



January 14, 2019

Roxanne Rothschild
Associate Executive Secretary
National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570-0001

Re: RIN 3142-AA13, The Standard for Determining Joint Employer Status

On behalf of the more than 8,000 members of the American Road & Transportation Builders Association (ARTBA), I respectfully offer comments on the National Labor Relations Board's (NLRB) proposed rulemaking regarding the standard for determining joint employer status.

ARTBA's membership includes private and public-sector members that are involved in the planning, designing, construction and maintenance of the nation's roadways, waterways, bridges, ports, airports, rail and transit systems. Our industry generates more than \$500 billion annually in U.S. economic activity and sustains more than four million American jobs.

ARTBA supports the NLRB's proposed standard for joint-employer status and agrees with the agency the proposal would "foster predictability and consistency regarding determinations of joint-employer status in a variety of business relationships."

Specifically, under the NLRB's proposed rule, "an employer may be considered a joint employer of a separate employer's employees only if the two employers share or codetermine the employee's essential terms and conditions of employment, such as hiring, firing, discipline, supervision, and direction." Further, the proposal also states, "to be deemed a joint employer under the proposed regulation, an employer must possess and actually exercise substantial and direct control over the essential terms and conditions of another employer's employee in a manner that is not limited and routine."

Transportation construction projects often involve multiple employers, typically structured with a prime contractor (or more than one in a joint venture agreement) and multiple subcontractors. While all parties involved are collaborating to achieve the same objective—the completion of a transportation improvement project in a timely, efficient and safe fashion—they also have their own separate employees, procedures and functions. Subcontractors on such projects will perform various specialized tasks.

Under certain legal and regulatory provisions, there is often an explicit or de facto requirement that prime contractors subcontract a significant amount of work on the project. At the same time, the legal framework for the federal-aid transportation programs commonly requires bright lines among the various employers. This is particularly true under compliance requirements for the federal Disadvantaged Business Enterprise (DBE) program, which prohibits comingling of

employees, capital, equipment and other resources between prime contractors and DBE subcontractors.

Given these circumstances, the NLRB's proposed rule will better inform prime contractors as to when they likely assume liability for the actions of a subcontractor. This is particularly important to the transportation construction industry, which accounts for uncertainty and excessive risk by incorporating them into project costs.

The proposed "substantial and direct" control standard would provide a clear and predictable way to determine liability. It also simply makes sense. A contractor on a job site should only be liable for those individuals over whom it exercises such "substantial and direct" control from a personnel management standpoint. To assume otherwise is to ignore the realities of legitimate and necessary business arrangements, such as those described above, which are needed to improve the nation's transportation infrastructure.

ARTBA thanks the NLRB for the opportunity to comment on this important issue and looks forward to working with the Board in the future.

Sincerely,

A handwritten signature in blue ink that reads "David Bauer". The signature is fluid and cursive, with a long horizontal stroke at the end.

David Bauer
President & CEO