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Fast Food Companies Are Invoking ‘Main Street’ To Fight Unions

By Lydia DePillis

Over the past few months, a quiet fight has been brewing on Capitol hill that could determine the future of labor organizing in America.

At the center of it is McDonalds. In December, the National Labor Relations Board found the company controls almost all aspects of its franchisees’ operations. The board is now reconsidering what level of control would make a company into a “joint employer” — companies that, from a legal perspective, have enough influence over working conditions that employees should be able to bargain with it directly. If McDonalds qualifies, legal experts say it could lead to mass unionization at McDonalds.

So what’s a gigantic corporation dependent on low wage workers to do?

Small businesses stand in for large corporations on Capitol Hill

Like many other industries that baked subcontracting, franchising and staffing agencies into their business models — hotels, auto manufacturers, trucking companies, and retailers, for example — McDonalds isn’t excited about its employees unionizing. It’s easier to pay people less and give them no benefits if they can’t sit at a bargaining table with the people who actually make the rules. (McDonalds did not immediately respond to a

request for comment.)

Of course, the McDonaldses of the world aren’t exactly sympathetic protagonists. So in a time-honored Washington gambit, they’ve put small franchisees at the center of their campaign against the NLRB’s new approach — predicting nothing less than the destruction of the franchise system if the NLRB is allowed to continue. There’s a Web site, defendmainstreet.com, which has been running ads featuring the owner of a pet care franchise. And at a Senate hearing Thursday, at which two franchise owners were invited to testify, committee Chairman Lamar Alexander claimed that the NLRB’s decision could “could destroy a small business opportunity for more than 700,000 Americans,” speaking of the people who’ve been able to run their own businesses because of how easy the franchise model makes it to set one up.

But would recognizing McDonalds as a joint employer really destroy the ability of other franchisees to run their own businesses? That’s far less clear.

McDonalds isn’t everybody

Here’s the argument the small franchisees make: If the franchisor is held accountable for labor violations, then it will try to control its franchises more tightly, or just have

more company-owned stores. Fewer franchises, the argument goes, means fewer opportunities for entrepreneurs.

“That can only mean one thing for me,” said Gerald Moore, the owner of several Little Gym franchises in North Carolina, South Carolina, and Tennessee, testifying before the Health Education Labor and Pensions committee. “Less freedom and less autonomy to run my business as I see fit...Our family business will no longer be ours.” That’s not fair, Moore said, because he makes all decisions relevant to employee experience, from whom to hire to how much to pay to how many hours they work.

If that were truly the case, however, Moore shouldn’t have anything to worry about. Witness Paul Secunda, Director of the Labor and Employment Law Program at Marquette University Law School, pointed out that joint employer determinations are made individually. Based on Moore’s testimony of how his business operates, The Little Gym, International — the franchisor — would never be called a joint employer in the first place.

That’s distinct from McDonalds. According to the NLRB’s review, the world’s biggest franchisor has almost total control over its franchisees — and, by extension, workers — from the computer systems they use to the menu items they offer and how much they can

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charge. If franchises actually do have more autonomy, then their franchisor won't be held accountable.

Is the point of this just to help employees unionize?

Although the testimony from franchisees was all about the independence of their businesses, much of the questioning by senators centered on the idea that the NLRB — which many conservative legislators believe is biased in favor of unions — just wants to set a new joint employer standard to promote labor organizing. Some of that questioning, in particular from Sen. Richard Burr (R-N.C.), was very accusatory — as if this were a stealth union strategy to grab more members.

As Secunda pointed out, it's actually the NLRB's job to preserve the right of employees to collectively bargain. Over the years, the fracturing of the employer-employee relationship has made that much more difficult, so the NLRB, a federal agency, is trying

to interpret the law in a way that's consistent with how the industry has changed.

In response, former NLRB member Marshall Babson — now an attorney with the employer-side law firm Seyfarth Shaw — argued that an operating principle of the National Labor Relations Act is to also to promote business success, which, he added, is the surest way to benefit workers. As an example, he cited workers at General Motors, who received hefty bonuses after this quarter's earnings report showed skyrocketing profits.

Of course, Secunda countered, that's because *those workers are unionized*. (The bonuses were larger than the contract required, but non-union blue-collar workers rarely receive profit-sharing at all.)

Now, making some franchisors into joint employers will have some effect. Some may choose to operate more of their own stores, rather than letting franchisees run them. But that wouldn't

necessarily lead to unionization — plenty of large chains, like Starbucks, haven't seen significant union drives. Other franchisors might just keep closer watch on their franchisors to make sure they weren't committing labor violations, which is hard to argue would be a bad thing.

On the flip side, as Sen. Al Franken (D.-Minn.) hypothesized, some might give their franchises *more* independence so as to avoid being classified as a joint employer, by doing things like allowing them to set prices. If that's the case, then unionizing those franchises would actually be meaningful, since the franchisee would have the power to bargain over issues that matter to employees.

At the end of the day, what is clear is that the big corporations haven't made a good case that the NLRB's new approach would destroy American small businesses — the large majority of which would likely not have to think much about all this joint employer stuff at all.