IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, *et al.*, Plaintiffs, v. NATIONAL LABOR RELATIONS BOARD, *et al.*, Defendants.	Civil Case No. 6:23-cv-00553-JCB

DEFENDANTS' REPLY IN SUPPORT OF
CROSS-MOTION FOR SUMMARY JUDGMENT

Table of Contents

Table of Authorities

Cases

Statutes

Other Authorities

Regulations

In their Motion for Summary Judgment, Plaintiffs failed to discuss the Rule's threshold step and thus misrepresented the Rule's two-step mechanism for determining joint-employer status under the National Labor Relations Act (NLRA or the Act). Confronted with that error, Plaintiffs fall back on a series of empty averments that the Rule is arbitrary and capricious because it is open-ended. They take no account of the reality that multiple-employer situations resist bright-line rules as they are innumerable and ever-changing. Plaintiffs cling instead to disproven claims about common-law standards of control and unsupported conjecture on bargaining infeasibility—and in doing so, they advance control requirements that have no footing in the common law or in the joint-employer rule they seek to keep in place. Their prior criticism that the Board did not hew to the boundaries of the common law has now morphed into an incongruous claim that a framework explicitly hewing to the common law, and aligning with salient NLRA considerations, is too vague to be reasonable. Plaintiffs' arguments fall flat. The Board is entitled to summary judgment because its new joint-employer Rule is lawful in all respects.

I. The Rule's two-step process for determining joint-employer status under the NLRA is logical and adheres to judicial precedents.

Plaintiffs' resumed attack on the Rule begins with a curious argument that the Board "misdescribes" its own Rule, particularly Subsection (a).[1] This is the Rule's "threshold" step, which Plaintiffs entirely neglected in their initial filing. Now, for the first time taking stock of Subsection (a), Plaintiffs claim that all it does is require an entity to be a "common law employer" *of any group of employees*, so that the entity is "an 'employer' in the first place."[2] From there, Plaintiffs attack the Rule's two-step framework as superfluous and incoherent.[3] Plaintiffs' arguments merely compound

[1] Pls. Reply and Opposition [ECF No. 36] ("Pls. Reply") at 8.

[2] *Id.*

[3] *Id.* at 9.

their initial misunderstanding of the Rule and rely upon a series of mistaken premises.

Initially, Plaintiffs' framing of the threshold step fails to appreciate that the Rule focuses on the putative joint employer's relationship with the particular employees in question. Plaintiffs misread the Rule's plain text, which provides that a joint employer must be "an employer of *particular employees*" and have "an employment relationship with *those employees* under common-law agency principles."[4] Plaintiffs' interpretation would suggest that an employer satisfies the threshold step merely if it is a common-law employer of *any* employees in general. But the Rule, by limiting coverage to "particular employees" and tying employer status to "those employees," is explicitly focused on the employees at issue in a specific factual context. This reading is confirmed by the Board's discussion of the operation of the Rule throughout the preamble.[5]

Section 103.40(e) does not bolster Plaintiffs' misreading of the first step of the Rule.[6] That provision applies to the *second* step of the inquiry (focusing on control over essential terms and conditions of employment as a prerequisite for a joint-employer finding) and merely confirms that reserved or indirect control over an essential term is sufficient to satisfy this step.[7]

Next, Plaintiffs claim that the Rule is "a muddle," because "there will never be a scenario in which an entity satisfies the first step and not the second."[8] Plaintiffs fail to appreciate that the

---

[4] *Standard for Determining Joint Employer Status*, 88 Fed. Reg. 73,946, 74,017 (Oct. 27, 2023) (to be codified at 29 C.F.R. § 103.40(a)) (emphasis added).

[5] *E.g.*, *id.* at 73,951; 73,964 n.153; 73,968 & n.204; 73,970 n.253; 73,985; 73,986.

[6] *See* Pls. Reply at 8.

[7] *E.g.*, 88 Fed. Reg. at 73,968 (explaining that under Subsection (e), if an entity possesses control only over "basic expectations or ground rules for the production or delivery of goods or services," the entity would not qualify as a common-law employer "because such control, as a normal incident of a third-party contract, does not establish the common-law employment relationship that is the threshold requirement for finding a joint employer relationship").

[8] Pls. Reply at 8-9. But as explained in the Rule, there are "innumerable variations" of contracting between entities, so there may be a rare case where an entity is sufficiently involved with a group of

second step asks a different set of questions, about control over *essential* terms and conditions of employment. The fact that both steps of the inquiry may often point in the same direction does not mean that the two-step inquiry is arbitrary and capricious, particularly where, as here, each step serves distinct and necessary purposes in this intricate area of law.

Step one, the common-law inquiry, is required under settled law—a proposition no party disputes.[9] This generalized common-law inquiry deals with determining agency in a wide variety of contexts, such as liability for tort, discrimination, or insurance matters. In such contexts, the focus is typically a "backward-looking" assessment of liability, and rarely considers the "forward-looking context" that matters under the NLRA—namely, how "to correctly allocate prospective bargaining rights and obligations in support of employees' collective right to bargain."[10] And so, the "work" that the second step does is to focus on considerations that the common law does not address; it does so by providing a finite list of essential terms in order to ground the joint-employer inquiry in the NLRA context.[11] For the following three reasons, Plaintiffs incorrectly claim "the second step adds nothing to the analysis."[12]

1. Plaintiffs' own acknowledgement that "control over the essential terms and conditions of employment is critical to bargaining"[13] highlights the necessity and purpose of step

---

workers to qualify as a common-law employer (particularly as to an isolated instance of tort or insurance liability) but does not control an enumerated essential term. 88 Fed. Reg. at 73,955. Notably, Plaintiffs do not appear to dispute the converse point, that there are many entities that would quickly satisfy the second step, but lack enough control to satisfy the first, and thus not qualify as joint employers. This lack of overlap demonstrates that the two steps are not duplicative.

[9] *E.g., Browning-Ferris Indus. of Cal., Inc. v. NLRB ("BFI 2018"),* 911 F.3d 1195, 1206-07 (D.C. Cir. 2018).

[10] 88 Fed. Reg. at 73,951 n.33.

[11] Congress tasked the Board with the primary, if not exclusive, authority to interpret and apply the NLRA. *See generally Garner v. Teamsters Loc. Union No. 776*, 346 U.S. 485, 490 (1953).

[12] Pls. Reply at 9.

[13] Pls. Reply at 21.

two: it ensures that meaningful collective bargaining can occur between any joint employer and its employees' representative. That concern is unique to the labor sphere, as it involves an ongoing, forward-looking relationship, not the one-time apportionment of rights and obligations.

2. The Board's distillation of the essential terms followed significant consideration of public comment. The closed list of essential terms contained in the Rule provides guidance to the regulated community because the to-be-codified standard identifies "the core subjects of collective bargaining contemplated by the Act, as illuminated by the Board's administrative experience."[14]

3. The Rule's definition of essential terms draws deeply from longstanding precedent regarding the joint-employer standard under the NLRA. It accords with the Third Circuit's seminal 1982 decision in *NLRB v. Browning-Ferris Industries of Pennsylvania, Inc.*,[15] as well as D.C. Circuit precedent from the past decade.[16] Critically, in 2015, the Board established a virtually identical two-step inquiry in *Browning-Ferris Industries of California, Inc.* ("*BFI 2015*").[17] While the D.C. Circuit's review of that decision quibbled with how the Board weighed certain aspects of control under that test, and sought definitions for some of the test's terms, the court endorsed a two-step inquiry, consistent with the Board's approach there that "the existence of a common-law employment relationship is necessary, but not sufficient, to find joint-employer status."[18] The Rule's framework is in precise fidelity to the D.C. Circuit's guidance.

In sum, the Rule's inquiry meticulously aligns with the Board's prior, judicially approved

---

[14] 88 Fed. Reg. at 73,982.

[15] 691 F.2d 1117, 1124 (3d Cir. 1982) ("[W]here from the evidence it can be shown that [entities] share or co-determine those matters governing essential terms and conditions of employment[,] they constitute 'joint employers' within the meaning of the NLRA.").

[16] *Sanitary Truck Drivers & Helpers Loc. 350 v. NLRB*, 45 F.4th 38, 45 (D.C. Cir. 2022); *BFI 2018*, 911 F.3d at 1221.

[17] 362 NLRB 1599, 1613 (2015), *enforcement denied and remanded*, 911 F.3d 1195 (D.C. Cir. 2018).

[18] *BFI 2018*, 911 F.3d at 1221 (quoting *BFI 2015*, 362 NLRB at 1611).

efforts to harmonize the historical common-law analysis with the NLRA's animating concerns.

II. The Rule provides meaningful guidance, predictability, and a discernable standard to regulated parties notwithstanding a vast number of potential applications.

Plaintiffs advance several arguments that the Rule is vague and lacks meaningful guidance in violation of the APA.[19] These arguments fail. Initially, the Rule establishes a framework in which issues regarding joint-employer status will be determined primarily through case-by-case adjudication, well-befitting this common-law-infused inquiry. As noted by the Fifth Circuit, the common-law employment inquiry is "fraught with technical distinctions and . . . dependent on fact findings."[20] Because joint-employer status "is essentially a factual issue,"[21] where "there is no shorthand formula or magic phrase that can be applied to find the answer,"[22] resolution through adjudication is necessary. But the Rule does more than simply incorporate the common law; it establishes a "more precise definition of statutory standards than would otherwise arise through protracted, piecemeal litigation of particular issues."[23] And administrative agencies commonly choose to announce a general standard in rulemaking, and thereafter flesh out its contours through adjudication.[24]

The APA does not prohibit the Board from aligning its test, in the first step, with the same

---

[19] Pls. Reply. at 10-11, 18-20, 23, 25.

[20] *NLRB v. Deaton, Inc.*, 502 F.2d 1221, 1228 (5th Cir. 1974).

[21] *Boire v. Greyhound Corp.*, 376 U.S. 473, 481 (1964).

[22] *NLRB v. United Insurance Co. of Am.*, 390 U.S. 254, 258 (1968).

[23] *Trans-Pac. Freight Conf. of Japan/Korea v. Fed. Mar. Comm'n*, 650 F.2d 1235, 1245 (D.C. Cir. 1980); *see also* Board's MSJ at 21-22 [ECF No. 34].

[24] *E.g.*, JEFFREY S. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING 131 (6th ed. 2018) ("[E]nforcement proceedings, although adjudicative, frequently also make policy, filling in the interstices of a statute and agency rules."). The Seventh Circuit has noted that agencies are permitted to "use ambiguous standards that acquire meaning through the process of application, just as the common law does." *Ill. Council on Long Term Care, Inc. v. Shalala*, 143 F.3d 1072, 1077 (7th Cir. 1998) (citing *Parker v. Levy*, 417 U.S. 733 (1974); *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974); and *CSC v. Letter Carriers*, 413 U.S. 548 (1973)), *rev'd on other grounds*, 529 U.S. 1 (2000).

analysis courts have long used, while further anchoring the analysis to the NLRA's purposes in the Rule's second step. The standard is comprehensible and largely familiar, as putative employers have long had to perform common-law analyses to anticipatorily protect their interests in torts, retirement obligations, civil rights, and other areas of the law.[25] That there will be close cases demonstrates the fact-intensive nature of this area, not that the Rule is unlawfully vague.

Plaintiffs' emphasis on the D.C. Circuit's decision in *ACA International v. FCC*,[26] does not aid their cause, as that case concerned whether a detailed statutory ban on telemarketing also covered smartphones. While the statute "aimed to deal with hundreds of thousands of telemarketers," the court found that the FCC's standard would have impermissibly swept in smartphones used by "hundreds of millions of everyday callers," outside the bounds of the statutory ban.[27] But here, the Rule does not sweep in parties outside the contemplation of the NLRA. Indeed, the NLRA applies to most private sector "employers," and the Rule is consistent with this term's broad statutory definition.[28]

---

[25] Indeed, if Plaintiffs' vagueness argument were accepted, it would mean that generations of common-law cases holding employers liable in torts and workers' compensation have applied an indecipherably vague standard. *See* Board's MSJ at 21, nn.65-66; 88 Fed. Reg. at 73,958 & n.77 (citing Supreme Court cases applying other employment laws).

[26] 885 F.3d 687 (D.C. Cir. 2018) (cited in Pls. Reply at 11, 23).

[27] *Id.* at 698, 700.

[28] *See NLRB v. Checker Cab Co.*, 367 F.2d 692, 698 (6th Cir. 1966) (recognizing that NLRA definition of "employer" is "very broad" and "must be read . . . in order to assure to employees the fullest freedom in exercising the rights guaranteed by [the NLRA]'").

Relatedly, as previously discussed (Board's MSJ at 21-22) and contrary to Plaintiffs' claims (Pls. Reply at 18-20), the Rule adequately distinguishes between routine contracting relationships and common-law employment, in part by expressly responding to the precise concerns Plaintiffs point to in *BFI 2018*. 88 Fed. Reg. at 73,955. In the Rule, the Board explained that contractual indicia of a "true" independent contractor relationship would not constitute evidence of a joint-employer relationship. *Id.* And contrary to what Plaintiffs suggest (Pls. Reply at 18), the mere label "independent contractor" does not determine *who employs* a specific set of employees, which is the issue in the instant case. *See, e.g.*, *Greyhound Corp.*, 376 U.S. at 481 (independent contractor can be a joint employer); *NLRB v. Greyhound Corp.*, 368 F.2d 778, 780 (5th Cir. 1966) (same).

III. The Rule is consistent with the common law.

Plaintiffs' arguments regarding the common law largely ignore the authorities cited in the Board's cross-motion and in the Rule itself, doubling down on the same arguments previously refuted by the Board.[29] Contrary to Plaintiffs' claims, the common law definitively considers reserved and indirect control as relevant, and in some cases, dispositive.

1. Reserved Control. Plaintiffs first contend that the Board cites no cases in which reserved control was found sufficient to establish a common law employment relationship.[30] But the Board provided ample authority, citing numerous cases where an employment relationship was found, absent evidence of actual, direct control.[31] As just one example from many cited in the Rule, in *Industrial Commission v. Meddock*, the Arizona Supreme Court emphasized that it is "the right to control rather than the fact that the employer does control that determines the status of the parties."[32] The court went on to find an employment relationship, even though "[t]he record [wa]s replete with testimony by persons employed, to the effect that *no control or supervision was exercised over them*" by the disputed employer.[33] In another example, *Larson v. Independent School Dist. No. 11J*, the Idaho Supreme Court found employer status based only on contractual terms, without evidence of direct exercise of control.[34]

---

[29] Notably, Plaintiffs make no attempt to rehabilitate any of the common law cases or authorities relied in their opening brief and refuted by the Board in its response. *See* Board's MSJ at 27.

[30] Pls. Reply at 12.

[31] 88 Fed. Reg. at 73,949 & nn. 18-19.

[32] 180 P.2d 580, 584 (Ariz. 1947).

[33] *Id.* at 583-85 (emphasis added).

[34] 22 P.2d 299, 300-01 (Idaho 1933). Plaintiffs also misrepresent the facts of *Maltz v. Jackoway-Katz Cap Co.*, 82 S.W.2d 909 (Mo. 1935), by claiming that the purported employer engaged in "daily oral 'commands.'" Pls. Reply at 12. The employee in *Maltz* was a traveling salesman, and the court made a "reasonable inference" that he received undefined instructions of some sort on occasions when he visited a company's headquarters. *Id.* at 1009-11, 1016. There was no indication, however, that these instructions went to the means, as opposed to the ends, of the work, and certainly no evidence to

Further, Plaintiffs' discussion of reserved-control tests under the common law and the Rule confuses the facts present in certain cases with the legal rule described in those cases.[35] Cases like *NLRB v. Zayre Corp.*[36] describe actual *or* reserved control as being the relevant test to determine joint employer status. That there also may have been evidence of actual exercise of control in those cases says nothing about the applicable legal test. The Board's response to the dissent on this point remains unanswered by Plaintiffs here: "Our colleague cites no pre-*TLI*/*Laerco* precedent holding that actual exercise of direct control was *necessary,* and no number of cases holding only that the direct exercise of control is *sufficient* can rationally establish that proposition."[37]

Plaintiffs similarly err by claiming that the Restatements at the time of the Taft-Hartley Act required *both* the exercise and reservation of control.[38] As addressed in the Board's cross-motion,[39] these Restatements characterized the inquiry disjunctively, asking whether a purported employer exercises *or* reserves control over the means and manner of the work being done.[40] Plaintiffs' proposed test, requiring *both* exercised and reserved control, is far narrower than the common law, the 2020 Rule, or even any pre-2020 Board test, as those tests held that certain types of exercised

---

suggest that they were provided "daily." The court emphasized that, as to control, the most important factor was that the salesman was an "at will" employee, pursuant to the terms of his sales contract—a classic reservation of authority. *Id.* at 1015. ("No single fact is more conclusive as to the effect of the contract of employment, perhaps, than the unrestricted right of the employer to end the particular services whenever he chooses, without regard to the final result of the work itself.") (cleaned up).

[35] Pls. Reply at 12.

[36] 424 F.2d 1159, 1165 (5th Cir. 1970).

[37] 88 Fed. Reg. at 73,962 n. 119; *see also id.* at 73,952.

[38] Pls. Reply at 13.

[39] Board's MSJ at 26.

[40] Plaintiffs' reliance on the more recent Restatement of Employment Law (Pls. Reply at 13, 17) has little, if any relevance here, as it was not in effect at the time of the Taft-Hartley Act's passage. *See BFI 2018*, 911 F.3d at 1213.

control, standing alone, would be sufficient.[41]

2. Indirect Control. As with reserved control, the Board provided ample case support finding joint-employer status based solely on indirect control.[42] Plaintiffs' attempt to distinguish some of those cases falls flat.[43] Plaintiffs claim that in *EEOC v. Global Horizons, Inc.*,[44] the purported employer ("the Growers") "actually hired" the employees in question and actually provided housing, transportation, and meals.[45] But in that case, the Growers did none of those things; instead, they contracted with the undisputed employer ("Global Horizons") to hire the workers, and Global Horizons then provided housing, transportation, and meals.[46] And so, the court held that "the power to control the manner in which housing, meals, transportation, and wages were provided to the Thai workers, *even if not exercised*, is sufficient to render the Growers joint employers."[47] Similarly, in *Butler v. Drive Automotive Industries of America*, the Fourth Circuit emphasized that the most important factor to its determination was that the purported joint employer instructed the supplier employer, a staffing agency, to terminate an employee, and the staffing agency complied—a classic example of indirect control.[48]

---

[41] Plaintiffs again cite *Adams & Associates, Inc. v. NLRB*, 871 F.3d 358 (5th Cir. 2017), as support for their view. Pls. Reply at 13. But they do not engage with the Board's explanation (Board's MSJ at 30) that *Adams* simply upheld the Board's joint-employer test at that time, which required evidence of direct control. No party argued for a broader formulation of the joint-employer standard, and the court had no occasion to address the issues at stake here.

[42] *See* 88 Fed. Reg. at 73,954 & n.45, *contra* Pls. Reply at 14.

[43] Pls. Reply at 14-15.

[44] 915 F.3d 631 (9th Cir. 2019).

[45] Pls. Reply at 14.

[46] 915 F.3d at 640 (noting that "contracts . . . delegated to Global Horizons responsibility for providing housing, access to cooking facilities, transportation, and wages for the Thai workers.").

[47] *Id.* at 641 (emphasis added). Plaintiffs' contention that *Global Horizons* (and others cited) applied the "economic realities" test, such as that utilized under the Fair Labor Standards Act, is simply wrong. *Id.* at 638 ("We reject the chief alternative for analyzing employment relationships in the Title VII context: the economic reality test.").

[48] 793 F.3d 404, 415 (4th Cir. 2015).

Citing no case law, Plaintiffs next try to cabin "indirect" control to some inchoate concept not involving control exercised through an intermediary.[49] But this concept is out of step with the D.C. Circuit's definition of indirect control in *BFI 2018* as an action taken "through an intermediary."[50] The Fifth Circuit in *Deaton* also characterized control exercised through an intermediary as "indirect,"[51] and that is the position taken by the Board in the Rule.

Although Plaintiffs concede that the 2020 Rule found "that indirect (or reserved) control . . . can be *relevant*,"[52] that Rule in operation renders many forms of reserved and indirect control *irrelevant*. As explained earlier,[53] under the 2020 Rule, reserved and indirect control are 1) only relevant if there is direct control as well, and 2) can only be used to supplement evidence of direct control. This is contrary to the common law, which permits finding an employment relationship based solely on reserved or indirect control, as discussed above.

3. Degree of Control. The Rule's deletion of the 2020 Rule's requirement that a joint employer exercise "substantial" control—i.e., control that is not "sporadic, isolated, or de minimis"—accords with the common law. The new Rule recognizes that control can be exercised in many different forms—direct, indirect, or reserved—and over many different objects.[54] The Board

---

[49] Pls. Reply at 14 (citing 88 Fed. Reg. at 73,911 n. 434 (Member Kaplan, dissenting)).

[50] 88 Fed. Reg. at 73,954, n.47 (citing/quoting *BFI 2018*, 911 F.3d at 1216-17). Plaintiffs also misread the D.C. Circuit's holding in *BFI 2018*. The Court there declined to enforce the Board's underlying decision because it disagreed with the Board's potentially overbroad understanding of indirect control. It did not, as Plaintiffs suggest (Pls. Reply at 16), hold that the evidence of indirect control in that particular case would be insufficient under an appropriate common law standard. *Id.* at 1222-23.

[51] 502 F.2d at 1223 n.3.

[52] Pls. Reply at 15.

[53] Board's MSJ at 34-35.

[54] Plaintiffs' argument that *Zayre Corp.* establishes a "substantial control" requirement is incorrect. Pls. Reply at 16. In the section quoted by Plaintiffs, the Fifth Circuit was commenting on the Board's own practices in making unit determinations in department stores, noting that the Board has often found multi-employer units where "the employer exercised or had the potential to exercise

reasonably concluded that the 2020 Rule's requirement of "substantial" control—and specifically its exclusion of "isolated" and "sporadic" instances of control—impermissibly ran the risk of rendering individual instances of control over an essential term and condition of employment irrelevant. Under the Rule, determining what is sufficient and what is insufficient will be resolved through a fact-intensive inquiry in individual cases; it is unjustified to assume that the removal of the 2020 Rule's requirement must mean that *any* exercise of "sporadic, isolated, or de minimis" control will be found sufficient by the Board.[55]

The Rule also does not disturb the common-law inquiry as to the relevant subjects of control, as outlined in *Singer Manufacturing Co. v. Rahn* and other cases.[56] The Board agrees with Plaintiffs that the "touchstone" at common law is control and that control must be tied to the way in which work is completed, not merely its ends. Plaintiffs are wrong, however, in contending that the Rule conflicts with these common law principles—rather, the Board has fully embraced the necessity of an appropriately focused common-law inquiry.[57]

IV. Joint employers can bargain effectively regarding the indicia of employment that they control, resulting in comprehensive collective-bargaining agreements for workers who are jointly employed.

Plaintiffs open with a novel interpretation of NLRA Section 8(d), claiming that it requires possession of authority to bargain over all "core subjects" to trigger a bargaining obligation.[58]

---

substantial control over the employment practices of the licensees and was in practical effect a joint employer." 424 F.2d at 1165. The court did *not* establish its own independent "substantiality" standard. The same can be said for *Local 777, Democratic Union Org. Comm., Seafarers Int'l Union v. NLRB*, 603 F.2d 862, 904 (D.C. Cir. 1978), in which the court found that certain "minor controls" set primarily by government regulation, are "too insubstantial" to establish an employment relationship, but did not purport to set its own requirement.

[55] 88 Fed. Reg. at 73,955.

[56] Pls. Reply at 17 (citing *Singer Mfg. Co. v. Rahn*, 132 U.S. 518 (1889)).

[57] *E.g.*, 88 Fed. Reg. at 73,968.

[58] Pls. Reply at 20.

Contrary to Plaintiffs' suggestion, that section does not conclusively define *who* is obligated to bargain, but rather what it means to bargain collectively.[59] Nonetheless, Plaintiffs double down on this point, now asserting that an employer must have "shared control over *all* those essential terms and conditions" for bargaining to be meaningful.[60]

If the standard were as Plaintiffs posit—shared control over all terms—it would leave many employees unable to meet across the table with the entities who actually control their working lives. What's more, it would eviscerate *any* joint-employer standard, including the 2020 Rule, which based joint-employer findings on direct and substantial control over "one or more" essential term and condition of employment.[61] Parties have for many decades negotiated collective-bargaining agreements involving innumerable multi-entity employer and union arrangements; courts and the Board have consistently rejected any contention that bargaining in such circumstances is unworkable.[62]

Plaintiffs also ignore the equally (if not more) troubling challenges arising from the failure to include those entities—who together possess full control over employees' working conditions—at

---

[59] *See NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 348 (1958) (noting that Section 8(d) "defines collective bargaining"); *Mgmt. Training Corp.,* 317 NLRB 1355, 1358-59 (1995) (rejecting contention that employer's inability to "alter a particular mandatory subject of bargaining" conflicts with its statutory duty to bargain).

[60] Pls. Reply at 20 (emphasis added).

[61] 29 C.F.R. § 103.40(a). Because Plaintiffs' proposed standard is even narrower than the Board's 2020 rule, simply enjoining the Board's new Rule would not even secure the standard Plaintiffs now claim is required for bargaining to be meaningful.

[62] *See, e.g.*, *N. Am. Soccer League v. NLRB,* 613 F.2d 1379, 1382-83 (5th Cir. 1980) (affirming joint bargaining between union, NASL, and individual member clubs; individual clubs selected players and set compensation, NASL retained right to "disapprove" any contract, and entities shared responsibility over discipline); *Checker Cab Co.*, 367 F.2d at 697-98 (affirming joint bargaining between union, non-profit association of cab owner members, and 286 individual cab owners; non-profit only controlled some of the employees' terms and conditions of employment); *Interstate Warehousing of Ohio, LLC*, 333 NLRB 682, 682-83 (2001) (rejecting claims that joint bargaining would be too cumbersome where one employer controlled economic terms for some workers and a separate employer controlled economic terms for others).

the bargaining table. In that situation, a singular employer may not have the authority to agree to one or more essential terms that ordinarily must be addressed in a collective-bargaining agreement, which would necessarily thwart bargaining.[63] Any joint-employer standard will involve complicated bargaining dynamics, and the Board reasonably decided the Act favors comprehensive bargaining, even assuming potential difficulties may arise.[64] In this regard, *Herbert Harvey, Inc. v. NLRB*[65] and *Management Training Corp.*[66] are directly on point, contrary to Plaintiffs' claims. Both cases extensively discuss whether bargaining can be meaningful for an entity that does not control all essential terms and conditions of employment, and both cases reached the same answer: yes.

Finally, Plaintiffs now accept that "piecemeal bargaining" describes an unlawful tactic where one party undermines the bargaining power of another by requiring that issues be bargained in a particular order.[67] Nonetheless, they complain that the Rule will create a similar problem by forcing entities lacking sufficient leverage to the bargaining table. Plaintiffs fail to appreciate that a joint employer, by virtue of its power to control at least some of the employees' working conditions, has sufficient power to negotiate effectively over those matters. Importantly, a joint employer maintains all the powers any employer would have in bargaining, including the power to hold its ground so

---

[63] In certain scenarios bargaining may, in fact, be much simpler under the Rule given a union can be assured that all parties possessing the power to impact each essential condition of employment have considered the issues and agreed to the relevant terms. In contrast, an employer's lack of ability to fully commit to specific terms of an agreement will often create significant snags in collective bargaining. *Cf. Billups W. Petrol. Co.*, 169 NLRB 964, 964 (1968) (noting that failure to designate an agent with sufficient bargaining authority is evidence of bad faith bargaining), *enforced*, 416 F.2d 1333 (5th Cir. 1969).

[64] *See* 88 Fed. Reg. at 73,986 (rejecting arguments that comprehensive bargaining is more challenging and noting that it will "help avoid fruitless negotiations"); *see also* Board's MSJ at 37.

[65] 424 F.2d 770, 778-79 (D.C. Cir. 1969).

[66] 317 NLRB at 1357-59 (joint employer need not control economic terms to bargain effectively; "give and take" remains possible).

[67] *See* Pls. Reply at 22-23.

long it proceeds in good faith.[68] And because the Rule anticipates that joint employers will bargain about subjects they control beyond the enumerated list, that potentially opens up additional issues for negotiation. Additionally, because nothing in the Rule mandates a specific form of bargaining, the parties remain free to determine "the mechanics" for themselves.[69] Simply put, tradeoffs and effective bargaining are possible under the Rule, and Plaintiffs have failed to show otherwise.

V. The Rule's thorough consideration of industry impacts does not reflect arbitrary or capricious decisionmaking.

Plaintiffs continue to insist the Board failed to weigh industry impacts, but tellingly decline to engage with the Board's explanation that the Rule carefully addressed the concerns raised by constituents in various industries. As previously noted, the Rule comprehensively addressed the very issues the Plaintiffs press here, and did so in compliance with the APA.[70]

In essence, Plaintiffs are rehashing their disagreement with a variety of reasoned conclusions the Board reached in the Rule, such as the decision not to adopt industry-specific standards, the enumeration of certain "essential" terms and conditions, and the formulation of bargaining obligations.[71] But disagreements with the Board's policy choices do not render the Rule unlawful.

---

[68] *See generally Carey Salt Co. v. NLRB*, 736 F.3d 405, 411 (5th Cir. 2013) (discussing Board's standard for determining whether parties have reached impasse despite good-faith bargaining, thereby permitting employer to unilaterally implement employment terms); *see also* 29 U.S.C. § 158(d) (duty of good faith does not "compel either party to agree to a proposal or require the making of a concession").

[69] *Deaton, Inc.*, 502 F.2d at 1229. Parties could, for example, agree that the union and one employer will come to a tentative agreement on most issues, and the joint employer will review and approve as to the terms that it controls. Where the joint employer does not agree, all parties could come to the bargaining table on all issues, with the opportunity to make "informed tradeoffs," Pls. Reply at 21, based on the joint employer's concerns.

[70] *Compare* Pls. Br. at 23-24 *with* Board's MSJ at 41-42 (addressing franchisors, construction, and hospitals), and citations therein. *Cf. FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513-15 (2009) (policy changes are not subject to heightened scrutiny but agency must supply "reasoned explanation" for the change).

[71] *See* 88 Fed. Reg. at 73,960.

Plaintiffs list a smattering of measures common to franchise agreements, multi-employer construction sites, and hospital temporary staffing;[72] these include inter-company provisions of staffing guidance, training requirements, scheduling and safety rules, payroll protocols, dress codes, and rules of operation. It should be neither difficult nor controversial to conclude—hypothetically, and assuming these provisions dictate the details of work for another employer's employees—that if a putative joint employer controlled *all* these terms and conditions, the entity could very likely be a joint employer under the Rule, barring countervailing considerations.[73] Meanwhile, the version of the CleanCo hypothetical articulated in Member Kaplan's dissent[74] represents the other end of the spectrum regarding control: if a user-entity's only control is prohibiting the supplier-employer's employees from using certain cleaning supplies, that alone would not confer joint-employer status.

Ultimately, the Rule does not, and need not, conjure up and resolve hypothetical joint-employer disputes, as Plaintiffs appear to demand as part of their APA challenge.[75] Under the Rule's carefully devised framework, the extent of control that an entity has will determine whether there is sufficient control over the manner and means of work, and that determination must be made based on the specific facts of the case. In this way, the Rule facilitates resolution of highly fact-specific issues as they arise between actual parties in actual cases.

---

[72] The Rule thoroughly addressed these context-specific arrangements. *See id.* at 73,971, 73,978-79 (franchise relationships); *id* at 73,959, 73,970, 73,979-80 (construction industry); *id.* at 73,960 (hospitals); *see also id.* at 73,985-86 (stating the "applying the final rule will require sensitivity to industry-specific norms and practices" and that the Board will "take any relevant industry specific context into consideration when considering whether an entity is a joint employer").

[73] *Cf. Cognizant Tech. Sols. U.S. Corp.*, 372 NLRB No. 108, slip op. at 1 (2023) (finding under the 2020 Rule that Google is a joint employer of a subcontractor's employees based on control over "supervision, benefits, and hours of work").

[74] 88 Fed. Reg. at 73,987.

[75] *See* Pls. Reply at 19, 23-24.

Respectfully submitted,

/s/ Tyler Wiese
TYLER WIESE
Senior Attorney
Minnesota Bar No. 0329601
Tel: (952) 703-2891
tyler.wiese@nlrb.gov

KEVIN P. FLANAGAN
Deputy Assistant General Counsel
(No official bar number in Maryland)
Tel: (202) 273-2938
kevin.flanagan@nlrb.gov

CHRISTINE FLACK
Supervisory Attorney
(No official bar number in Maryland)
Tel: (202) 273-2842
christine.flack@nlrb.gov

ELISABETH H. CAMPBELL
Attorney
NY Bar No. 5935325
Tel: (202) 273-0121
elisabeth.campbell@nlrb.gov

National Labor Relations Board
Contempt, Compliance, and Special Litigation Branch
1015 Half St. SE
Washington, DC 20003
Fax: (202) 273-4244

Attorneys for Defendants

Dated: January 23, 2024

CERTIFICATE OF SERVICE

I certify that on January 23, 2024, I filed the foregoing document, Defendants' Reply in Support of Cross-Motion for Summary Judgment, with this Court using the CM/ECF filing system, and a copy is being served on the ECF Filers electronically by the Notice of Docket activity.

/s/ Tyler Wiese

TYLER WIESE
Senior Attorney
Minnesota Bar No. 0329601
Tel: (952) 703-2891
tyler.wiese@nlrb.gov