Before the Subcommittee on Health, Employment, Labor and Pensions
Committee on Education and the Workforce
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"What Should Workers and Employers Expect Next from
the National Labor Relations Board?"

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Chairman Roe and Ranking Member Tierney and other members of the subcommittee, I would like to thank you for giving me the opportunity to testify this morning.

I understand that the question "what should workers and employers expect next from the National Labor Relations Board" is directed at two specific cases in which the NLRB recently called for amicus briefs: *Purple Communications, Inc.*, Cases 21-CA-095151, *et al.*, and *Browning-Ferris Industries of California, Inc. d/b/a/ BFI Newby Island Recyclery*, Case 32-RC-109684. All indications are that what workers and employers should expect is that the NLRB will decide these two cases by carefully applying established legal principles to the particular facts of each case and that, in so doing, the Board will attempt to provide legal guidance to workers and employers who encounter similar situations in the future. The two cases involve very different kinds of issues, and I will take up each in turn.

Purple Communications – in which the Board received amicus briefs

just last week – concerns employee communications with one another using their work email addresses. The NLRB's last attempt to address this issue came in *Register Guard*, 351 NLRB 1110 (2007), *rev'd in relevant part*, 571 F.3d 53 (D.C. Cir. 2009), where, as it has done in *Purple Communications*, the Board called for amicus briefs addressing a wide range of issues related to employee use of work email. That attempt failed. A divided Board ruled that the employer had violated the NLRA by certain prohibitions on the use of work email for NLRA protected communications but not by other prohibitions, and, in the end, the D.C. Circuit reversed the Board's decision insofar as it found the particular employer prohibition on union emails at issue in that case was lawful. That outcome has left employers and workers uncertain of when email communications on NLRA-protected topics are protected and when they are not.

The employer in *Purple Communications*, like the employer in *Register Guard*, allowed employees to use their work email addresses to communicate with one another about various personal matters, both while they were at work and after work hours from home. This is exceedingly common. Indeed, as anyone who has a work email address knows, it could hardly be otherwise. Given the convenience of email communication, employees will inevitably use that means to engage in the same types of communication that takes place through face-to-face conversation in the cafeteria or breakroom. Any

employer attempt to stop that sort of casual email communication is doomed to failure. This is why employers generally do not even pretend to prohibit such personal communications.

The legal question that arises in these circumstances is whether the employer can prohibit its employees from using their work email addresses to communicate with one another about topics that are protected by the National Labor Relations Act, most specifically about union-related topics. The Board has long held that singling out NLRA-protected communications for that sort of content-based prohibition constitutes illegal "discrimination." The problem, however, is that the Board has not used the word "discrimination" in the way a court would use it – for example, in determining whether a government has engaged in "discrimination" in violation of the equal protection clause. Rather, the Board uses the term "discrimination" in the sense the Supreme Court did in *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 793 n. 10 (1945), when it held that rules that erect "unreasonable impediment[s] to self-organization . . . are discriminatory."

The Board's somewhat eccentric use of the term "discrimination" in deciding cases of this sort has created problems. In the first place, reviewing courts have occasionally had trouble seeing how treating differently apparently dissimilar forms of communication constitutes discrimination. In

this regard, the Seventh Circuit remarked that "perhaps 'discrimination' ought to have a special meaning under the NLRA." *Guardian Industries Corp. v. NLRB*, 49 F.3d 317, 321 (7th Cir. 1995). Perhaps more importantly, the Board's use of the term "discrimination" in these cases has created confusion among employers and workers as to what constitutes a lawful restriction on workplace communications.

In *Purple Communications*, the employer, while permitting personal communication via email, maintained a rule that "strictly prohibited" employees from using their work email addresses to "[e]ngag[e] in activities on behalf of organization[s] or persons with no professional or business association with the Company." You could imagine such a rule being enforced in a formally nondiscriminatory manner, for instance, by prohibiting communications related to all sorts of organizations, like churches, sports clubs and so on. But it is settled NLRA law that the application of such a rule to prohibit employees from discussing union organizing in a place where they were otherwise free to engage in personal communications would be unlawful. For instance, there is no question that an employer could not lawfully apply a similar rule to prohibit union-related conversations in an employee cafeteria or breakroom. By the same token, an employer may not maintain a rule that, on its face, seems to prohibit such protected communications. This is all settled law. As a general matter, there is no

reason to treat employees' communication by means of their work email addresses any differently from other forms of employee communication.

To return to the question posed by the title of these hearings, what workers and employers should expect from the NLRB in *Purple Communications* is clarification that personal communication through work email addresses is, in principle, no different than other sorts of personal communication that takes place at work. An employer can no more prohibit union-related discussions through work email than it can prohibit union-related face-to-face conversations. Treating email communications like other communications leaves employers free to adopt those rules that are justified by actual practical needs; what employers may not do, however, is to bar protected communications based on their content without showing such a need.

In sum, the Board would be behaving responsibly were it to use this opportunity to provide clear guidance to workers and employers regarding the extent to which the NLRA protects employee communications with one another via work email.

The second case under consideration is *Browning-Ferris Industries*, in which the Board will be receiving amicus briefs next week. This case concerns the increasingly common practice of employers staffing their operations with workers who are directly employed by a third-party. Like

Purple Communications, *Browning-Ferris Industries* presents a typical example of a common phenomenon. While *Purple Communications* addressed the right of employees to individually communicate with one another, *Browning-Ferris Industries* concerns the right of employees to bargain collectively over their terms and conditions of employment.

Browning-Ferris is in the business of recycling trash. Approximately 300 employees work at the company's Milpitas, California recycling facility. Sixty of those employees are represented by Teamsters Local 360. The case before the Board arose from the effort of the other 240 employees to select Local 360 as their collective bargaining representative. The principal difference between the union-represented employees and the employees who are seeking representation is that the latter are directly employed by Leadpoint Business Services, a firm that Browning-Ferris has contracted with to staff the inside operations at the Milpitas facility. Browning-Ferris has maintained control over the operations, including the functions performed by the Leadpoint employees.

In petitioning for an NLRB representation election, Local 360 listed both Browning-Ferris and Leadpoint as joint employers of the inside employees. The union did so, because the terms and conditions under which the inside employees work are, in effect, controlled by both Browning-Ferris and Leadpoint. That circumstance makes it impossible to bargain over all

the terms and conditions of employment without both employers at the table.

Browning-Ferris owns the facility and all of the equipment within it, which gives the Company control over whether the facility and the equipment meet governing safety standards. Browning-Ferris controls the inside operation by determining when and how fast the sorting lines will run and by determining how the sorters will carry out their tasks on the lines. Browning-Ferris also limits the amount Leadpoint may pay the sorters and the length of time the sorters may be assigned to Browning-Ferris's facility. And, Browning-Ferris retains the right to dismiss any particular sorter from working at the Company's facility.

The Board has long held that two companies can be required to engage in collective bargaining as joint employers where they "share, or codetermine, those matters governing the essential terms and conditions of employment." *The Greyhound Corp.*, 153 NLRB 1488, 1495 (1965). As Justice Stewart observed, in his influential concurring opinion in *Fiberboard Products Corp. v. NLRB*, 379 U.S. 203, 222 (1964), "In common parlance, the conditions of a person's employment are most obviously the various physical dimensions of his working environment. What one's hours are to be, what amount of work is expected, what periods of relief are available, what safety practices are observed, would all seem conditions of one's employment."

By controlling the operation of the sorting lines on which the inside

employees work, Browning-Ferris controls their conditions of employment. Beyond that Browning-Ferris even controls some certain terms of their employment, like wage rates and tenure. Thus, it would be practically impossible for the inside employees to engage in collective bargaining over these matters without having Browning-Ferris at the bargaining table.

Although the bare statement of the NLRB's long-standing test would seem to clearly require joint-employer bargaining in the circumstances presented by this case, the Board's application of that test over the years has given rise to much confusion as the Regional Director's decision in *Browning-Ferris Industries* amply demonstrates.

For instance, while the Regional Director recognized that Browning-Ferris controlled the speed of the lines and the time they ran, he discounted the effect this had on conditions of employment, because Browning-Ferris did not directly control how the workers on the line responded to its speed. While the Regional Director recognized that Browning-Ferris controlled the times and shifts of the facility, he discounted this because Browning-Ferris did not directly control schedule of the inside employees working those shifts. And, while the Regional Director recognized that Browning-Ferris determined whether overtime was necessary on a particular day, he discounted this on the grounds that Browning-Ferris did not assign particular inside employees to work overtime.

With respect to terms of employment, while the Regional Director recognized that Browning-Ferris had placed a cap on what Leadpoint paid the inside employees, he noted that "nothing in the Agreement would forbid Leadpoint from . . . lowering its employees' wages" – an especially dubious proposition as the employees in question were paid only the minimum wage. And, while the Regional Director noted that Browning-Ferris had effectively recommended discharge of certain inside employees, he discounted this by noting the requests had not been framed as mandatory directives.

In sum, it seems clear that the inside workers at Browning-Ferris's Milpitas recycling facility would not be able to effectively bargain over their wages, hours or conditions of employment if only their immediate employer, Leadpoint, was at the table. Nevertheless, the Board decisions applying its generally sound joint-employer test led the Regional Director to miss the forest for the trees. Given that employers are increasingly turning to the sorts of arrangements typified by this case, the Board has good reason to seriously think about what it has been doing in this area.

Once again, the Board would only be doing its duty were it to clarify the collective bargaining rights of employees whose terms and conditions of employment are effectively jointly controlled by two different entities.

The NLRB is presently comprised of five members, each of whom enjoys the full confidence of the President, who appointed them, and of the

Senate, which confirmed each of those appointments. The Board members are all experienced labor law practitioners, who have each demonstrated good, sound practical judgment throughout their long careers. There is no reason whatsoever that workers and employers should expect anything from the NLRB in deciding these cases other than a thoughtful, considered application of established principles to the particular facts of each case.

In short, there is every indication that the NLRB will perform well its assigned task in deciding these two cases and that there is no need for the legislative branch to have any doubt about that.

This is not to say that there is not important work for the legislative branch in the realm of labor relations and with respect to the National Labor Relations Act in particular. To the contrary, there is much constructive work that the legislative branch could do in this area.

The preamble to the National Labor Relations Act observes that "[t]he inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract and employers who are organized in the corporate or other forms of ownership association . . . depress[es] wage rates and the purchasing power of wage earners in industry." 29 U.S.C. § 151. The solution to that problem, in the words of the preamble, is to "encourage[e] the practice and procedure of collective bargaining and [to] protect 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." *Ibid.*

For many years now, the Act has obviously failed to effectively encourage collective bargaining. The portion of the American workforce that is able to collectively bargain with their employees has steadily dropped. And the result has been that the wages of workers have been depressed. We would urge Congress to turn its attention to reviving the National Labor Relations Act so that it effectively serves its purpose and by so doing helps revive the American middle class.

Thank you for considering these comments.