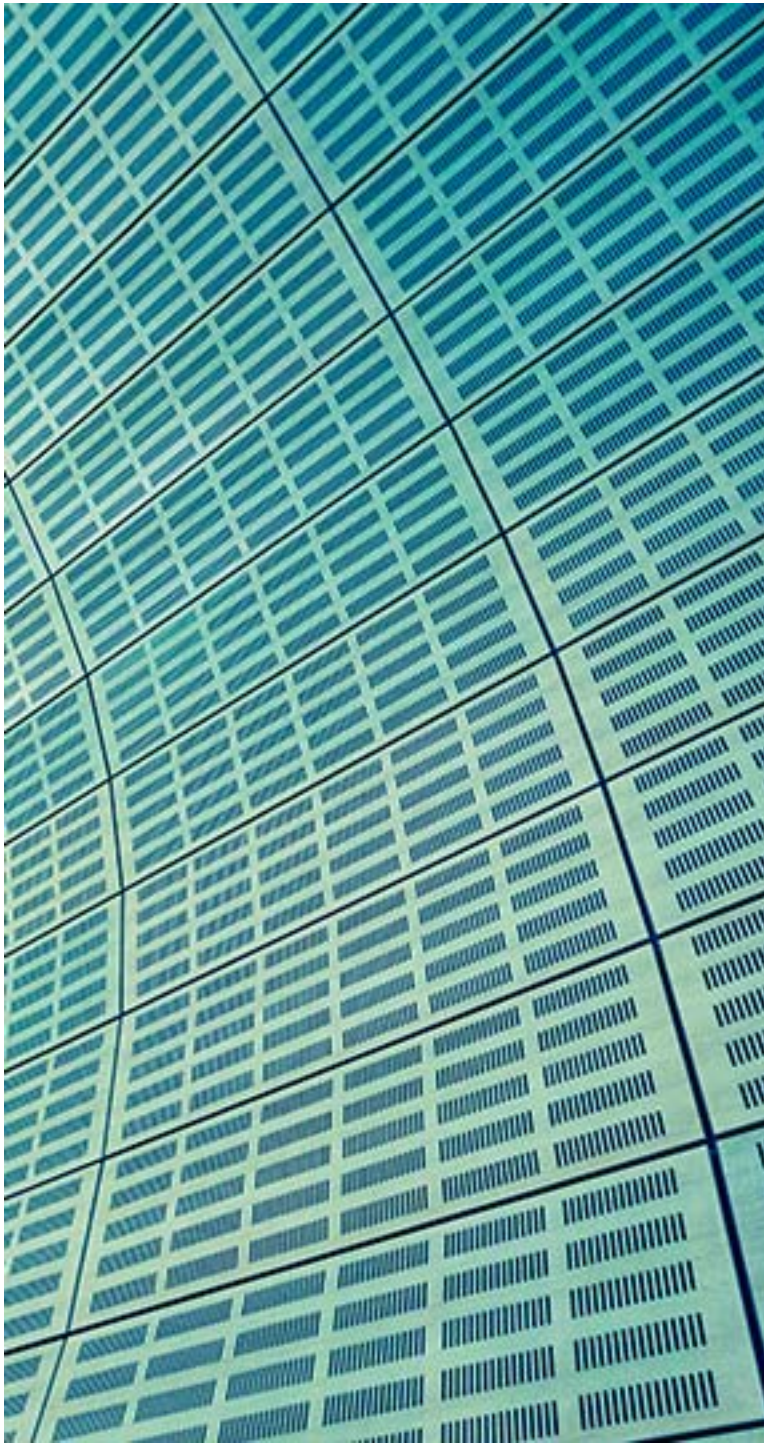

THOMPSON COBURN LLP

Section 13(c) and Joint Employment

This is a story about an arbitration . . .

THOMPSON COBURN LLP

The Players

WMATA

- Transit agency that provides bus, rail, and paratransit services in the greater Washington, D.C. area

THOMPSON COBURN LLP

The Players

The Union

- Transit worker union that represents, for collective bargaining purposes, transit workers in the greater Washington, D.C. area

THOMPSON COBURN LLP

The Path to Arbitration

- Prior to June 2013, WMATA's paratransit service (MetroAccess) was operated by a single service provider.
- In 2012, WMATA decided to change its contracting model by splitting the service between multiple providers.
- In 2013, WMATA awarded contracts to five different providers.

THOMPSON COBURN LLP

The Path to Arbitration

- The Union thought that WMATA's contracting model change entitled it to notice and the right to negotiate the adverse impacts of the change on employees (*i.e.*, Paragraph 5 obligations).
- WMATA did not think that any Section 13(c) agreement obligations were triggered.

THOMPSON COBURN LLP

The Path to Arbitration

- The Union sought arbitration under the applicable Section 13(c) agreements.
- WMATA resisted arbitration.
- The Union filed a complaint in federal court to compel WMATA to arbitrate under the Section 13(c) agreements *and* the WMATA Compact.
- The district judge sent the parties to arbitration.

THOMPSON COBURN LLP

So the parties went to arbitration…

A “typical” 13(c) arbitration with a significant wrinkle – the Union’s allegation that WMATA was obligated to bargain with the employees of paratransit contractors as a Joint Employer

THOMPSON COBURN LLP

The Legal Backdrop to the Arbitration

- The WMATA Compact
- Old *and new* NLRA jurisprudence on the doctrine of "joint employer"
- The relevant provisions of the 13(c) agreement

THOMPSON COBURN LLP

WMATA Compact Section 66

- The WMATA Compact governs WMATA's collective bargaining obligations with its employees.
- Section 66(c) of the Compact requires arbitration of labor disputes involving WMATA and its employees.

THOMPSON COBURN LLP

WMATA Compact Section 66

(b) The Authority shall deal with and enter into written contracts with employees as defined in section 152 of Title 29, United States Code [the National Labor Relations Act], through accredited representatives of such employees or representatives of any labor organization authorized to act for such employees concerning wages, salaries, hours, working conditions and pension or retirement provisions.

THOMPSON COBURN LLP

WMATA Compact Section 66

(c) In case of any labor dispute involving the Authority and such employees where collective bargaining does not result in agreement, the Authority **shall submit such dispute to arbitration by a board**…The term "labor dispute" shall be **broadly construed** and shall include any controversy concerning wages, salaries, hours, working conditions, or benefits including health and welfare, sick leave, insurance or pension or retirement provisions but not limited thereto, and **including any controversy concerning any differences or questions that may arise between the parties** including but not limited to the making or maintaining of collective bargaining agreements, the terms to be included in such agreements, and the interpretation or application of such collective bargaining agreements and any grievance that may arise and questions concerning representation.

THOMPSON COBURN LLP

“Joint Employer”

- The “joint employer” doctrine has its roots in NLRA jurisprudence.
- It is used by the NLRB to impose collective bargaining obligations for a single bargaining unit on multiple entities and hold the “putative” employer liable for violations of the NLRA.

THOMPSON COBURN LLP

“Joint Employer”

Since 1982, the NLRB has made joint employer determinations by asking:

* * *

Whether the involved business entities share or co-determine those matters governing the essential terms and conditions of employment (hiring, firing, discipline, supervision, and direction).

THOMPSON COBURN LLP

“Joint Employer”

On August 27, 2015, that changed…sort of…

* * *

The NLRB reaffirmed the standard of joint control or co-determination over essential terms and conditions of employment, but indicated its intent to move away from previous precedent that required the direct exercise of that control by the putative employer.

Instead, the NLRB suggested that the existence of control (whether indirect and whether exercised or not) could be sufficient to impose joint employer obligations on a putative employer.

THOMPSON COBURN LLP

The 13(c) Provisions at Issue

Paragraph (1)

The term "Project," as used herein, shall not be limited to the particular facility, service, or operation assisted by Federal funds, but shall include any changes, whether organizational, operational, technological, or otherwise, which are a result of the assistance provided...

The phrase "as a result of the Project," shall, when used in this arrangement, include events related to the Project occurring in anticipation of, during, and subsequent to the Project and any program of efficiencies or economies related thereto; provided, however, that volume rises and falls of business, or changes in volume and character of employment brought about solely by causes other than the Project (including economies or efficiencies unrelated to the Project) are not within the purview of this arrangement…

The 13(c) Provisions at Issue

Paragraph (5)

The Recipient shall provide to all affected employees sixty (60) days' notice of intended actions which may result in displacements or dismissals or rearrangements of the working forces as a result of the Project…(the "Notice")

At the request of either the Recipient or the representatives of [employees represented by a Union], negotiations for the purposes of reaching agreement with respect to the application of the terms and conditions of this arrangement [to the intended change(s)] shall commence immediately…(the "Implementing Agreement")…

Issues before the Board

1. Whether WMATA must collectively bargain with the Union representing MetroAccess contractor employees pursuant to the Compact? (The Joint Employer issue)
2. Whether WMATA must compensate MetroAccess contractor employees pursuant to the 13(c) arrangements? (The 13(c) “notice and implementation” issue)

THOMPSON COBURN LLP

The Union's Position

WMATA is a joint employer of MetroAccess contractor employees.

THOMPSON COBURN LLP

The Union's Position

The MetroAccess reorganization triggered Paragraph 5 (notice and implementing) obligations under the 13(c) agreement.

THOMPSON COBURN LLP

WMATA's Position

The Compact does not obligate WMATA to bargain with employees of WMATA's contractors.

THOMPSON COBURN LLP

WMATA's Position

The MetroAccess reorganization did not trigger Paragraph 5 obligations under the 13(c) agreement.

THOMPSON COBURN LLP

The Board’s Decision

The Board lacked jurisdiction to decide the Union's 13(c) claims via WMATA Compact Section 66.

THOMPSON COBURN LLP

The Board's Decision

Even if the Board had jurisdiction, the NLRB-created doctrine of "joint employer" does not apply outside of a NLRA-based collective bargaining relationship.

THOMPSON COBURN LLP

The Board's Decision

Even if the Board had jurisdiction, the Union did not show that the MetroAccess reorganization and its alleged adverse impacts resulted from a "Federally funded Project."

THOMPSON COBURN LLP

“Take Aways”

When facing Paragraph 5 notice and implementing challenges (and assuming your particular 13(c) agreement supports it), insist that the Union show a “causal connection” between the alleged adverse effects and Federal assistance.

THOMPSON COBURN LLP

“Take Aways”

If, as a public entity, you face “joint employer” allegations, remember that:

- You have arguments to counter joint employer status based on your status as an NLRA-exempt entity.
- The joint employer inquiry may be in flux, but even so, the recent Browning-Ferris decision is not intended to make an entity’s right to dictate the results of a contracted service probative indicia of employer status.