McDonald's USA, LLC, a joint employer, et al.[1] ***and*** **Fast Food Workers Committee and Service Employees International Union, CTW, CLC, et al.**

Cases 02–CA–093893, et al., 04–CA–125567, et al. 13–CA–106490, et al., 20–CA–132103, et al., 25–CA–114819, et al., and 31–CA–127447, et al.

August 14, 2015

ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA, HIROZAWA, JOHNSON, AND MCFERRAN

Respondent McDonald's USA, LLC's (McDonald's) request and supplemental request for special permission to appeal the January 22, 2015 Order of Administrative Law Judge Lauren Esposito denying its motion for a bill of particulars or, in the alternative, motion to strike joint employer allegations and dismiss the complaint are denied. The Respondent has failed to establish that the judge abused her discretion in denying the Respondent's motion.

McDonald's appeals from the judge's order on the ground that the General Counsel's failure to plead factual allegations in support of joint employer liability has left McDonald's without adequate notice of the charges against it sufficient to prepare its defenses for trial. Contrary to McDonald's, we find that the allegations in the complaint are sufficient to put McDonald's on notice that the General Counsel is alleging joint employer status based on McDonald's control over the labor relations policies of its franchisees.

Under Section 102.15 of the Board's Rules and Regulations, a well-pleaded complaint requires only "(a) a clear and concise statement of the facts upon which assertion of jurisdiction by the Board is predicated, and (b) a clear and concise description of the acts which are claimed to constitute unfair labor practices, including, where known, the approximate dates and places of such acts and the names of respondent's agents or other representatives by whom committed." Further, a bill of particulars is justified "only when the complaint is so vague that the party charged is unable to meet the General Counsel's case." *North American Rockwell Corp. v. NLRB*, 389 F.2d 866, 871 (10th Cir. 1968). The General Counsel is not required to plead his evidence or the theory of the case in the complaint. Id.; *Boilermakers Local 363 (Fluor Corp.)*, 123 NLRB 1877, 1913 (1959). See also *Artesia Ready Mix Concrete*, 339 NLRB 1224, 1226 fn. 3 (2003), and cases cited therein.

Here, the judge conducted a well-reasoned analysis of the relevant authority and its application to the pleadings in this matter. As noted above, the Board's Rules and Regulations and Board and court precedent support the judge's conclusion that the consolidated complaint was sufficient to put McDonald's on notice that the General Counsel is alleging joint employer status based on McDonald's control over the labor relations policies of its franchisees. Accordingly, we find that McDonald's has not established that the judge abused her discretion in reaching this conclusion.

Further, in light of our disposition of the issues concerning the motion for a bill of particulars, the Respondent's alternative motion to strike joint employer allegations and dismiss the complaint is denied.

Dated, Washington, D.C. August 14, 2015

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBERS MISCIMARRA AND JOHNSON, concurring in part and dissenting in part.

We respectfully dissent from our colleagues' denial of the Respondent's request for special permission to appeal Judge Esposito's denial of its motion for a bill of particulars. This denial presents an acute due process problem and is shortsighted in terms of prudently managing the Board's resources and minimizing the burdens placed on the parties. Not only should Respondent's motion be granted on the merits, this is far preferable to having years of litigation in a large consolidated case, following which a court may decide that the entire case must be dismissed based on deficiencies in the complaint.

First and foremost, the due process issue here is significant. Unfortunately, the majority bypasses this issue based on a rote recitation of the Board's notice-pleading

[1] By order dated June 1, 2015, the administrative law judge granted the unopposed request made by certain Respondents that the short-form version of the case caption in this proceeding read "McDonald's USA, LLC, A Joint Employer, et al."

rules. Although notice pleading permits a complaint to provide general notice of the alleged violation(s), this still requires attention to the concept of "notice."

It is no secret that the General Counsel here intends to pursue a more expansive theory of joint employer liability than the Board subscribes to under current law.[1] Yet the relevant paragraphs of the complaint contain little more than conclusory allegations that McDonald's is a "joint employer." Here is a representative example:

> At all material times, Respondent McDonald's has:
>
> (a) had a franchise agreement with Respondent McDonald's at 220 W 42nd St.;
>
> (b) possessed and/or exercised control over the labor relations policies of Respondent McDonald's at 220 W 42nd St.; and
>
> (c) been a joint employer of the employees of Respondent McDonald's at 220 W 42nd St.

The language in subparagraphs (b) and (c), which our colleagues deem adequate, is consistent with the Board's *current* joint employer standard. See, e.g., *Laerco Transportation*, 269 NLRB 324, 325 (1984) (stating that two or more business entities constitute a joint employer where "they share or codetermine those matters governing the essential terms and conditions of employment"). However, this complaint language provides no notice regarding the new joint employer standard upon which the General Counsel intends to rely in the alternative, nor what facts the General Counsel believes will prove joint employer status under the alternative standard.

"The primary function of notice is to afford respondent an opportunity to prepare a defense by investigating the basis of the complaint and fashioning an explanation of events that refutes the charge of unlawful behavior." *Pergament United Sales v. NLRB*, 920 F.2d 130, 135 (2d Cir. 1990) (citations omitted). Consistent with fundamental due process principles, the Administrative Procedure Act requires that parties to administrative adjudications be given notice of "the matters of fact *and law* asserted." 5 U.S.C. § 554(b)(3) (emphasis added); see also *Eagle Express Co.*, 273 NLRB 501, 503 (1984) (lack of notice of alternative theory precluded full and fair litigation; although the General Counsel is entitled to rely on alternative theories, the respondent is also entitled to notice that this is being done). Accordingly, as a matter of due process, McDonald's is entitled to know the contours of the General Counsel's alternative joint employer theory and to receive a bill of particulars setting forth the facts the General Counsel intends to rely on to support his case under that theory.[2]

We do not quarrel with the notice-pleading principles invoked by our colleagues.[3] However, this case involves a term of art—"joint employer"—that the complaint clearly uses in its current sense, as defined by extant precedent. However, the General Counsel also intends to pursue a separate theory that may be the sole basis for finding that Respondent McDonald's has violated the Act. As to this alternative "joint employer" theory, the complaint provides no notice of any kind.

The situation may be illustrated by a hypothetical example. Suppose our statute delineated violations by food group, and the complaint alleged that McDonald's was a "tomato." This would place parties on notice of matters currently understood to be associated with a "tomato." However, if the complaint alleges "tomato," a substantial

[1] In *Browning Ferris Industries of California, Inc.*, 32–RC–010968 currently pending before the Board, the General Counsel filed an amicus brief seeking an expanded joint employer liability standard. Further, at a March 24, 2015 House subcommittee hearing on the Agency's budget for fiscal year 2016, the General Counsel testified that he will pursue a new theory of joint employer liability in the McDonald's litigation. There, the General Counsel stated that "[w]e do not have any cases in the United States open right now that allege joint employer status solely under the position we are advocating in the *Browning-Ferris* case. In every case that we are seeking to have somebody held as a joint employer, we are doing it under the Board's current standard, *and then arguing in the alternative for Browning-Ferris, and that includes McDonald's*" (emphasis added).

Under our statute, the General Counsel decides what theories to argue in cases presented to the Board, and we do not criticize the General Counsel for responding to inquiries regarding his new joint employer theory in Congress and in speeches. However, the pleadings in *this* case must fairly apprise the parties in *this case* of the grounds that may be the basis for findings of a violation. The General Counsel's statements *outside* this case are no more sufficient to provide adequate notice than would be public statements made by a respondent employer or union that are not referenced in their answer(s) or other pleadings.

[2] Alternatively, since our colleagues deny McDonald's motion for a bill of particulars, they should grant its alternative motion to strike the joint employer allegations to the extent of limiting the General Counsel to litigating the joint employer issue under the Board's current standard—*Laerco Transportation*, supra, and *TLI, Inc.*, 271 NLRB 798 (1984)—and precluding him from advancing his alternative theory in this case.

[3] Reciting the Board's notice-pleading standard, the majority observes that a well-pleaded administrative complaint simply requires "a clear and concise description of the acts which are claimed to constitute unfair labor practices." See Sec. 102.15 of the Board's Rules and Regulations. Further, citing *North American Rockwell Corp. v. NLRB*, 389 F.2d 866, 871 (10th Cir. 1968), the majority observes that the General Counsel is generally not required to plead his evidence or legal theory of the case, and that "[a] bill of particulars is justified only when the complaint is so vague that the party charged is unable to meet the General Counsel's case." These principles are perfectly sound as a general matter in the usual unfair labor practice case, where a term of art used in a complaint has a well-understood meaning under applicable precedent, and where the respondent accordingly has fair notice from the complaint itself of the "matters of . . . law asserted," 5 U.S.C. § 554(b)(3). However, as noted in the text, the General Counsel here is arguing—as an independent basis for finding a violation—a different theory as to which the complaint is silent.

due process problem would result if the General Counsel proves a violation based on an "alternative tomato" theory that, in reality, describes a "carrot." Even though the General Counsel may use the same label to describe both, a tomato is red, while carrots are orange; a tomato is round, while carrots are pointy; and a tomato is soft and juicy, while carrots are crunchy. Moreover, if the hearing moves forward and the "alternative tomato" theory results in a violation based on the characteristics of a carrot, the Respondent will have been irreparably denied the "opportunity to prepare a defense." *Pergament*, 920 F.2d at 135.

Similar to alleging "tomato" while presenting an alternative theory that proves "carrot," the complaint's "joint employer" allegation does not provide any reasonable notice of the General Counsel's alternative theory of violation. And, as argued by the General Counsel, the alternative theory may be the *sole* basis for finding that Respondent violated the Act. It bears emphasis that the phrase "joint employer" does not, by itself, provide adequate notice of the basis for finding a violation when the General Counsel is advancing an entirely new theory of what constitutes a "joint employer," about which the complaint is completely silent. In this context, the phrase "joint employer" is nothing more than the legal conclusion that the General Counsel hopes that the Board will reach, based on facts and legal principles that, under current law, would *not* establish a violation of the Act. Even under a notice-pleading standard, due process requires that parties have reasonable notice of the particular grounds upon which an alleged violation may be based. By failing to identify any of the salient differences between the phrase "joint employer" (as used under current law) and the General Counsel's revised "joint employer" theory (about which the complaint is silent), the complaint is "so vague that the party charged is unable to meet the General Counsel's case." *North American Rockwell*, 389 F.2d at 871.

This is a serious due process problem that can be easily resolved by granting Respondent's motion for a bill of particulars. For this reason, we believe Respondent's motion should be granted to the extent of compelling the General Counsel to set forth the legal parameters of his alternative "joint employer" theory, together with the facts he believes will demonstrate McDonald's "joint employer" status under that theory.[4] Even if reasonable minds may differ as to whether this requirement is an absolute necessity, the General Counsel and the Board should err on the side of providing relevant notice, and this is especially true when the Board may impose liability based on a new legal theory and facts that, absent the changes urged by the General Counsel, might *not* be the basis for finding a violation.

Which brings us to our final point: the Board's responsibilities as steward of Agency resources and toward the parties and the public. Given the massive scope of this case, the Board should do everything reasonably necessary to ensure that it is litigated and decided *once*. Having this case overturned based on a denial of due process at the complaint stage would poorly serve the Board and produce a terrible injustice for the parties, in addition to causing substantial harm to other employees, unions and employers for whom–in a world of finite resources–the Board's assistance may be denied or delayed. This is all too likely an outcome if we proceed in a fashion that creates a substantial risk of reversal purely on procedural grounds relating to a deficient pleading filed at the litigation's outset, which predictably will be followed by huge expenditures of time, money, and human capital. There is no reason to run such a risk, when prudent measures at the outset—namely, granting the Respondent's motion—can ameliorate it.

In sum, we believe the Board should grant Respondent's motion for a bill of particulars setting forth the legal and factual contours of the joint employer standard for which the General Counsel argues in this case, particularly since the General Counsel's new standard may be the sole basis upon which the Board finds a violation against McDonald's. In the absence of granting Respondent's motion, we believe the Respondent will have a plausible and potentially compelling argument that its due process rights have been violated—and the Board may find that it has expended substantial resources building and litigating a case on an unstable foundation. When litigation commences, it is in the interests of all parties and the Board—and the public at large—for the complaint to place the goalpost in a clearly marked location, and it is the Board's job to ensure that the General Counsel keeps it there. Thus, we would order the General Counsel to provide the Respondent with a bill of particulars setting forth in reasonable detail all elements of the proposed alternative joint employer standard and a general description of the facts that form the basis for the joint employer allegations under that proposed standard.[5]

[4] We concur with our colleagues, for the reasons they state, to the extent that they deny the motion for a bill of particulars in relation to the *current* joint employer standard and facts the General Counsel intends to prove to show that McDonald's is a joint employer under that standard.

[5] This approach is consistent with the Supreme Court's instruction that any agency potentially changing its interpretation of the law, where substantial liability may result, must provide "fair warning of the conduct a regulation prohibits or requires" and avoid "unfair surprise" in order to receive any deference from the courts. See *Christopher v.*

Accordingly, for the foregoing reasons, we respectfully dissent.

Dated, Washington, D.C. August 14, 2015

Philip A. Miscimarra, Member

Harry I. Johnson, III Member

NATIONAL LABOR RELATIONS BOARD

SmithKline Beecham Corp., 132 S.Ct. 2156, 2167 fn. 15 (2012) (alterations and internal quotations omitted). In any event, regardless of the evidence adduced at the hearing relevant to any alternative theory of joint employer status put forward by the General Counsel, the judge is bound to decide the case under extant precedent. *Iowa Beef Packers, Inc.*, 144 NLRB 615, 616–617 (1963), enfd. in relevant part 331 F.2d 176 (8th Cir. 1964).