed to by the new General Counsel and Respondents.[20]

In accepting the settlement agreements, the NLRB majority explained that the cases encompassed "over 150 hearing days over almost three years," and that further litigation would needlessly prolong the cases despite the fairness of the remedies in the settlement agreements:

> From the employees' point of view, the remedy they will receive under the settlement agreements is essentially identical to that which they would have received if the General Counsel's joint-employer theory had prevailed, except for a broader notice-posting requirement. This is especially true given that the complaint does not allege that McDonald's [USA] independently committed any unfair labor practices itself.[21]

19. Standards for Determining Joint Employer Status, 83 Fed. Reg. 46,681 (Sept. 14, 2018).

20. 368 N.L.R.B. No. 134 (Dec. 12, 2019) (Full case caption: "*McDonald's USA, a joint employer, et al. and Fast Food Workers Committee and Service Employees International Union, CTW, CLC, et al. Cases 02-CA-093893 et al.*").

21. Order Remanding, *supra* note 7.

The NLRB majority also explained that "the Board has generally not held franchisors to be joint employers with their franchisees." [22] As to *Browning-Ferris*, the NLRB majority explained that it was distinguishable on several grounds. First, on appeal to the Court of Appeals, *Browning-Ferris* was affirmed only in part.[23] Second, not only was *Browning-Ferris* not a franchise case, but also the *Browning-Ferris* NLRB majority "explicitly disclaimed an intent to address the joint-employer standard in the context of the relationship between a franchisor and a franchisee."[24] And finally, *Browning-Ferris* did not decide that a franchisor would be a joint employer by acting to protect its product or brand: "*Browning-Ferris* thus left open the question of whether the Board should continue to exempt franchisors from joint-employer status to the extent their control over employee working conditions is related to their legitimate interest in protecting the quality of their product or brand."[25]

Taking into consideration the viewpoint of the Franchisee Respondents, the NLRB majority wrote:

> The Franchisees agree with and adopt McDonald's [USA] arguments. They emphasize that they are small businesses with limited resources that have become unjustifiably embroiled in costly and time-consuming litigation over matters that have nothing to do with the mostly minor unfair labor practice charges against them, but instead relate to the previous General Counsel's desire to establish McDonald's [USA] as a joint employer.[26]

In accepting the settlements, the NLRB majority also relied on its proposed rule, which would clarify future NLRB law regarding joint-employer status, bringing to an end "this unique case":

> [T]he potential adverse impact on all parties of delay and expense from further litigation in a unique case such as this, which already ranks among the lengthiest and most complex proceedings in Board history—for the judge to update and clarify the case law on a matter that is now the subject of a proposed rulemaking—further demonstrates why it is appropriate for the Board to rule on the propriety of the settlement agreements now rather than in a subsequent review on exceptions to the judge's eventual decision.[27]

Later, in its Order, the panel majority added:

---

22. *Id.*; *see also*, *e.g.*, S.G. Tilden, Inc., 172 NLRB 752, 753 (1968) (finding that franchisor was not a joint employer, even though the franchise agreement dictated "many elements of the business relationship," because the franchisor did not "exercise direct control over the labor relations of [the franchisee] and "the requirement that the franchisees observe . . . standards set by [the franchisor] was merely to keep the quality and goodwill of the [franchisor's] name from being eroded").

23. Order Remanding, *supra* note 7, n.24 (citing Browning-Ferris Indus. of Cal., Inc. v. N.L.R.B., 911 F.3d 1195 (D.C. Cir. 2018)). Indeed, "[t]he court . . . found, that in applying the indirect-control factor, the Board failed to confine its analysis to indirect control over the essential terms and conditions of employment. The court accordingly remanded that aspect of the decision to the Board for it to explain and apply its test consistent with common-law limitations." *Id.*

24. *Id.* (citing *Browning-Ferris*, 362 N.L.R.B. at 1618 n.120).

25. *Id.* (citations and quotations omitted).

26. *Id.* n.24.

27. *Id.* n.15.

> Moreover, the Board's recent notice of proposed rule-making regarding the standard for determining joint-employer status, which issued after the judge's order, may render moot the utility of using this case as a vehicle to develop joint-employer law. The proposed rule specifically addresses elements of the franchisor/franchisee relationship [examples 5 and 6]. As the General Counsel points out, if the Board implements a new joint-employer standard through rule-making, it will likely supplant any standard arising from the litigation of these cases. As a result, a decision regarding joint-employer status may have limited precedential value.[28]

VII. President Donald Trump's Administration Is Developing Similar Joint Employer Rules for Other Federal Agencies

In January 2020, the United States Department of Labor (DOL) announced its Final Rule for determining "joint employer" status under the Fair Labor Standards Act (FLSA).[29] The FLSA requires minimum wage and overtime pay for hourly employees. The effective date of the new DOL FLSA rule was March 16, 2020.[30]

Like the NLRB rule, the DOL rule contains a four-factor balancing test. For franchisors, the factors are whether the franchisor hires or fires its franchisor's employee; supervises and controls the employee's work schedule or conditions of employment to a significant degree; determines the employee's rate of pay and method of payment; and maintains the employee's employment records.[31] Under the new test, a franchisor would avoid joint employer liability, if it did not engage in the day-to-day employment decisions of its franchisees.[32]

The United States Equal Employment Opportunity Commission is also proposing a joint employer rule.

VIII. Concluding Observations on Franchisor Liability Under Federal Labor and Employment Laws

It happens on occasion that conflicting political goals can lead to turmoil in a sector of the economy. In the authors' view, partisanship at the NLRB put the franchise business model at risk in the United States. If a franchisor with many franchisees were a joint employer, the franchisor easily could vicariously become a "repeat violator" although it had committed no unfair labor practice. Repeat violators are subject to more severe remedies and to adverse publicity. Despite the claims of the administration of President Donald Trump that it has aided the economy by eliminating administrative rules,

28. Order Remanding, *supra* note 7.
29. *See* 29 C.F.R. § 791 *et seq*.
30. *Id.*
31. *Id.*
32. *Id.*

the issue at the heart of the *McDonald's* case demonstrates that not all administrative rules are bad.

IX. Epilogue: Federal Rules Alone May Not Save the Franchise Business Model

The franchise business model in the United States may suffer a series of collateral attacks from state governments. While the new NLRB was working to resolve the *McDonald's* case, the state of California passed Assembly Bill 5 (AB5), which became effective January 1, 2020. Since the NLRB wields federal preemption on all labor union issues, California's AB5 instead considers franchisors joint employers for state wage and employment law provisions. For many such provisions, such as the minimum hour wage regulation, state governments in the United States federal system may require employers to comply with rules beyond those promulgated by the DOL and other federal agencies. This means that, while the NLRB rule prevents franchisee employees from organizing as a labor union and negotiating as a bloc against the franchisors, state law may negate the utility of any such federal protections: franchisors still can be held liable for a litany of other state employment regulations vis-à-vis franchisee employees.