

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
ADMINISTRATIVE LAW JUDGE LAUREN ESPOSITO**

**McDONALD'S USA, LLC, A JOINT EMPLOYER,  
et al.,**

**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.  
31-CA-127447, et al.**

**2MANGAS INCORPORATED'S OPPOSITION TO GENERAL COUNSEL'S MOTION  
TO ADJOURN OCTOBER 5, 2015 HEARING DATE**

We represent Respondent 2Mangas Incorporated ("2Mangas") which is joined as a party in the Region 31 Consolidated Complaint filed on December 19, 2015. 2Mangas opposes General Counsel's Motion to Adjourn October 5, 2015 Hearing Date. We respectfully request that the trial resume on October 5, 2015 as currently scheduled.

**I. Background**

2Mangas is the owner-operator of a McDonald's restaurant located at 4292 Crenshaw Boulevard, Los Angeles, California. An Order Consolidating Cases, Consolidated Complaint, and Notice of Hearing dated December 19, 2014 issued by Region 31 ("Consolidated Complaint") consolidates two unfair labor practice charges which were filed against 2Mangas by the Los Angeles Organizing Committee. (*See*, Case Nos. 31-CA-129982 and 31-CA-134237.) The Consolidated Complaint alleges at Paragraphs 16 and 17 that Jose Rodriguez held the position of General Manager and has been a supervisor of 2Mangas and that his conduct violated Section 8(a)(1) of the National Labor Relations Act (the "Act") as follows:

- (a) About May 12, 2014 store manager at the back of the 2Mangas' facility, interrogated employees about their Union activities.
- (b) About May 12, 2014, at the back of the 2Mangas' facility, created the impression that employees' Union activities were under surveillance.

(c) About May 17, 2014 at Rodriguez' office in the 2Mangas facility, interrogated employees about their and other employees' union activities.

The allegations lack factual specificity even though it should be a straightforward matter to describe the facts surrounding two or three instances. 2Mangas denies that the charges have any merit. However, more than one year after the filing of the charges, 2Mangas continues to be required to defend itself against phantom charges.

2Mangas is facing the possibility of financial hardship based upon minor, unsubstantiated charges. In defending against these charges, 2Mangas has produced volumes of documents. The allegations of the particular charges against 2Mangas are insubstantial and under any other circumstances would have been resolved or settled long ago. But because of General Counsel's refusal to sever or settle any cases without an admission that McDonald's USA LLC is a joint employer, and insistence on a trial as to the joint employer theory without a predicate determination on the validity of the unfair labor practice charges, 2Mangas is forced to bear the burden and excessive expense of this litigation.

## **II. The Unfair Labor Practice Charges Should Be Heard on the Merits Without Further Delay**

Due process in an administrative hearing includes a fair trial, conducted in accordance with fundamental principles of fair play and applicable procedural standards established by law. Administrative convenience or necessity cannot override this requirement. Russell-Newman Mfg. Co. v. N. L. R. B., 370 F.2d 980, 984 (5th Cir. 1966); Swift and Co. v. United States, 308 F.2d 849 (7th Cir. 1962); Hornsby v. Allen, 326 F.2d 605 (5th Cir. 1964). The generic charges recited in the Consolidated Complaint do not establish a violation of the Act as to 2Mangas. No facts are alleged regarding the context or content of any workplace communications which purportedly involved Jose Rodriguez on May 12 and May 17. The Consolidated Complaint lacks sufficient specificity to state a plausible claim that Jose Rodriguez' purpose was to interfere with, restrain or coerce employees in the exercise of their right rights under the Act. 2Mangas is being forced to defend itself without knowing whether any facts exist which may support the General Counsel's

conclusory allegations. Due process demands that 2Mangas be permitted to have a hearing of the vague charges now.

2Mangas made available documents in response to the General Counsel's subpoena on June 18, 2015. The General Counsel's larger desired document and ESI production in response to its subpoenas is neither germane nor necessary to prove the simple allegations of interrogations or conduct creating the impression of surveillance. The Consolidated Complaint gives no indication that any documentary evidence is at issue for the charges involving alleged actions of Jose Rodriguez. It is inconceivable that ESI is necessary for the General Counsel to prove interrogation and impression of surveillance charges which purportedly occurred at the back of the store or in Jose Rodriguez' office. Therefore, the adjudication of the General Counsel's subpoena enforcement action is not a prerequisite to the commencement of the trial for 2Mangas.

It is eminently reasonable to proceed by first requiring that the General Counsel prove a violation of the Act by 2Mangas prior to imposing significant additional and duplicative expense upon 2Mangas to produce documents and ESI which have nothing to do with the charges. If, as 2Mangas expects, the General Counsel fails to prevail on the charges, 2Mangas will be relieved of the burden of the subpoena and hearing costs of the massive multi-party litigation. By staging the hearing of nebulous garden variety charges prior to the outcome of any prospective subpoena enforcement action, 2Mangas will be spared the incursion of potentially unnecessary costs unless it becomes clear they are warranted.

The General Counsel's motion for adjournment does not demonstrate good cause for continuing to delay the hearing for 2Mangas. The General Counsel has not asserted a nexus between the alleged acts of Jose Rodriguez and the charges against other respondents. *See, e.g., United States Postal Service*, 263 NLRB 357, 367 (1982)(Board upheld ALJ's denial of consolidation where there was no indication that the charging party in one case had any contact with the respondent or the officials involved in the other case.) The national consolidated litigation has proven itself to be grossly inefficient for the determination of the insubstantial charges involving 2Mangas. If the General Counsel is not ready to proceed with the trial of the joint

employer theory, the entire litigation should not be delayed. *See, e.g., Arnold v. Eastern Air Lines*, 712 F.2d 899, 906 (4<sup>th</sup> Cir. 1983)(reversing a decision to consolidate cases and holding that “considerations of convenience many not prevail where the inevitable consequence to another party is harmful and serious prejudice.”); *see also, In re Repetitive Stress Injury Litig.*, 11 F.3d 368, 373 (2d Cir. 1993)(“Although consolidation may enhance judicial efficiency, ‘considerations of convenience and economy must yield to a paramount concern for a fair and impartial trial.’”) As the General Counsel has precluded franchisees from disposing of the cases without trial, 2Mangas should no longer be forced to wait to win the cases on the merits at trial.

### **III. 2Mangas Will Be Prejudiced by an Adjournment of the Consolidated Trial**

Matters of continuance rest in the discretion of the hearing officer or examiner, but are subject to court intervention upon a clear showing of abuse of discretion. *N. L. R. B. v. Air Control Products of St. Petersburg, Inc.*, 335 F.2d 245, 247 (5<sup>th</sup> Cir. 1964); *Jefferson Elec. Co. v. NLRB*, 102 F.2d 949, 955 (7<sup>th</sup> Cir. 1939); *NLRB v. Algoma Plywood & V. Co.*, 121 F.2d 602, 604 (7<sup>th</sup> Cir. 1941); *NLRB v. American Potash & Chemical Corp.*, 98 F.2d 488, 491-492 (9<sup>th</sup> Cir. 1938). Such an abuse shall be found where the exercise of discretion “is demonstrated to clearly prejudice the appealing party.” *N.L.R.B. v. Pan Scape Corp.*, 607 F.2d 198, 201 (7<sup>th</sup> Cir. 1979); *Electromec Design and Development Co. v. NLRB*, 409 F.2d 631, 635 (9<sup>th</sup> Cir. 1969).

Bare allegations which are unsupported by any reason to believe that 2Mangas may have violated the Act do not warrant the prejudice to 2Mangas from another adjournment of the consolidated trial. The blanket proposition that the existence of a franchise agreement spawns a putative joint employer relationship with every independent franchisee for all personnel matters is untenable with respect to the three conclusory allegations against one individual. The General Counsel has not shown a compelling need for any subpoena enforcement action in order to proceed with the hearing of the charges against 2Mangas.

The Board must conclude matters before it “*within a reasonable time* for the sake of the convenience and necessity of the parties.” *TNS, Inc. v. NLRB*, 296 F.3d 384, 404 (6<sup>th</sup> Cir. 2002)(emphasis in original). Respondents may not be needlessly subjected to expense and

delays. *See, id.* at 403-404 (denying enforcement after eighteen year lapse between case filing and Board decision); NLRB v. Nixon Gear, Inc., 649 F.2d 906, 914 (2dCir. 1981)(denying enforcement, noting “expense and delay to which [the Company} was needlessly subjected”); NLRB v. Connecticut Foundry Co., 688 F.2d 871, 881 (2d Cir. 1982)(denying enforcement, criticizing the Board for delay because it “renders the Company’s burden . . . much more difficult if not insurmountable).

The General Counsel should be held to the standard that has been articulated to justify undertaking this litigation. In the interest of conserving the resources of 2Mangas and to avoid unnecessary delay, the General Counsel’s motion for adjournment should be denied. Where, as here, a respondent has been deprived of the expeditious resolution of a baseless or marginal case through hearing or settlement, another adjournment of the trial is improper. The delay will likely result in financial hardship for 2Mangas. For the above reasons, 2Mangas respectfully requests that the ALJ deny the General Counsel’s motion for adjournment and resume the trial on October 5, 2015.

DATED: August 27, 2015

Respectfully submitted,

By: /s/ Regina A. Petty

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**CERTIFICATE OF SERVICE**

The undersigned, an attorney admitted to practice before the Courts of the State of California, affirms under penalty of perjury that on August 27, 2015, she cause true and correct copies of 2MANGAS INCORPORATED'S OPPOSITION TO GENERAL COUNSEL'S MOTION TO ADJOURN OCTOBER 5, 2015 HEARING DATE to be served by electronic mail to the following parties:

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