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**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., and 31–CA–127447, et al.

May 26, 2016

ORDER¹

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA
AND HIROZAWA

Respondent MaZT's emergency expedited requests for special permission to appeal the December 3, 2015 rulings of Administrative Law Judge Lauren Esposito denying MaZT's motion for an order addressing the use and administration of Sharepoint and MaZT's motion for modification of the Case Management Order, or in the alternative, to clarify or establish precise standards for the advance notice of witnesses and the presentation of evidence, are denied as moot for the reasons set forth below.

On March 3, 2015, Administrative Law Judge Lauren Esposito issued a Case Management Order (CMO) which provides, *inter alia*, that the hearing in this matter will take place in three phases—the first in Manhattan, the second in Chicago, and the third in Los Angeles. The CMO distinguishes between joint-employer evidence applicable on a “corporate or nationwide basis,” all of which will be presented in Manhattan, and joint-employer and ULP evidence applicable to “each specific franchisee,” which will be presented in Manhattan, Chicago, or Los Angeles, respectively, depending upon the geographic location of each individual franchisee. Finally, in order to minimize the litigation costs of the individual franchisees, the CMO originally provided for parties to be able to participate in hearings remotely by videoconference, if they wished, and directed the General Counsel to provide notice regarding the presentation of joint-employer evidence “sufficiently in advance” to allow parties wishing to participate in the hearing by videoconference to arrange to do so.²

In an effort to facilitate the remote participation element of the CMO, the General Counsel proposed using

the Agency's videoconference and file-sharing technologies. However, there were a number of difficulties in implementing these technologies in a way that would allow for real-time remote participation by interested parties. In addition, a dispute arose between Respondent MaZT and the General Counsel regarding the sufficiency of advance notice and use of joint-employer evidence under the CMO.

On July 3 and November 25, 2015, respectively, Respondent McDonald's USA, LLC and Respondent MaZT each filed motions with the judge related to the proposed use of the Agency's videoconference and file-sharing technologies. On November 25, Respondent MaZT also filed a separate motion to modify the CMO to clarify or establish precise standards for the advance notice of witnesses and presentation of evidence related to joint-employer status, and to limit the use of joint-employer evidence introduced during the franchisee-specific phases of the hearing. The judge denied each of these motions and the Respondents each filed requests for special permission to appeal these rulings.³ The General Counsel filed an opposition to each of these three requests.

On March 14, 2016, the judge approved a Stipulation between McDonald's USA, Respondent Franchisees, the Charging Parties, and the General Counsel as to Modification of the Case Management Order (Stipulation). The Stipulation, *inter alia*, modifies the CMO “to replace remote participation of counsel for respondent franchisees by videoconference with the rights to deferred objection and cross-examination [as described in the Stipulation].” (Stipulation at 1.) The Stipulation also provides that “every party agrees to withdraw any appeals it has pending regarding the videoconference system as moot.” *Id.* In light of this Stipulation, on March 25, 2016, the Board issued a Notice to Show Cause why these three pending requests for special permission to appeal should not be dismissed as moot.

On April 7, 2016, Respondent McDonald's USA, LLC filed a response to the Notice to Show Cause stating that it agreed to withdraw its July 27, 2015 request for special permission to appeal. On April 8, 2016, Respondent MaZT filed a response to the Notice to Show Cause stating that the Stipulation did not affect the issues raised in its two pending requests for special permission to appeal. On April 14, 2016, the General Counsel filed a brief in opposition to Respondent MaZT's response, arguing that both remaining requests for special permission to appeal are moot under the terms of the Stipulation.

¹ The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

² As discussed *infra*, the videoconferencing aspect of the CMO was eliminated by joint stipulation.

³ Respondent McDonald's USA, LLC filed its request for special permission to appeal on July 27, 2015. Respondent MaZT filed its requests for special permission to appeal on December 15, 2015.

Having duly considered these matters and for the reasons stated below, we find that Respondent MaZT's two pending requests for special permission to appeal are moot.

In its requests for special permission to appeal, Respondent MaZT stated concerns about notice of witnesses and use of the Agency's file-sharing technology that were grounded, at least in part, in the difficulties of remote participation. As noted above, however, the Stipulation modified the CMO to eliminate the need for parties to participate in the hearings remotely via videoconference. Without the element of remote participation, there is no basis for the rigid advance notice requirement sought by Respondent MaZT and no need for real-time remote access to documents.⁴ Respondent MaZT will not be participating remotely in any aspect of the hearing and will be physically present when the General Counsel presents its case concerning MaZT. Thus, there is no validity in the concerns Respondent MaZT has raised regarding use of the Agency's file-sharing technology. While litigation documents will continue to be made available using this technology as a convenience to the parties, if Respondent MaZT prefers, it will be able to obtain copies of the transcripts and exhibits from the court reporter (as in any other NLRB proceeding), and will have the opportunity to present objections regarding evidence in remote hearings in accordance with the Stipulation.

In addition, we do not see any basis for Respondent MaZT's request to further limit the use of joint-employer evidence introduced during the franchisee-specific phases of the hearing. In this regard, the CMO distinguishes between joint-employer evidence applicable on a "corporate or nationwide basis" and joint-employer and ULP evidence applicable to "each specific franchisee."⁵ The Stipulation provides further definition to this distinction. Thus, under the CMO and the Stipulation, for any franchisee-specific evidence offered against Respondent

⁴ Contrary to our dissenting colleague, we find that the CMO provides for the parties to receive appropriate advance notice from the General Counsel, especially when viewed in light of the Stipulation. The Stipulation, which Respondent MaZT agreed to, eliminates the use of videoconferencing for the introduction of evidence, including witness testimony. Instead, counsel for respondent franchisees who have not made an appearance on the record at the time of the introduction of evidence at issue are permitted to defer objections and cross-examination. This provides ample time for the respondent franchisees to raise objections to all testimony or exhibits relevant to the allegations concerning it and to recall any witness for cross-examination.

⁵ If, during the various phases of the hearing, the General Counsel seeks to introduce evidence in a manner that is contrary to the judge's CMO or the parties' Stipulation, any party can raise an objection with the judge during the hearing.

MaZT, counsel for MaZT will have a full opportunity to examine, object to, and/or rebut that evidence.

Accordingly, for the foregoing reasons, we deny Respondent MaZT's December 15, 2015 requests for special permission to appeal as moot.

Dated, Washington, D.C. May 26, 2016

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, concurring in part and dissenting in part.

This is a consolidated proceeding involving 31 separate respondents and 61 unconnected unfair labor practice (ULP) cases, and the structure of the hearing is based on unusual procedures requested by the General Counsel. I have previously expressed my view that the decisions made to date in this consolidated proceeding will result in extraordinary costs and delays,¹ and the worst burdens will be imposed on the alleged discriminatees (since they will be denied relief until the completion of a lengthy multiple-city hearing and subsequent appeals that are likely to involve many more years of litigation than would be associated with separate cases) and on each of

¹ The Board's prior procedural rulings in this case outline its extraordinary and unprecedented nature. See *Lewis Foods of 42nd Street, LLC*, 362 NLRB No. 132 (2015) (finding that judge properly denied McDonald's request to have a transcript of a telephonic conference addressing scheduling and production of documents subpoenaed by the General Counsel); *McDonald's USA, LLC*, 362 NLRB No. 168 (2015) (finding that judge properly denied McDonald's motion for a bill of particulars regarding General Counsel's alternative theory of joint-employer status, about which the consolidated complaints are silent); *McDonald's USA, LLC*, 363 NLRB No. 91 (2016) (finding that judge properly denied motions filed by McDonald's and New York franchisees to sever consolidated cases based on alleged prejudice to the respondents and the alleged denial of due process); *McDonald's USA, LLC*, 363 NLRB No. 92 (2016) (denying appeals by McDonald's and New York franchisees challenging Case Management Order based on objections to the structure of multiple-city hearings and the order in which evidence must be presented); *McDonald's USA, LLC*, 363 NLRB No. 144 (2016) (denying McDonald's appeal from judge's order that prevents McDonald's from obtaining various subpoenaed documents relating to potential "brand protection" defense to alleged joint-employer liability). I have authored separate dissenting opinions regarding the majority's rulings in all but one of these prior decisions, and in 362 NLRB No. 168, former Member Johnson and I coauthored a dissenting opinion.

the 31 separate respondents (since most of the hearing will be devoted to matters *other than* each separate respondent's alleged violations). The judge and my colleagues have recognized that the size and structure of this litigation require meaningful accommodations to address substantial process-related costs and burdens on the parties.²

At present, the Board is considering two appeals by Respondent MaZT, Inc. (MaZT), which I address in succession below.

First, MaZT appeals from the judge's refusal to clarify her Case Management Order's requirement that the General Counsel provide "sufficient" advance notice of witness names and planned appearance dates so that each respondent can decide whether or how to participate in the hearing when particular witnesses testify. MaZT has requested that, for every week in which the General Counsel will call witnesses to testify, the General Counsel be required to provide the witnesses' names and appearance dates on Monday of the preceding week. In part, this request by MaZT was prompted by the fact that the Case Management Order contemplated that various respondents would participate in the hearing from remote locations, relying on videoconference and document management technologies that have proven to be unreliable. Although my colleagues correctly note that the parties' stipulation has dispensed with remote participation, I believe it is unreasonable in a case of this size and complexity to deny MaZT's request that all parties receive one week's advance notice from the General Counsel of witness names and appearance dates (with notice to be provided, regarding witnesses who testify in any given week, by the close of business on Monday of the preceding week). The denial of MaZT's request for reasonable advance notice of witness names and expected appearance dates will predictably cause confusion, prejudice and unnecessary disputes and appeals to the Board. As to the majority's disposition of this issue,³ I respectfully dissent.

Second, in today's Order, my colleagues reiterate that the hearing's structure will include a discrete stage devoted to "each specific franchisee," during which the other 30 separate respondents will not need to partici-

pate.⁴ This is consistent with the majority's earlier rulings in this case. Thus, when upholding the consolidation of diverse parties and claims in this proceeding, the majority stated that "the Case Management Order provides for a distinct component of the litigation as it relates to each individual franchisee, which helps to protect the Respondents' . . . due process rights, as well as controlling the efficiency and costs of litigation for those individual businesses."⁵ Likewise, when approving the Case Management Order, the majority again stated that "the Case Management Order provides for an orderly presentation of evidence that helps to protect each Respondent's . . . due process rights, as well as controlling the efficiency and costs of litigation for those individual businesses."⁶ In its pending request for review, MaZT seeks confirmation that joint-employer evidence adduced during one respondent's "specific franchisee" hearing stage (in which the General Counsel has stated that the other franchisee respondents need not participate) will not be used against the other respondents. The hearing-stage structure of this proceeding contemplates that each franchisee respondent need not participate in the "specific franchisee" hearing stages devoted to other respondents, and the majority has emphasized that the purpose of this structure is to protect the due process rights of each individual respondent.⁷ Thus, the Board's earlier rulings and the disposition of MaZT's current motion establish that any franchisee-specific joint-employer evidence introduced or admitted during one "specific franchisee" hearing stage cannot be used against the other respondents.⁸ On this basis, I concur with the majority's disposition of this MaZT request.

⁴ The majority states that "the CMO distinguishes between joint-employer evidence applicable on a 'corporate or nationwide basis' and joint-employer and ULP evidence applicable to 'each specific franchisee.'" The Stipulation provides further definition to this distinction. Thus, under the CMO and the Stipulation, for any franchisee-specific evidence offered against Respondent MaZT, counsel for MaZT will have a full opportunity to examine, object to, and/or rebut that evidence." The majority also states that "during the various phases of the hearing, [if] the General Counsel seeks to introduce evidence in a manner that is contrary to the judge's Case Management Order or the parties' Stipulation, any party can raise an objection with the judge during the hearing."

⁵ *McDonald's USA, LLC*, 363 NLRB No. 91, slip op. at 2 (emphasis added).

⁶ *McDonald's USA, LLC*, 363 NLRB No. 92, slip op. at 1 (emphasis added).

⁷ See fns. 5 and 6, *supra*.

⁸ In other words, joint-employer evidence introduced or admitted during one "specific franchisee" hearing stage cannot be applied by reference against any other respondents. If the General Counsel wishes to use joint-employer evidence introduced or admitted during one "specific franchisee" hearing stage against other respondents, that same evidence must be proffered in each hearing stage devoted to those other respondents, where each of those respondents would have the oppor-

² See fns. 5 and 6, *infra*, and accompanying text.

³ Apart from the issue of advance notice of witnesses' names and expected appearance dates, I join my colleagues in denying MaZT's more detailed requests set forth on p. 3 of Exhibit J to MaZT, Inc.'s emergency expedited request for special permission to appeal the administrative law judge's order denying MaZT's motion for modification of the Case Management Order, or in the alternative, to clarify or establish precise standards for the advance notice of witnesses and the presentation of evidence.

Dated, Washington, D.C. May 26, 2016

Philip A. Miscimarra, Member

NATIONAL LABOR RELATIONS BOARD

tunity to contest its admission and cross-examine the General Counsel's witnesses.