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# Joint Employer Exemptions under the National Labor Relations Act: Will the Real N.L.R.B. Please Stand Up?

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# JOINT EMPLOYER EXEMPTIONS UNDER THE NATIONAL LABOR RELATIONS ACT: WILL THE REAL N.L.R.B. PLEASE STAND UP

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## I. INTRODUCTION

When legal theory is misapplied or departs from reality, parties subject to the law suffer. Planning and counseling become contrived in an attempt to conform to unrealistic legal principles. This article addresses legal theory under the National Labor Relations Act[1] and the National Labor Relations Board's[2] standards for asserting jurisdiction when an employer maintains close ties to an entity that is exempt from the Act's coverage. As will be shown, the legal theory applied by the Board in this area is unfocused and often disregards the operational complexities and business purposes involved in joint business ventures. Application of traditional legal principles under the Act provides a workable solution.

Section 1 of the Act states that the purpose of the NLRA is to guarantee employees freedom to associate, thereby minimizing industrial strife between "employees" and "employers." Section 2(2) defines the term "employer" under the Act:

> The term 'employer' includes 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, of any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or any one acting in the capacity of officer or agent of such labor organization.[3]

Although section 2(2) excludes certain entities, the Board retains dis-

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1. 29 U.S.C. §§ 151-169 (1982) [hereinafter cited as NLRA].
2. Hereinafter the "Board."
3. 29 U.S.C. § 2(2).

cretionary authority to assert jurisdiction over other private sector employers. Section 14(c)(1) of the Act provides as follows:

> The Board, in its discretion, may, by rule of decision or published rules adopted pursuant to the Administrative Procedure Act, decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction: *provided*, that the Board shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959.[4]

Pursuant to sections 2(2) and 14(c)(1), the Board frequently treats two employers as one or as "joint employers" to administer the Act.[5] Joint employer status results in the common liability of separate business entities for unlawful conduct in which, for example, one employer's discriminatory conduct will be attributed to its joint employer.[6] For purposes of exempting employers from the Act's coverage, however, the Board has not consistently applied its own joint employer theory, thus giving rise to doubts about the Board's objectivity in administration of the Act and posing difficulties for practitioners who counsel clients on exemptions. The exemption issue runs to the core of the Act and concerns the power of the Board to administer the Act fairly.

For example, the Board may assert jurisdiction over an employer closely related to an exempt entity to process a union's petition for election and to designate a "unit" of employees to vote in such an election.[7] Yet, if the exempt employer actually employs the "unit" employees, in whole or in part, the issue arises whether the Board has jurisdiction to conduct an election. In short, the Board must decide whether or not to stay its own hand.

By examining those cases which primarily concern a private sector employer's ties to the United States Government, this article focuses on the confusion in current Board law on the appropriate legal standard to apply in "shared exemption" cases. Traditionally,

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4. 29 U.S.C. § 14(c)(1).

5. *See* L.E. Davis d/b/a Holiday Inn of Boston, 237 N.L.R.B. 1042, 1044 (1978), *enf'd in part,* 617 F.2d 1624 (7th Cir. 1980); Sakrete of Northern California, Inc., 137 N.L.R.B. 1220, 1222 (1962).

6. *See, e.g.*, Hecks Properties, Inc., 264 N.L.R.B. 501, 501 n.3 (1982).

7. *See* 29 U.S.C. § 159. The employer must bargain over mandatory subjects of bargaining—wages, hours and other terms and conditions of employment—with the lawfully selected bargaining representative of unit employees pursuant to 29 U.S.C. §§ 151, 158(a)(5) and 158(d).

the Board examines two private sector employers with close ties to determine if they are "joint employers" and should be treated as one entity for jurisdictional purposes. While it would be both simple and reasonable for the Board to apply a "joint employer" test in shared exemption cases, this has not been done. Rather, in such cases, the Board has frequently refused employers the status ordinarily afforded them in cases where two private sector employers' liability is at issue. The inequitable result: the Board asserts jurisdiction over employers that should be fairly treated as one with their exempt partners.

## II. THE SINGLE EMPLOYER-JOINT EMPLOYER CONTINUUM

Exploration of shared exemptions necessitates examination of the Board's joint employer theory. A tremendous amount of confusion surrounds the Board's treatment of separate business entities under the Act. The mix-up takes at least two forms: there is no clear standard for determining the nature of two business entities and whether they should be called "single," "joint," or "separate;" there is no clear correlation between the nature of business entities, and the *effect* their status has under the Act. Anyone litigating or planning under the Act must ask: (1) what is the employer—single, joint or something else and (2) what difference does it make. A review of the decisional law illustrates that no matter where two business entities fall on the single employer-joint employer continuum, the Board treats them as one to assert jurisdiction no matter what test is applied to result in single or joint employer holdings.

A seminal decision on joint and single employer status is *Sakrete of Northern California*.[8] There, the Board decided that a larger corporation clearly within the Board's jurisdiction qualified a smaller company because they constituted a single employer. The Board used the following test:

> The Board often treats separate corporations as one employer for jurisdictional purposes, where it is found that the firms, despite their nominal separation, are highly integrated with respect to ownership and operation. Some of the principal factors which have been considered relevant in determining the extent of integration are: (1) interrelation of operations, (2) centralized control of labor relations, (3) common management, and (4) common ownership of financial control.[9]

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8. 137 N.L.R.B. 1220 (1962).

9. *Id.* at 1222. The Board has refined the *Sakrete* test by holding that no one factor is

The Board applied its test by finding that common ownership, ultimate decision making authority of one man—the president of the large entity—and "substantially parallel" conduct of business established that the two companies constituted a single employer.[10]

Historically, the *Sakrete* factors have been applied to find that two business entities are joint employers—not just a single integrated employer. In *L.E. Davis, d/b/a Holiday Inn of Benton*,[11] the Board decided that a restaurant and motel sharing a common situs in a lessor-lessee arrangement were joint employers under *Sakrete*. The entities presented themselves to the public as part of a Holiday Inn facility under a single trademark, and served many of the same customers.[12] The restaurant and motel shared control over labor relations by virtue of the innkeeper's active participation in all collective bargaining for both entities.[13] The record also contained evidence of common management practices.[14] The joint employer finding led the Board to hold that the restaurant violated the Act by failing to honor a collective bargaining agreement in effect for restaurant employees prior to leasing.[15]

In *Parklane Hosiery Co.*,[16] an administrative law judge, as affirmed by the Board, applied the *Sakrete* four-factor test to determine whether two entities satisfied the Board's jurisdictional standards under a section entitled "Joint Employer Contentions."[17] The judge decided that two businesses engaged in a franchisor-franchisee relationship did *not* share common ownership, management, or control over labor relations and were not "integrated."[18] These factors, according to the judge, were the Board's "conventional joint employer criteria."[19] Nonetheless, the judge decided to assert jurisdiction over both entities as "alter egos" because they exhibited a "unity of interest;" to treat them separately would have permitted them both to evade their statutorily prescribed legal duties to bargain under the Act.[20]

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controlling; emphasis is on the first three factors, particularly, centralized labor relations. Parklane Hosiery Co., 203 N.L.R.B. 597, 612 (1973).

10. *Id.* at 1222-23.
11. 237 N.L.R.B. at 1042.
12. *Id.*
13. *Id.* at 1045.
14. *Id.*
15. *Id.*
16. 203 N.L.R.B. 597 (1973).
17. *Id.* at 612.
18. *Id.* at 613-14.
19. *Id.* at 614.
20. *Id.* at 615.

In 1984, the Board decided to clarify the single employer-joint employer analysis in *TLI Inc. and Crown Zellerbach Corp.*[21] The Board held that the common four-factor test "applies only after deciding whether two separate companies constitute a single enterprise."[22] In contrast, "where two separate entities share or co-determine those matters governing the essential terms and conditions of employment, they are to be considered joint employers for purposes of the Act."[23] The Board further provided that there must be a showing that a joint employer "meaningfully affects matters relating to the employment relationship."[24]

The Board's *TLI* decision implies that facts showing a closely integrated relationship between two businesses will be analyzed under *Sakrete*. Yet, a single employer finding under *Sakrete* is extreme. The facts may show that two employers are something less than a single entity; they may constitute two separate businesses *sharing* control. As joint employers, the Board will still assert jurisdiction over them under *TLI*. Unresolved by the Board is why joint employers appropriate for *assertion* of jurisdiction are not appropriate for joint *exemption* when one entity cannot be compelled to com-

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21. 271 N.L.R.B. No. 128 (1984).

22. *Id.*, slip op. at 3.

23. *Id.*, citing NLRB v. Browning-Ferris Industries, 691 F.2d 1117 (3d Cir. 1982). In *Browning-Ferris*, the Court decided that the four-factor test applied to establish a "single employer" relationship when "two nominally independent enterprises, in reality, constitute only *one integrated enterprise.*" *Id.* at 1122. The Court distinguished the single and joint employer concepts as follows:

> In contrast, a "joint employer" concept does not depend upon the existence of a single integrated enterprise and therefore the. . . four factor test is inappropriate. Rather, a finding that companies are "joint employers" assumes in the first instance that the companies are "what they appear to be"—independent legal entities that have merely "historically chosen to handle jointly . . . important aspects of their employer-employee relationship". NLRB v. Checker Cab Company, 367 F.2d 692, 698 (6th Cir. 1966).

*Id.* at 1122. The *Browning-Ferris* Court found that in a joint employer relationship, unlike in a single employer case, "no finding of a lack of arm's length transaction or unity of control or ownership is required." *Id.* The record need only show that two entities share or co-determine a group of workers' essential terms of employment. *Id.* This could happen in a good faith contracting relationship. *Id.* Thus, the *Browning-Ferris* standard for joint employer findings is fairly lax compared to the four-factor test for single employer findings.

The United States Court of Appeals for the Ninth Circuit in Sun-Maid Growers of California v. NLRB, 618 F.2d 56 (9th Cir. 1980), found that joint employer status exists "when an employer exercises authority over employment conditions which are within the area of mandatory collective bargaining." *Id.* at 59 (citing Gallenkamp Stores Co. v. NLRB 402 F.2d 525 (9th Cir. 1968)). *Cf.* Pulitzer Publishing Co. v. NLRB, 618 F.2d 1275, 1279 (8th Cir.), *cert. denied*, 449 U.S. 875 (1980) (endorsing application of the Board's factors).

24. *Id.* (citing Lacero Transportation & Warehouse, 269 N.L.R.B. No. 61, slip op. at 6 (1984)).

ply with Board orders under section 2(2) of the Act.

## III. The Current Legal Standard To Determine Whether An Employer Is Exempt Under Section 2(2) Of The Act

Presently, Board's standards for determining shared exemptions under section 2(2) of the Act are, at best, confusing. The confusion stems from a blurring of legal standards on separate statutory questions: (1) whether joint employer status exists where one employer is an exempt institution under section 2(2);[25] (2) whether an exempt institution is actually the "true employer" of employees working for the employer;[26] and (3) whether under section 14(c)(1), the Board will exercise its discretionary authority on exemption matters.[27]

It is clear under section 2(2) that the Board must *not* assert jurisdiction over an employer who, as a joint employer, shares control of labor relations with an exempt institution because the exempt institution cannot be compelled to bargain over terms and conditions of employment. However, under section 14(c)(1), the Board may set its own guidelines and standards for asserting jurisdiction over an employer with ties to an exempt institution as defined in section 2(2)—usually contractors who perform a plethora of services, from guarding government installations to administering job corps programs.[28] Recent Board decisions have repeatedly confused these distinct questions, analyzing some fact patterns under section 2(2) and others under section 14(c)(1), without explanation as to why one section is invoked over the other. Further, the Board has failed repeat-

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25. *See* NLRB v. Chicago Youth Centers, 616 F.2d 1028 (7th Cir. 1980); Lutheran Welfare Services of Illinois, 607 F.2d 777 (7th Cir. 1979); ARA Services, Inc., 221 N.L.R.B. 64 (1975); Ohio Inns, Inc., 205 N.L.R.B. 528 (1973).

26. *See* Board of Trustees of the Memorial Hospital of Fremont County v. NLRB, 624 F.2d 177 (10th Cir. 1980); Mon-Yough Community Mental Health and Mental Retardation Services, Inc., 227 N.L.R.B. 1218 (1977).

27. *See* National Transportation Services, Inc., 240 N.L.R.B. 565 (1979).

28. The United States Supreme Court has stated that the Board must resolve the appropriate standard, but has drawn guidelines as follows:

> As we recognized in [NLRB v. Hearst Publications, 322 U.S. 111 (1944)], the terms 'employee' and 'employer' in this statute carry with them more than the technical and traditional common law definitions. They also draw substance from the policy and purposes of the Act, the circumstances and background of particular employment relationships, and all the hard facts of industrial life.
>
> And so the Board, in performing its delegated function of defining and applying these terms, must bring to its task an appreciation of economic realities, as well as a recognition of the aims which Congress sought to achieve by this statute. . . .

NLRB v. E.C. Atkins & Co., 331 U.S. 398, 403, *reh'g denied*, 331 U.S. 868 (1947).

edly to confront the fundamental question of whether joint employer status even exists in such cases.

### A. *The National Transportation Service, Inc. Test*

In *National Transportation Service, Inc.*,[29] the Board analyzed whether it should assert jurisdiction over an employer "with close ties to an exempt entity."[30] The Board maintained that the proper standard is as follows:

> [W]e shall determine whether the employer itself meets the definition of "employer" in [s]ection 2(2) of the Act and, if so, determine whether the employer has sufficient control of the employment conditions of its employees to enable it to bargain with a labor organization as their representative.[31]

Further, the Board noted that under section 14(c)(1) of the Act, which establishes its discretionary authority, the Board has traditionally utilized a two-prong test. First, it analyzes whether a private employer retains sufficient control over its employees' terms and conditions of employment so as to effectively bargain with the employees' representative. Second, where the employer retains such control, "the focus of necessity is on the nature of the relationship between the purposes of the exempt institution and the services provided by the non-exempt employer"—the "intimate connections" test.[32]

The Board decided that the intimate connections prong of the test under section 14(c)(1) of the Act was too ambiguous and vague to apply and, therefore, was no longer to be utilized.[33] The Board declared that under *National Transportation*, the only appropriate test under section 14(c)(1) is the "degree of control" exercised over terms and conditions of employment by the employer in dispute.[34]

The decision in *National Transportation* has created total confusion in the shared exemptions arena because there no longer appears to be any distinction between the analyses under section 2(2)

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29. 240 N.L.R.B. 565 (1979).

30. *Id.* at 565.

31. *Id.*

32. *Id.* (citing Rural Fire Protection Co., 216 N.L.R.B. 584, 586 (1975)).

33. *Id.* at 565-66.

34. *Id.* The Board subsequently abandoned other nonmonetary tests similar to the "intimate connections" test in favor of its *National Transportation* analysis. *See, e.g.*, Wordsworth Academy, 262 N.L.R.B. 438 (1982) (the Board will no longer utilize the "adjunct test," under which the Board asserted jurisdiction over an employer "adjunct" to a "public system"); Soy City Bus Services, 249 N.L.R.B. 1169 (1980) (the Board will no longer utilize the "local-in-character test," under which the Board refused to assert jurisdiction over an employer which performs only local, community services).

and section 14(c)(1). Contemplating the troubles ahead, the dissenting members noted:

> The majority erroneously chooses to characterize the Board's refusal to assert jurisdiction over such employers as an exercise of its discretion under [s]ection 14(c)(1) of the Act. Rather, the Board has found in these cases that the employer shared the exemption of a governmental body from our jurisdiction.[35]

The dissenting members' position is in accord with the joint employer theory. Logically, an employer who exhibits a joint employer relationship with an exempt entity must be treated as *one* with the exempt entity and share the exemption from Board jurisdiction under section 2(2). Yet, as a result of *National Transportation*, both the courts and the Board now look to a nebulous degree-of-control test without regard to the issue of joint employer standing, the distinctions between section 2(2) or section 14(c)(1), or any distinctive precedent under the separate sections of the Act.[36]

Confusion over the proper standard is exemplified by Board decisions. In *Educational and Recreational Services, Inc.*,[37] the Board considered whether a busing company that contracted with a county school district retained sufficient control over the employees' employment conditions to enable it to engage in meaningful bargaining. The Board decided that the exempt school district exercised substantial control over employment under *National Transportation,* noting that the school district was in fact a joint employer of the employer's employees.[38]

The Board's decision in *Educational and Recreational Services, Inc.* indicates that an analysis under *National Transportation,* and therefore under section 14(c)(1) of the Act, *implies* joint employer status under section 2(2).[39] The Board now regularly cites,

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35. 240 N.L.R.B. at 567 n.12.

36. Commentators note confusion in analysis of shared exemption cases post-*National Transportation. See, e.g.*, Kiss, *The Effect of National League of Cities on the Political Subdivision Exemption of the NLRA*, 32 LAB. L.J. 786, 790 (1980): "Due to the similarity of the factual inquiry, the difference between the control test and the joint employer test has been confused and often disregarded."

37. 263 N.L.R.B. 972 (1982).

38. *Id.* at 974 (citing Educational and Recreational Services, Inc., 261 N.L.R.B. 448 (1982) and ARA Services, Inc., 221 N.L.R.B. 64 (1975)).

39. See also Michigan Eye Bank, 265 N.L.R.B. No. 1377 (1982) where the Board dismissed an election petition insofar as it included employees whose terms and conditions were controlled by an exempt entity, a public university. *Id.* at 1377 n.2. The Board apparently accepted the employer's argument that the university was a joint employer of that particular class of employees, meriting a shared exemption under section 2(2). *Id.* Unfortunately, the Board cited Slater Corporation, 197 N.L.R.B. 1282 (1972), a one-page decision, for precedent.

without explanation, the *National Transportation* decision to support findings under section 2(2) of the Act. [40] As a result, there is no way to tell whether the Board is exercising discretionary authority, or alternatively, is determining whether or not an employer is statutorily exempt under section 2(2) of the Act by virtue of the fact it is a joint employer with an exempt institution.

Moreover, since the Board based *National Transportation* on section 14(c)(1), the fate of the intimate connections test under section 2(2) is unclear. Commentators caution that since *National Transportation* was a decision under section 14(c)(1) of the Act, there is no way to tell whether the Board still utilizes the intimate connection test under a section 2(2) joint employer analysis.[41] Therefore, until the Board makes clear which test is applicable, employers must continue to request that the Board analyze a shared exemption issue under both section 2(2), utilizing the intimate connection test in conjunction with a joint employer argument, and section 14(1)(c), ostensibly under the degree of control test.

The confusion between exempt status under section 2(2) in contrast to that under 14(c)(1) was further accentuated in *Champlain Security Services, Inc.*.[42] Citing *National Transportation,* the Board refused to use the intimate connections test to analyze whether a security service guarding a Coast Guard installation pursuant to a government contract should share the government's exemption. On the surface, the Board appeared to base its decision on its *discretionary* authority under section 14(c)(1). Yet, the Board has said that it will *automatically* assert jurisdiction under its discretionary authority when an employer's services have a substantial impact on national defense.[43]

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*Id. Slater Corporation* was an "intimate connections" case which is now in question after *National Transportation.*

40. *E.g.,* Greater Framingham Mental Health Ass'n, 263 N.L.R.B. 1330 n.15 (1982); The Mental Health Ass'n of North Central Massachusetts, Inc., 258 N.L.R.B. 38 (1981); Champlain Security Services, Inc., 243 N.L.R.B. 755, 766 (1979).

41. Hart, *When Will Contractors With Political Subdivision Be Deemed To Share Political Subdivision's Exemption Under The National Labor Relations Act Under Section 2(2) (29 U.S.C. § 152(2)),* 54 A.L.R. FED. 619, 624-625. See also Michigan Eye Bank, 265 N.L.R.B. at 1337 n.2 (1982), which cites Slater Corp., 197 N.L.R.B. 1282 (1972), a decision utilizing the "intimate connections" test.

42. 243 N.L.R.B. at 755.

43. Castle Instant Maintenance/Maid, Inc., 256 N.L.R.B. 130, 131 (1981), *enforced without opinion,* 95 Lab. Cas. (CCH) D 13796 (9th Cir. 1982); Trico Disposal Service, Inc., 191 N.L.R.B. 104 (1971); Readi-Mix Concrete and Materials, Inc., 122 N.L.R.B. 318, 320 (1958). A review of the relevant precedent reveals that the substantial impact on national defense standard displaces the Board's own discretionary-monetary inflow/outflow rules, but it has nothing to do with a statutory exemption under section 2(2) of the Act. *See, e.g.,* Young

The Board's failure to harmonize these lines of cases is another example of the Board's failure to properly clarify legal precedent. If the Board in *Champlain Securities Services, Inc.* was truly looking to a section 2(2) analysis, it should have cited a joint employer case, and no conflict between discretionary theories would have arisen.

### B. *Confusion Regarding the Proper Test to Apply in Shared Exemption Cases in the Circuit Courts of Appeal*

The most thorough examination of shared exemption status and joint employer theory is set forth in a series of decisions in *Herbert Harvey, Inc.*.[44] The case was initiated when a union filed a petition for election under section 9(c) of the Act.[45] Harvey was engaged in

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Bryant d/b/a Fort Sam Houston Beauty Shop, 270 N.L.R.B. No. 144 (1984), Castle Instant Maintenance/Maid, Inc., 256 N.L.R.B. at 131; Pentagon Barber Shop, Inc., 255 N.L.R.B. 1248 (1981); Tayko Industries, Inc., 214 N.L.R.B. 84 (1974), *enforced in pertinent part,* 543 F.2d 1120 (9th Cir. 1976); J.J. Cook Construction Co. and Empire Building Corp., 203 N.L.R.B. 41 n.2 (1973); Trico Disposal Service, Inc., 191 N.L.R.B. 104; Beisder Aviation Corp., 135 N.L.R.B. 399, 415, 441 (1962); Carteret Towing Co., 135 N.L.R.B. 975, 976 (1962), *enforced,* 307 F.2d 835 (4th Cir. 1962); Hazelton Laboratories, Inc., 136 N.L.R.B. 1609 n.1 (1962); Canal Maris Improvement Corp., 129 N.L.R.B. 1332, 1333 (1961); McFarland 131 N.L.R.B. 745 (1961), *enforced,* 306 F.2d 219 (10th Cir. 1962); Tri-Associated Drywall Contractors Inc., 131 N.L.R.B. 1077, 1078 (1961); Midwest Piping Co., 127 N.L.R.B. 408, 419 (1960); Texas Zinc Minerals Corp., 126 N.L.R.B. 603, 607 (1960); Geronimo Service Co., 129 N.L.R.B. 366, 367 (1960); Gray, Rogers, Graham and Osborne, 129 N.L.R.B. 450 (1960), *enforced,* 295 F.2d 38 (9th Cir. 1961); Local Union No. 188, United Ass'n Journeymen and Apprentices (Peacock Construction Co.), 124 N.L.R.B. 323, 324-25 (1959); Readi-Mix Concrete and Materials, Inc., 122 N.L.R.B. at 320.

44. 159 N.L.R.B. 254 (1966), *supplemented,* 162 N.L.R.B. 890 (1967), *rev'd and remanded,* 385 F.2d 684 (D.C. Cir. 1967), *on remand,* 171 N.L.R.B. 238 (1968), *enforced,* 424 F.2d 770 (D.C. Cir. 1969).

45. See *infra* note 7. Section 9(c) states in pertinent part as follows:

> (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board —
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> (A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in subsection (a) of this section, or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in subsection (a) of this section; or
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> (B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in subsection (a) of this section;
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> the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing

the business of management and operation of apartment buildings in the District of Columbia and supplied building maintenance services to the World Bank pursuant to a contract executed in 1955. The contract was renewed yearly and was expanded to include new buildings acquired by World Bank. Under a cost-plus-fixed-fee arrangement, Harvey was paid a monthly fee and was reimbursed for all direct costs incurred in rendering the services required under the contract.[46]

The contract required that Harvey secure written approval by the Bank for any expenditures exceeding the contract's stated amount. All supplies and materials purchased became the property of the Bank. Harvey paid employee wages, sick leave, and vacation pay from an advance provided by the Bank. Benefits such as group hospitalization and workers' compensation were covered by the same advance. Harvey made all deductions for income tax and contributions to the Social Security system. Harvey controlled hiring, but clearance from the Bank was required whenever an applicant's acceptability was at issue. Harvey's supervisors could recommend the discharge of employees, but the discharges were not effective until reviewed by Harvey's management and the Bank. Harvey complied with Bank recommendations on hiring and firing when such were made.[47]

The Board found that although conditions of employment were subject to review and approval by the Bank, Harvey retained sufficient control over terms and conditions of employment to effectively bargain. Thus, the Board found that Harvey was an "employer" under section 2(2) of the Act and directed an election.[48]

The union won the election, and Harvey refused to bargain. The Board found that Harvey's refusal was an unfair labor practice under sections 8(a)(1) and (5)[49] of the Act.[50] On review of the Board

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that such a question of representation exists, it shall direct an election by secret ballot and shall certify the result thereof.

46. 159 N.L.R.B. at 254.

47. *Id.* at 255.

48. *Id.* at 255-56.

49. Section 8(a)(1) states that "it shall be an unfair labor practice for an employer. . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [s]ection [7] of this title." Section 7 states as follows:

> Employees 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 activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a

order to bargain with the prevailing union, the United States Court of Appeals for the District of Columbia reversed the Board's decision.[51]

The court found that the Bank and Harvey were joint employers and stated, "the question becomes whether the labor board erred in directing one of the joint employers to bargain with the union, when it had no jurisdiction over the other employer."[52] The court stated that the Board impliedly recognized the Bank's exempt status and the possible conflict by finding that Harvey was "*an* employer" instead of "*the* employer."[53] The court noted that if the Board found that the World Bank had the dominant role in the employer combination, any agreement made by Harvey as a result of negotiations would have been subject to veto by an entity which cannot be ordered to bargain. Accordingly, the court remanded to the Board to decide whether the Bank was an exempt institution and whether to assert jurisdiction over both employers as joint employers.[54]

On remand, the Board accepted the court of appeals's finding of joint employer status, *but only as the "law of the case."*[55] The Board further decided that, as an entity involved in the "delicate field of international relations," the World Bank was an exempt institu-

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condition of employment as authorized in section [8(a)(3)] of this title.

Section 8(a)(5) makes an employer's refusal to bargain collectively with the lawfully selected bargaining representative for employees under section 9 an unfair labor practice. See *infra* note 7.

50. *Herbert Harvey, Inc.*, 162 N.L.R.B. 890 (1967).

51. *Herbert Harvey, Inc.*, 385 F.2d 684, 685 (D.C. Cir. 1967).

52. *Id.* at 685-86.

53. *Id.* (emphasis added).

54. *Id.* In a concurring opinion in *Herbert Harvey, Inc.* Judge McGowan stated as follows:

> But the World Bank is what it is, and I wonder whether the Board would assert jurisdiction over it if it had not contracted out its maintenance needs. If the Board would not, then I wonder whether petitioner, as an employer providing service similar to those supplied other exempted institutions and on similar terms, is not being treated differently to a degree that approaches the arbitrary. The joint employer concept, if applicable, would presumably mean that two persons are subject to the act rather than one. It does not appear to me to imply that, if one of such two is an exempt institution, the other must invariably be treated as exempt also unless the Board chooses to do so.

*Id.* at 686-87. Accordingly, Judge McGowan recognized that asserting jurisdiction over one joint employer means forcing another into the sphere of private sector bargaining even though the decision is within the Board's authority. He further stressed that consistency in the area was necessary. *Id.* Treating the employers as *one* for purposes of declining to assert jurisdiction would be consistent, especially since treating joint employers differently "approaches the arbitrary." Unfortunately, the final sentence quoted in Judge McGowan's opinion is contrary to the purpose and application of joint employer theory.

55. *Herbert Harvey, Inc.*, 171 N.L.R.B. at 238, 239 (1968).

tion.[56] Although a joint employer relationship existed, the Board found that Harvey still retained sufficient control over working conditions to bargain collectively with the union. The basis for the Board's finding was a contract provision between Harvey and the World Bank which held Harvey solely liable for the acts of its employees. The Board stated that the parties' intent was for Harvey to retain its independence. The Board noted that the Bank reserved no contractual rights to determine wage rates, set hours of work, discharge or hire, or otherwise control conditions of employment. The Board further noted that although Harvey was compensated by a fixed sum, there were no limitations on wage rates in the contract. Participation by the Bank in certain decisions such as hiring and firing, according to the Board, was understandable in light of the service contract nature of the parties' relations.[57]

On review for the second time, the Court of Appeals for the District of Columbia agreed with the Board's decision and accepted the Board's finding on joint employer status as only the "law of the case."[58] It further concluded that the Board had properly analyzed whether one joint employer had the dominant role in setting conditions of employment. Accordingly, the court deferred to the Board's "expert" conclusions on the joint employer relations involved.[59]

Unfortunately, this series of *Herbert Harvey, Inc.* decisions fails to clarify the appropriate standard in shared exemption cases. Although the joint employer concept was properly raised, it was the court of appeals that initiated the analysis. Even then, the joint employer analysis was ultimately limited to the "law of the case" and was not stated as a rule of general applicability. The final result in *Harvey* permits the Board to ignore an exempt institution's veto power and power of approval over critical decisions on mandatory subjects of bargaining by finding that such relations are typical to a service contract relationship. In short, the Board merely paid lip service to a joint employer analysis in *Herbert Harvey*; on remand, it analyzed the contractor's relationship with an exempt institution under the same "degree of control" test applied under the Board's discretionary standards pursuant to section 14(c)(1).

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56. *Id.* at 238 n.7 (citing Benz v. Compania Naviera Hidalgo, 353 U.S. 138, 147 (1957)).

57. *Id.* The Board's decision also analyzed the "intimate connections test" now defunct under *National Transportation Services,* and concluded that the employer's maintenance services were unrelated to the World Bank's international finance business. *Id.* at 239-40.

58. *Herbert Harvey, Inc.*, 424 F.2d 770, 770 (D.C. Cir. 1969).

59. *Id.* at 779-80.

The *Herbert Harvey* decision, based on a section 14(c)(1) analysis, runs counter to traditional joint employer theory. Under this theory a finding of joint employer status *necessitates treating the two employers as one* regardless of their relative powers to alter labor relations once the finding is made under either a four-factor test as set forth in *Sakrete*[60] or the less rigid standard adopted in *TLI*.[61] Neither the Board nor the Court of Appeals for the District of Columbia in *Herbert Harvey* properly applied the Board's joint employer theory. Rather, the employers were treated *separately* for jurisdictional purposes, even though they were found to be joint employers.

Confusion over the proper analysis to apply in shared exemption cases is further illustrated by the United States Court of Appeals for the Ninth Circuit decision in *Zapex Corp. v. NLRB*.[62] A principal issue in *Zapex* was whether the Board properly asserted jurisdiction over companies that provided scientific and technical support to the Combat Development Experimentation Command of the United States Army.[63] The court examined the contractual relations between the Zapex employer and the government to determine whether the private sector employer retained freedom to control terms and conditions of employment.[64]

The court noted that the relevant Supreme Court precedent was *NLRB v. E.C. Atkins & Co.*,[65] in which the Court decided "whether private plant guards, who are required to be civilian auxiliaries to the military police of the United States Army, are employees within the meaning of [s]ection 2(3) of the National Labor Relations Act."[66] The Supreme Court in *NLRB v. E.C. Atkins & Co.* set out the appropriate standard for review of Board determinations: a Board decision "must be accepted by reviewing courts if it has a reasonable basis in the evidence and is not inconsistent with the law."[67] The Supreme Court upheld a Board determination that guards were employees under the Act because the evidence established that an employer-employee relationship clearly existed between the *private sector employer* and the guards. As auxiliary police, employees only

60. Sakrete of Northern California, Inc., 137 N.L.R.B. 1220, 1222 (1962).
61. 271 N.L.R.B. No. 128, slip op. at 3.
62. 621 F.2d 328 (9th Cir. 1980).
63. *Id.* at 330.
64. *Id.* at 330-31.
65. 331 U.S. 398 (1947), *reh'g denied*, 331 U.S. 868 (1947).
66. *Id.* at 399.
67. *Id.* at 403.

deviated from their private employer's control in emergencies or in purely auxiliary police matters.[68] Plant management personnel had exclusive authority to determine aspects of their employment as plant guards.[69] In fact, the War Department specifically reserved those powers to the private sector employer. Accordingly, the Supreme Court upheld a Board determination that the private sector employer could bargain over the employees' plant guard job duties.[70]

After discussing the Supreme Court decision in *NLRB v. E.C. Atkins & Co.*, the court in *Zapex* then turned to the appropriate Board law to determine whether there was a reasonable basis in the evidence to enforce a Board order. However, the court could not clearly determine what theory the Board used to assert jurisdiction. The court noted that the Board sometimes found that asserting jurisdiction was inappropriate in shared exemption cases when there was an "intimate relationship" between a private employer and an exempt institution.[71] Yet, the court further observed, "[w]hether this inappropriateness rests on a finding of a joint employer situation or on a discretionary abstention by the Board because of the intimate relationship is not entirely clear."[72] The court was compelled to decide the case by applying the "degree of control" analysis derived from *NLRB v. E.C. Atkins & Co.* without resolving the confusion it properly detected in the Board's decision in *Zapex*.[73]

Even several years after the *National Transportation* decision, the Court of Appeals for the Ninth Circuit still struggles with shared exemption cases. In *Museum Associates, v. NLRB*,[74] the Court of Appeals for the Ninth Circuit was presented with the issue of whether a museum was a governmental subdivision exempt from the jurisdiction of the Board under section 2(2) of the Act. It was clearly a statutory matter which did not involve discretionary standards of review under section 14(c)(1). Yet, after noting that the degree of control was at the heart of any test, the court stated that a government-funded or regular employer will not be forced to engage "in a mere exercise in futility" if it lacks sufficient autonomy over working conditions to enable it to bargain efficiently with a union. In support

68. *Id.* at 407-08.
69. *Id.*
70. *Id.* at 413-15.
71. *Zapex*, 621 F.2d at 332.
72. *Id.* at 333.
73. *Id.*
74. 688 F.2d 1278 (9th Cir. 1982).

of that proposition, the court cited *Rural Fire Protection Co.*,[75] the very case apparently overruled by the Board in *National Transportation* for its use of the intimate connections test.[76]

In short, the "degree of control" test, under any label, has been misused. Although the Board may not openly admit as much, the degree of control test has effectively been used to determine an employer's status under section 2(2) *and* under section 14(c)(1). This confusion of tests has created inconsistent results. On the one hand, under section 2(2)

> [t]he NLRB has long held that if two or more employers exert significant control over the same employees, they constitute "joint employers" under the NLRA. *Stoudt and Son, Inc.*, 114 N.L.R.B. 838 (1955); *Veta Mines, Inc.*, 336 N.L.R.B. 288 (1941). The Board has also held that it has no jurisdiction over joint employers if one of the employers is exempt from the Act, since a collective bargaining agreement is not feasible in such circumstances. *See, e.g., Mississippi City Lines*, 223 N.L.R.B. 11 (1978); *Transit Systems, Inc.*, 221 N.L.R.B. 299 (1975); *Ohio Inns, Inc.*, 205 N.L.R.B. 528 (1973).[77]

On the other hand, when analyzing the degree of control exercised by an exempt institution over terms and conditions of employment, the Board rarely mentions joint employer or true employer status, but instead regularly relies on *National Transportation* under the Board's discretionary authority pursuant to section 14(c)(1). The board's approach skews traditional joint employer jurisdictional analysis: under joint employer theory, the Board need only find that two employers co-determine or share control over certain major terms and conditions of employment, most importantly, mandatory subjects of bargaining under the Act.[78] Once it is established that two employers share in setting crucial terms and conditions of employment over which both employers would have to bargain, the degree of control is irrelevant: the employers must be treated as one. The state of the law demands clarification.

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75. *Id.* at 1280 (citing Rural Fire Protection Co., 216 N.L.R.B. 584, 585-86 (1975)).

76. *National Transportation*, 240 N.L.R.B. at 565.

77. Lutheran Welfare Services of Illinois v. NLRB, 607 F.2d 777, 778 (7th Cir. 1979).

78. *See Sun-Maid Growers of California v. NLRB*, 618 F.2d at 59; TLI and Crown Zellerbach Corp., 271 N.L.R.B. No. 128, slip op. at 3.

## IV. The Appropriate Legal Standard For Shared Exemption Cases Under Section 2(2) of The Act

The degree of control test used to determine joint employers in a shared exemption case under section 2(2) is not as stringent as the degree of control test exercised by the Board under its *National Transportation* decision and related cases. In fact, if the degree of control necessary to satisfy *National Transportation* is present, then the exempt institution may actually be the true employer, not simply a joint employer. As a result, the critical foundation for the degree of control analysis in shared exemption cases is in section 2(2) under joint employer law. As the dissent in *National Transportation* properly noted, by switching sections of the Act to determine shared exemption cases, the Board effectively abandoned all precedent. In order to make sense of its own prior decisions, the Board must return to the section 2(2) umbrella in accord with joint employer precedent.

Any analysis of joint employer finding in shared exemption cases under section 2(2) must address *Ohio Inns, Inc.*[79] There, the Board decided whether it should assert jurisdiction over a lodge operating pursuant to a concession contract with the State of Ohio in a state-owned park. Under the contract, the state had to approve prices for admittance to the cabins and guestrooms, food, beverages, entertainment and amusement. The state controlled the lodge employer's hours of operation and all phases of promotion and publicity. The manner and form of records and accounting used by the employer were directed and approved by the state. The state required detailed reporting to it by the employer and could enter on the premises at any time to determine if the employer was operating properly. If the employer failed to follow any state directives, to correct any deficiencies, or to meet any obligation under the contract, the state could terminate the contract at will.[80]

Concerning labor relations, the state in *Ohio Inns, Inc.*, had the authority to approve or disapprove labor policies, including wage rates, and contractually retained the power to force the discharge of any employee it deemed to be incompetent, disorderly or unsatisfactory. The state in fact discharged individuals under the contract. Further, the employer complied with all state hiring requests. The state also participated in training programs to instruct employees on how to efficiently serve customers in the employer's dining room. Thus, the Board decided that the sum total of contract powers and

79. 205 N.L.R.B. 528 (1973).
80. *Id.*

supporting evidence indicated that any collective bargaining agreement would have to be approved by the state to be effective.[81]

Turning to the appropriate law involved, the Board found that "the state is at least a joint employer here."[82] Thus, because the state was exempt from Board jurisdiction under section 2(2) of the Act, the Board would not assert jurisdiction over the employer.[83] Oddly, the Board arrived at its conclusion even though both parties in the proceeding requested that the Board assert jurisdiction.[84] The strong policy against asserting jurisdiction over joint employers when one is exempt rests not only in the exemptions specifically set forth in the statute, but in the Board's rationale that it cannot resolve representation or unfair labor practice issues unless it is "in a position to effectively require *full compliance* [with the Act]."[85] If the Board asserted jurisdiction, the state's power of disapproval regarding critical terms and conditions of employment could create a conflict between government authorities in unfair labor practice proceedings in the future. Such conflicts would frustrate the Board's administration of the Act.[86]

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81. *Id.*

82. *Id.*

83. *Id.* at 528-29.

84. *Id.* at 529 n.3.

85. *Id.* (emphasis added).

86. The Board discussed the *Ohio Inns, Inc.* doctrine in subsequent cases in which it asserted jurisdiction under section 2(2) of the Act. *See, e.g.*, Bishop Randall Hospital, 217 N.L.R.B. 1129 (1975), *enforcement denied*, 624 F.2d 177 (10th Cir. 1980); Buffalo General Hospital, 218 N.L.R.B. 1090 (1975). In *Bishop Randall Hospital*, the employer had exclusive control over its personnel with respect to rates of pay, hours of employment, and other terms and conditions of employment. Therefore, the Board found a basis for collective bargaining existed. 217 N.L.R.B. at 1130. In denying enforcement of the Board's decision in *Bishop Randall Hospital*, the Court of Appeals for the Tenth Circuit found that the hospital was an exempt political subdivision under section 2(2) of the Act, and, at the very least, a joint employer with the government. 624 F.2d at 188-89. The court based its decision on continuing dialogue between the hospital administrator and government trustees of the hospital concerning wage rates, fringe benefits and staffing. The evidence revealed that the trustees approved the administrator's wage rate decisions and the hospital complied with proposals on other terms merely "suggested' by the trustees. *Id.* at 187-88. Therefore, the government's trustees participated enough in setting terms and conditions of employment through "dialogue" and "suggestions" to merit a finding on joint employer status.

In *Buffalo General Hospital*, the employer, who claimed an exemption pursuant to relations with a county government, was free to hire regardless of whether the county disapproved of an individual's credentials or salary range. In addition, the employer set all wage rates, and there was no historical example of county disapproval of wage rates selected. All facilities were owned by the employer. Furthermore, the county had no right to inspect the employer's premises or to police any purchases of supplies or equipment by the employer. 218 N.L.R.B. at 1091. Accordingly, the Board asserted jurisdiction over the employer notwithstanding its ties to the county.

Another leading case that discusses the proper standard of review for shared exemption cases under section 2(2) of the Act is *ARA Services, Inc.*[87] There, the Board was presented with the issue of whether it should assert jurisdiction over a private employer that provided automotive fleet maintenance services for approximately one-half of a county government's vehicles. The contract between the parties dictated the hours the employer was to remain open, the various classifications of employees and the number of employees in each classification, the appropriate wage rates, the reporting requirements of the employer, the manner in which the employer obtained parts and supplies, maintenance and repair programs the employer was required to establish, holidays and vacations and other benefits for employees and the method of compensation. It further directed "that the extent and character of the work to be done by the contractor shall be subject to the general control and approval of the contracting offices [of the county]."[88]

The *ARA* contract also required that the employer maintain preferential hiring treatment for county residents applying for jobs.[89] The county had open access to the employer's personnel files, books, records and other files. Furthermore, the county reserved the right to approve employees before they were hired by the employer and to request dismissal of employees. The county also reserved the right to make unannounced on-site inspections of the employer's facilities as it deemed necessary.[90] In practice, the county maintained a personnel director who oversaw operations by inspecting and checking records and operations.[91] Based on the record, the Board found that the employer was a joint employer with the county and shared the statutory exemption enjoyed by the county under section 2(2) of the Act.[92]

The United States Courts of Appeals have also applied the joint employer doctrine under section 2(2) independent of the Board's de-

87. 221 N.L.R.B. 64 (1975).

88. *Id.* at 64-65.

89. *Id.* at 65.

90. *Id.*

91. *Id.*

92. *Id. See also* Toledo District Nurse Ass'n, 216 N.L.R.B. 743 (1975) (pre-*National Transportation* decision which utilizes joint-employer analysis under section 2(2)). In *ARA Services, Inc.*, the government exercised control by "reserving" authority. If the government actually administered labor relations to control operations with the assistance of the contractor, the government would not only be a joint employer, but the true employer under section 2(2) of the Act. Mon-Yough Mental Health and Mental Retardation Services, 227 N.L.R.B. 1218, 1219 (1977). Thus, under *ARA Services, Inc.*, the reservation of power to set labor relations policy or oversee operations is sufficient evidence of joint employer relations.

gree of control test under its discretionary authority.[93] In fact, in *Lutheran Welfare Services of Illinois v. NLRB*[94] the court found it unnecessary to make a detailed review of control to determine joint employer status. There, the court found that the employers that operated child-care facilities in Chicago under federal Head Start and Day Care programs, with the bulk of funding administered by a local agency, shared the government's exemption under the Act. The court rejected the Board's argument that the government did not have substantial control over labor relations of the employers because the relationship between the employers and the government was "primarily contractual."[95]

Instead, the court pointed out that the employers classified employees and set their salaries in accordance with government policies; the employers were required to obtain government approval for hiring, promotions, wage or merit increases, fringe benefits, and to set working hours; the employers were required to prepare a policy procedure manual for the government; the employers were required to submit organizational charts and evaluation reports; and the employers' directors were supervised by government personnel.[96] Those factors alone convinced the court that the employers shared joint employer status with the government necessary to exempt the employers under section 2(2) of the Act.[97]

## V. The Security Services Industry: Protecting Joint Employer Status

Board decisional law on shared exemptions in the security services industry illustrates the soundness of the joint employer theory and the vagueness of the degree of control test. Prior to its decision in *National Transportation,* the Board decided *National Detective Agencies,*[98] followed by *Champlain Securities Services, Inc.*[99]

In *National Detective Agencies, Inc.*, the Board determined that an employer providing security guards for two international institutions, a bank, and a development fund, shared those institutions' sec-

93. *See* Board of Trustees v. NLRB, 624 F.2d 177, 189 (10th Cir. 1980); NLRB v. Chicago Youth Centers, 616 F.2d 1028 (7th Cir. 1980); Lutheran Welfare Services of Illinois v. NLRB, 607 F.2d 777 (7th Cir. 1979).

94. 607 F.2d 777 (7th Cir. 1979).

95. *Id.* at 778.

96. *Id.*

97. *Id.*

98. 237 N.L.R.B. 451 (1978).

99. 243 N.L.R.B. 755 (1979).

tion 2(2) exemption.[100] Overruling a Regional Director, the Board found that both international institutions retained a substantial degree of control over significant aspects of the employment relationship, because the institutions were concerned not only with the guards' quality, but also with minute details of daily operations, including the image the guards presented to customers.[101]

Specifically, the Board emphasized contract provisions which reserved to the exempt institutions power to control the exact services to be performed by guards, their hiring, training, compensation, replacement and shift scheduling. In one instance, the exempt institution screened all applicants for hire and issued minimum performance requirements. Guards were provided for permanent assignment, but the institution had the power to alter the number of required security personnel. Furthermore, although the employer was obligated to assign guards and receptionists of superior quality to the exempt institution, the institution had the express right to immediately remove any unsuitable individual.[102]

Most importantly, the Board in *National Detective Agencies* found that the exempt institutions controlled the guards' wage rates. One exempt institution had negotiated with the employer for express contract provisions governing wage rates. The other institution *indirectly* determined wage rates by "suggesting" rates which the employer adopted. Additionally, the employer was contractually required to document and submit to the institution any wage rate changes required by local law as well as to agree in writing to any rate adjustment due to any increase in employee benefits, insurance and "other necessary and reasonable administrative expenses."[103] Relying upon *ARA Services, Inc.*,[104] a joint employer case, the Board correctly held that the employer in *National Detective Agencies* could not effectively bargain with a union over the minute details of employment actually controlled by the exempt institutions.[105]

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100. 237 N.L.R.B at 453.

101. *Id.*

102. *Id.* at 452.

103. *Id.*

104. 221 N.L.R.B. at 64.

105. 237 N.L.R.B. at 453 n.4. In contrast to the decision in *National Detective Agencies, Inc.*, the Board in Atlas Guard Service, 237 N.L.R.B. 1067 (1978), another pre-*National Transportation* decision, found that a guard contractor retained sufficient control over employees contracted to the General Services Administration (GSA) of the United States government to enter into a meaningful bargaining relationship. There, the GSA instituted only certain Department of Labor regulations for wages and fringe benefits and required minimum levels of training as well as minimum legislative requirements on age, citizenship, experience, education and physical condition. Additionally, the GSA retained the power to fire a guard for

*Champlain Securities Services, Inc.*[106], a 1979 case, appears to have been incorrectly decided. There, the employer provided security services to protect a Coast Guard installation on Governor's Island, an island owned by the government. The government's contract with Champlain mandated that the employer maintain a training program for employees, defined job duties, set health, height, weight, vision and grooming requirements, required United States citizenship and fluency in the English language and mandated supervisory requirements.[107] Further, the employer had to report to Coast Guard liaison officers who monitored performance under the contract. The Coast Guard provided all equipment to the employer and had the express power to terminate employees.[108] The Board stated that the employer controlled hiring,[109] but obviously the employer could not employ anyone who failed to meet Coast Guard requirements, including successful completion of the Coast Guard-mandated training program.

Nonetheless, the Board overruled an Acting Regional Director's decision that the employer shared the Coast Guard's exemption under section 2(2) of the Act. The Board based its decision on *National Transportation* under section 14(c)(1), finding that the employer could bargain over some terms and conditions, and therefore

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incompetence or inefficiency. 237 N.L.R.B. at 1067-68. However, the private employer in *Atlas* supervised employees through a district manager located in a government building where employees worked. The district manager *exclusively* interviewed, hired, fired, laid off and determined individual work assignments. Moreover, the employer arranged and paid for training programs for employees and controlled shift differentials, pay scales, vacation time, and the method of payment and fringe benefits above those mandated by the Department of Labor. The Board also found that the president and general manager of the employer were in charge of labor relations. The Board asserted jurisdiction over the employer, because, according to the Board, it exercised enough control over the guards' employment to enter into a meaningful bargaining relationship. 237 N.L.R.B. at 1067-68.

*Atlas Guard Service* made no mention of joint employers nor even cited a joint employer case. 237 N.L.R.B. at 1067-68. Reservation of powers to terminate employees and force compliance with regulations or other employment matters is evidence of centralized labor relations. Inspection rights and frequent reporting requirements could show common management. Sharing equipment and facilities could show interrelation of operations. Without proper joint employer analysis in the Board's decision, it is difficult to determine the proper outcome of the *Atlas* case. Thus, the *Atlas Guard Service* decision is an example of the Board's failure to apply the proper legal authority.

For application of the "intimate connections" test in the security services industry pre-*National Transportation*, see The Wackenhut Corp., 203 N.L.R.B. 86 (1973).

106. 243 N.L.R.B. 755 (1979).

107. *Id.*

108. *Id.* at 755-56.

109. *Id.* at 755.

was subject to the Board's jurisdiction.[110] The Board failed to raise joint employer analysis anywhere in its decision.[111]

If the joint employer theory is applied to the facts in *Champlain Securities*, exemption for the security contractor appears appropriate. Under *Sakrete*,[112] the Coast Guard satisfied the most important factors exhibiting single employer status: operations were interrelated because the Coast Guard owned all facilities, including the island where employees worked, and provided all work equipment; management supervisory requirements were dictated by the Coast Guard in the contract and were under the purview of Coast Guard liaison officers; labor relations were centralized on major terms of employment such as training, hiring requirements, terminations and job duties, all controlled by the Coast Guard. Similarly, under *TLI*,[113] the evidence was more than sufficient to merit a joint employer finding: the Coast Guard and Champlain co-determined essential terms of employment. Accordingly, Champlain should have shared the Coast Guard's exemption as a single employer, or, at the very least, as a joint employer.

Further confusing the Board's decision in *Champlain Securities Services* was the Board's citation to *Singer Co.*[114] The Board, by analogy, relied on *Singer Co.* to support a finding that the cost-plus-fixed-fee agreement in *Champlain Securities* did not exhibit enough control by the government over the employer to merit a shared exemption under the Act. Yet, inspection of *Singer Co.* and the line of cases upon which it relies reveals that it, too, fails to cite or rely on any joint employer precedent.

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110. *Id.* at 756-57.

111. See also Loma Prieta Regional Center, Inc., 241 N.L.R.B. 1071 (1979), which suffers from the same defect as *Champlain Securities Services, Inc.*: the case nowhere raises joint-employer issues, instead analyzing the section 2(2) issue under *National Transportation Service* rather than *Ohio Inns* or *ARA Services.*

112. 137 N.L.R.B. at 1220.

113. 271 N.L.R.B. No. 128, slip op. at 3. *Cf.* NLRB v. E.C. Atkins & Co., 331 U.S. 398 (1947), where employees in effect held two entirely separate positions. As private plant guards, the employees' terms and conditions of employment were administered entirely by the private sector employer; as auxiliary military police, a job which functionally had nothing to do with employee plant guard duties, the employees were subject to War Department regulation. *Id.* at 407-08, 413-15. In *Champlain Security Services,* the employer actually contracted to perform a government function, to protect government facilities and personnel. Naturally, government controls on an important function such as protecting a military base are more stringent, including controls on the individuals who perform the function. In its zeal to avoid applying an "intimate connections" test to the facts of *Champlain,* the Board neglected its traditional and relevant joint employer analysis, which mandates an exemption for the employer.

114. 240 N.L.R.B. 965 (1979).

In *Singer Co.*, the Board scrutinized the relationship between the employer, which operated a residential job corps center in Detroit, and the Department of Labor (DOL).[115] The contract between the employer and the DOL was a cost-plus-fixed-fee arrangement.[116] The Board conceded that the DOL had tremendous control over labor relations:

> DOL must approve the Employer's selection and retention of key staff members (none of whom are in the unit sought), salary ranges and job descriptions for all positions, the kind and number of employee fringe benefits and the amount of money available therefore, changes in the number of employees in each job classification and changes in employee wages when such changes exceed ten percent.[117]

The contract also required the employer to notify the DOL of labor disputes which could affect the employer's operations.[118] Nonetheless, the Board found that the employer alone was responsible for hirings, firings, promotions, demotions and transfers of employees in the unit.[119] The Board stated that the employer could agree to *certain* terms and conditions, such as seniority systems that govern wage increases, promotions, shift assignments for overtime, job bidding procedures, a system of progressive discipline, or grievance procedures.[120] Thus, the Board, with two members dissenting,[121] asserted jurisdiction over the employer.[122]

In deciding that the employer exercised enough freedom to bargain under its contract with the DOL, the Board overruled *Teledyne Economic Development Co.*,[123] which established that a similar cost-

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115. *Id.*

116. *Id.* Under a cost-plus-fixed-fee arrangement, a contractor receives a fixed sum and is reimbursed for additional expenses approved by the government or other contracting party. *See* Reynolds Corp., 74 N.L.R.B. 1622, 1630-32 (1947), *enforcement denied on other grounds,* 168 F.2d 877 (5th Cir. 1948).

117. 240 N.L.R.B. at 966.

118. *Id.* at 965.

119. *Id.* at 966.

120. *Id.* Importantly, the Board pointed out that the employer in *Singer Co.* maintained a collective bargaining agreement for a separate unit of employees covered by the DOL contract. *Id.* Therefore, the Board had bargaining history to guide its determination. Nonetheless, as properly pointed out by the dissenting members, the employer did not contest jurisdiction over the employer for the petition for election of the other unit and voluntarily submitted to a Board-conducted election; voluntary submission does not waive the employer's right to contest jurisdiction on a separate petition for different employees. *Id.* at 967-68.

121. *Id.* at 967, (Members Penello and Murphy dissented).

122. *Id.* at 967. *Accord* Teledyne Economic Development Co., 265 N.L.R.B. 1216 (1982); Management and Training Corp., 265 N.L.R.B. 1152 (1982).

123. 223 N.L.R.B. 1040 (1976).

plus-fixed-fee contract indicated a substantial degree of control over terms and conditions of employment to merit a shared exemption under the Act. In overruling *Teledyne*, the Board cited two cases involving shared exemptions under section 2(2) of the Act: *Catholic Bishop of Chicago*[124] and *Hull House Association*[125] Those cases, which dealt with government control over Head Start and Day Care Centers under contract with Model Cities, a local government agency, are overshadowed by the decisions of the Court of Appeals for the Seventh Circuit in *NLRB v. Chicago Youth Centers*,[126] and *Lutheran Welfare Services of Illinois v. NLRB*.[127] Neither of the Board decisions dealt with joint employer analysis nor cited joint employer precedent. In contrast, the United States Court of Appeals in *Lutheran Welfare Services of Illinois v. NLRB* reviewed the Board's decision denying a shared exemption for similar programs administered by Model Cities in Chicago. The Court refused to enforce a Board order because the Board failed to follow its own joint employer precedent.[128]

The line of cases leading to *Singer Co.*, including *Reynolds Corp.*[129], a major decision, are not supportive of the Board's reasoning.[130] In *Reynolds Corp.*, the employer was engaged in the manufacture of naval weaponry under contract with the Navy. The plant, facilities, equipment, raw materials and finished products were at all times the property of the Navy.[131] The Board found that the employer operated the plant under a cost-plus-fixed-fee contract, and "determined the methods of manufacture, hired the supervisory staff and the employees, determined their wages, hours and working conditions, directed their duties and functions, paid their salaries and trained, promoted, demoted and discharged them."[132] The employer was solely responsible for labor relations at the plant, and the naval commanding officer could only "suggest" matters to the employer. The only controls exercised by the Navy relevant to the case were

124. 235 N.L.R.B. 776 (1978).

125. 235 N.L.R.B. 797 (1978).

126. 616 F.2d 1028 (7th Cir. 1980).

127. 607 F.2d 777 (7th Cir. 1979).

128. *Id.* at 778.

129. 74 N.L.R.B. 1622 (1947), *enforcement denied on other grounds,* 168 F.2d 877 (5th Cir. 1948).

130. *See* American Smelting and Refining Co. (Colorado Plateau Uranium Ore Project), 92 N.L.R.B. 1451 (1951); Great Southern Chemical Corp., 96 N.L.R.B. 1013 (1951); *Reynolds Corp.*, 74 N.L.R.B. 1622; United States Cartridge Co., 42 N.L.R.B. 191 (1942).

131. 74 N.L.R.B. 1626.

132. *Id.* at 1630-31.

strict supervision to ensure that the employer complied with the contract and approval of all purchases in excess of $500.[133]

Reynolds Corporation argued that it was not an employer within the meaning of section 2(2) of the Act, but was merely an agent for the true employer, the government.[134] The Board rejected this argument, citing Supreme Court precedent holding that contractors with the government are not agents or instrumentalities sufficient to share in sovereign immunities reserved to the federal government.[135] None of the cases relied upon by the Board in *Reynolds Corp.* involved the National Labor Relations Act or addressed the issue of whether a private sector employer controlled by the government should be forced to collectively bargain with a union.[136] For example, the Board specifically discussed a decision by the United States Court of Appeals for the Seventh Circuit, *Bell v. Porter.*[137] The *Bell v. Porter* decision was under the Fair Labor Standards Act and also failed to address collective bargaining under the National Labor Relations Act.

Agency under legislation other than the National Labor Relations Act is not relevant to government control over employment, joint employer status, or the freedom to bargain without government constraint. *Singer Co.* and *Reynolds Corp.* simply fail to support the notion that a cost-plus-fixed-fee contract somehow dispels the government's power over a contractor's labor relations and operations.[138]

Finally, the Board in *Singer Co.* relied on *National Transpor-*

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133. *Id.* at 1631.

134. *Id.* at 1632.

135. *Id.* at 1632. *See also* cases cited therein, *id.* at n.12.

136. *Id.* at 1632 n.12 (citing Penn Dairies v. Milk Control Commission, 318 U.S. 261 (1943) (application of state milk price legislation to federal contractors); Alabama v. King and Boozer, 314 U.S. 1 (1941) (application of state taxation laws to federal contractors); James v. Dravo Contracting Co., 302 U.S. 134 (1937) (application of state occupation tax to federal contractors)).

137. 159 F.2d 117 (7th Cir. 1946).

138. Interestingly, the Board views cost-plus contracts differently in traditional employer analysis. In Dining and Kitchen Administration, 257 N.L.R.B. 325 (1981), *enforcement denied,* 676 F.2d 906 (2nd Cir. 1982), the Board affirmed an administrative law judge's decision that treated a cost-plus contract as evidence of common management. The judge reasoned that the strict reporting requirements which permit a contracting party to scrutinize operations showed common management, thus militated in favor of establishing joint employer relations. *Id.* at 331. The Court of Appeals disagreed, finding that the contract was actually evidence of a subcontracting relationship rather than a joint employer relationship. 676 F.2d at 913. Since cost-plus-fixed-fee contracts often have strict reporting requirements, the Board should assess that evidence under the common management "factor" of single employer analysis. See Sakrete of Northern California, 137 N.L.R.B. at 1222.

*tation* to deny application of the intimate connections test.[139] The Board did not mention either section 2(2) or section 14(c)(1) in connection with its denial, and there is no way of knowing whether the Board was addressing the intimate connections test as it applies to its discretionary authority or to mandatory statutory exemptions.

In short, *Singer Co.* is not useful authority here, especially as cited for support by analogy in *Champlain Securities Services. Singer Co.* put undue emphasis on the existence of a cost-plus-fixed-fee agreement without applying a joint employer analysis based on sound Board precedent. As indicated in the earlier discussions on joint employer status and the reasoning of such cases as *Ohio Inns, Inc.*, government control raises the spectre of conflict between government agencies, which may frustrate the Board's attempt to demand full compliance with the Act. *Singer Co.* never addressed the issue of an inability to require *full compliance* under the Act. The Board merely found that the ability to control certain terms and conditions was enough and ignored potential conflicts through the government's reserved powers over other major terms and conditions. Therefore, the precedential value of *Singer Co.*, lacking any joint employer analysis, is highly questionable.

If joint employer analysis is applied to the facts in *Singer Co.*, a strong argument for exemption results. There was no question, and the Board conceded, that the DOL shared control over major terms and conditions of employment: wages, benefits, job duties and manning requirements were dictated by the government, establishing centralized labor relations. Management was also controlled by the DOL: the government controlled selection and retention of key staff members, and a DOL project manager contacted the employer to monitor operations an a daily basis.[140] The DOL exercised almost total financial control over the employers operations. Under *TLI*[141] the Singer Company was clearly a joint employer with the DOL. They arguably satisfy the single employer test.[142] Accordingly, the

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139. 240 N.L.R.B. at 967.

140. *Id.* at 967. The dissenting members pointed out that the DOL clearly controlled day-to-day labor relations "indirectly." *Id.* They stated that the majority's search for "direct" control was misplaced. According to the dissenting members, "[w]e prefer to base our decision herein on substance rather than mere form." *Id.* In fact, as established in numerous other Board decisions, it is sufficient if an exempt employer reserves authority to control labor relations. *See* National Detective Agencies, Inc., 237 N.L.R.B. 451 (1978); Ohio Inns, 205 N.L.R.B. 528 (1973); *accord* Bishop Randall Hospital v. NLRB, 624 F.2d 177 (10th Cir. 1980).

141. 271 N.L.R.B. No. 128, slip op. at 3.

142. Sakrete of Northern Cal., 137 N.L.R.B. 1220, 1222 (1962).

Singer Company should have been considered "one" with the DOL for purposes of jurisdiction and thus, exempt under the Act.

## IV. Will The Real NLRB Please Stand Up

The Board may remain on its present course and continue to apply *National Transportation* in shared exemption cases, making occasional reference to joint employer standing. Alternatively, the Board may reinstate the joint employer analysis under section 2(2) to determine whether an exempt entity and employer should be treated as one under the Act, necessitating a shared exemption for joint employers. The former course is contrary to traditional joint employer law and creates the appearance that the NLRB is willing to find that joint employers are liable for each other's conduct in unfair labor practice cases, but may not share each other's jurisdictional exemptions from the Act's coverage.

Further, the *National Transportation* test ignores real and potential conflicts between government entities when the Board cannot obtain *full compliance* by a private sector employer partly controlled by an exempt entity. In this regard, *National Transportation* and its progeny directly contradict *Ohio Inns*, illustrating how the Board's legal theory in this area has departed from the reality of joint ventures. The potential conflicts between government entities in shared exemption cases are overwhelming: if an employer is forced to arbitrate the discharge of an employee who was terminated by the government on national security grounds and an arbitrator orders reinstatement, the employer could not comply with the award without contravening a government mandate; if the Board orders an employer to bargain over wage rates which the employer has no power to change without another government agency's approval, the government agency and the NLRB will contradict each other, leaving the employer with no clear guidance on the proper resolution of the conflict. These conflicts cannot be resolved by a prior Board decision asserting jurisdiction based on an employer's ability to bargain over a grievance procedure. The possible additional conflicts are infinite.

In contrast to the *National Transportation* test, joint employer status is a long-standing, well-established concept. Joint employer theory permits practitioners to counsel clients with close ties to an exempt entity with greater predictability. In this regard, consistent application of joint employer analysis will facilitate the resolution of jurisdictional questions in shared exemption cases.

Additionally, as case law has established, the powers an exempt entity reserves to itself or indirectly controls in a joint employer rela-

tionship are crucial. It is the potential for conflict and the inability to expect full compliance that create the touchstone of shared exemption analysis.

Even if the Board declines to apply a joint employer analysis under the *first* step of *National Transportation* test regarding the definition of an employer under section 2(2), a joint employer analysis, rather than a degree-of-control test, should be applied to the *second* step of the *National Transportation* analysis. In applying its discretionary standards to assert jurisdiction, the Board must recognize that joint employers, by definition, share control and power of a business entity, most importantly, over its labor relations.

Finally, joint employer analysis would not ensure that every government contractor escapes the strictures of the National Labor Relations Act. The facts in *Reynolds Corp.* or *NLRB v. E.C. Atkins & Co.* would not sustain a finding of joint employer relations since labor relations control was reserved to the private sector employer. Joint employer analysis would only exempt contractors who are in fact in a joint employer relationship with an exempt entity.

To effectuate the purposes of the Act, preserve the Board's impartiality, and foster predictability in labor relations, the Board must clarify its jurisdictional standards in shared exemption cases. The failure to clarify jurisdictional standards will ensure continued confusion and conflict in the roles of government entities, other entities exempt from the National Labor Relations Act, private sector employers, unions and employees. The failure to clarify jurisdiction standards also leaves the Board's neutrality in question: Why are joint employers jointly liable and not jointly exempt from the Act? To minimize industrial strife—a primary purpose of the Act—those involved need guidance on their rights to invoke the Act. Application of joint employer theory in shared exemption cases is a viable route out of the current confusion under Board decisional law.