

United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: July 21, 2015

TO: Allen Binstock, Regional Director
Region 8

FROM: Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: RJS Dean Enterprise, LLC d/b/a and/or joint employer/alter ego of Youngstown General Construction Company, Inc., et al. Case 08-CA-139052

177-1650
712-5028-7500
712-5014-0140
601-5062

The Region submitted this case for advice regarding whether RJS Dean Enterprise, LLC (RJS Dean) and Youngstown General Construction Company, Inc. (YGCCI) are joint employers, and if they are not, which entity(ies) should be named as respondent(s) in the Section 8(a)(1) and (3) complaint that the Region intends to issue. We conclude that RJS Dean and YGCCI are not joint employers because they do not share or codetermine matters governing essential terms and conditions of employment; rather, YCGGI/[REDACTED] is the sole employer of the employees at issue. However, we find that RJS Dean should be named as a respondent by virtue of its relationship with YGCCI as joint venturers. Further, RJS Dean should be held liable for the unfair labor practices of (b) (6), (b) (7)(C) d/b/a YGCCI because RJS Dean invested [REDACTED] with actual authority to act on its behalf. Additionally, we find that (b) (6), (b) (7)(C) and (b) (6), (b) (7)(C) should be individually named as respondents as the proprietors of YGCCI, since YGCCI lost its corporate status in 2013, and that (b) (6), (b) (7)(C) should be named as an individual operating as a sole proprietor on one of the contracts.

FACTS

The City of Youngstown, Ohio began a project to repave its city streets in 2014. The city contracted with two paving contractors, R.T. Vernal and Shelly & Sands. R.T. Vernal then subcontracted with RJS Dean to lift manhole covers and with YGCCI to do flagging to redirect traffic. Shelly & Sands also subcontracted with RJS Dean to lift manhole covers. Both R.T. Vernal and Shelly & Sands subcontracted with RJS Dean because RJS Dean is a Minority Business Enterprise (“MBE”) and the contractors needed to fulfill a requirement under the 2014 resurfacing project to contract with a MBE.

RJS Dean does not have any employees or equipment of its own. It therefore turned to YGCCCI to obtain and perform contracts on RJS Dean's behalf. (b) (6), (b) (7)(C) (b) (6), (b) (7)(C) ("(b) (6), (b) (7)(C)") is the self-described (b) (6), (b) (7)(C), (b) (6), (b) (7)(C), and "biggest boss" of YGCCCI. (b) (6), (b) (7)(C) ("(b) (6), (b) (7)(C)") is YGCCCI's (b) (6), (b) (7)(C). YGCCCI is not a MBE and thus cannot fulfill the MBE requirements on city contracts on its own. RJS Dean's owner made business cards for (b) (6), (b) (7)(C) identifying (b) (6), (b) (7)(C) as RJS Dean's (b) (6), (b) (7)(C) (b) (6), (b) (7)(C) of General Construction and Concrete Projects.

Sometime in 2013, RJS Dean and YGCCCI entered into a formal joint venture agreement whereby YGCCCI would supply the labor for any subcontracts that RJS Dean obtained. (b) (6), (b) (7)(C) signed the agreement on behalf of YGCCCI. YGCCCI had lost its status as a corporation on April 14, 2011 for failing to file corporate tax reports or pay taxes as prescribed by the State of Ohio and has not regained its status. However, (b) (6), (b) (7)(C) and (b) (6), (b) (7)(C) continued entering into contracts on behalf of YGCCCI. The joint venture was established for "the furnishing and performance of the work, labor, and materials necessary for the completion of the Various street repair contract[s]." The agreement specifies that the obligations under any contract the joint venture enters into will be joint and several. It also designates RJS Dean as the sponsoring joint venturer and states that contracts will be "performed on behalf of the joint venturer under the direction of the sponsoring joint venturer...." The joint venture agreement further states that: "The parties to this agreement authorize the performance of the construction contract under the direction of the officers, employees, or agents of the sponsoring joint venturer...." Profits derived from the performance of any construction contracts are to be split as follows: 51% for RJS Dean and 49% for YGCCCI. The agreement is effective for 24 months.

(b) (6), (b) (7)(C) was responsible for obtaining the contracts and overseeing the work performed by RJS Dean and YGCCCI on the 2014 repaving project. In (b) (6), (b) (7)(C) role as (b) (6), (b) (7)(C) of RJS Dean, and in furtherance of the joint venture between RJS Dean and YGCCCI, (b) (6), (b) (7)(C) helped RJS Dean obtain the contract with Shelly & Sands for the 2014 repaving project. (b) (6), (b) (7)(C) also assisted RJS Dean in obtaining the contract with R.T. Vernal, which (b) (6), (b) (7)(C) signed as (b) (6), (b) (7)(C) of RJS Dean. (b) (6), (b) (7)(C) then supervised the labor, assigned employees, and sent invoices for the work performed by RJS Dean and YGCCCI on the contracts. Some invoices were sent on behalf of RJS Dean-YGCCCI, some were under the name (b) (6), (b) (7)(C) but requested payment to be made to RJS Dean, and some were under (b) (6), (b) (7)(C) name and asked the check to be made directly to (b) (6), (b) (7)(C)

(b) (6), (b) (7)(C) and (b) (6), (b) (7)(C) sent certified payroll records to the Department of Labor claiming employees were being paid prevailing wages on the repaving projects. These documents were signed on behalf of "RJS Dean Enterprise—YGCCCI" by (b) (6), (b) (7)(C) who referred to (b) (6), (b) (7)(C) as "(b) (6), (b) (7)(C)" or "(b) (6), (b) (7)(C)" and were sometimes also signed by (b) (6), (b) (7)(C) without specifying (b) (6), (b) (7)(C) title.

In (b) (6), (b) (7)(C) 2014, (b) (6), (b) (7)(C) hired the discriminatee to work on the repaving project. The discriminatee believed (b) (6) was working for RJS Dean. (b) (6), (b) (7)(C) worked for nine weeks and recorded (b) (6), (b) (7)(C) hours each week, along with the work (b) (6), (b) (7)(C) performed and how much (b) (6), (b) (7)(C) was paid. Most of the work performed by the discriminatee was flagging and manhole work. (b) (6), (b) (7)(C) worked on both the R.T. Vernal and Shelly & Sands jobsites, and performed work that was subcontracted to both RJS Dean and YGCCCI. At the end of each week, the employees would go to (b) (6), (b) (7)(C) office and a YGCCCI officer would come out and pay them in cash. (b) (6), (b) (7)(C) admitted that (b) (6), (b) (7)(C) has paid (b) (6), (b) (7)(C) employees in cash for years.

In late (b) (6), (b) (7)(C) while the discriminatee was raising manholes on a Shelly & Sands paving project, (b) (6), (b) (7)(C) spoke to an inspector who was assigned to investigate Shelly & Sands's work on the repaving project. The inspector told the discriminatee that (b) (6), (b) (7)(C) should try to become a member of the Laborer's Union and get an apprenticeship. The discriminatee contacted the Charging Party, The Laborers International Union of North America, Local Union No. 125 ("Union"), and scheduled a meeting with the Union's business agent to discuss obtaining the prevailing wage for (b) (6), (b) (7)(C) work. On (b) (6), (b) (7)(C) (b) (6), (b) (7)(C) called the discriminatee and told (b) (6), (b) (7)(C) that (b) (6), (b) (7)(C) knew (b) (6), (b) (7)(C) was talking to the Union and to "leave it alone" because employees were not going to be paid the prevailing wage of \$30.00 per hour since (b) (6), (b) (7)(C) (b) (6), (b) (7)(C) wasn't getting paid that much. The discriminatee then met with the Union on (b) (6), (b) (7)(C) and signed an authorization card.

The discriminatee continued to work for RJS Dean and YGCCCI/ (b) (6), (b) (7)(C) until (b) (6), (b) (7)(C), when (b) (6), (b) (7)(C) called (b) (6), (b) (7)(C) and demanded to know why (b) (6), (b) (7)(C) went behind (b) (6), (b) (7)(C) back and spoke with the Union. On (b) (6), (b) (7)(C), the discriminatee spoke to (b) (6), (b) (7)(C) again to ask whether they were working that day, and (b) (6), (b) (7)(C) said, "How could I have you working for me since you went behind my back and turned me in [to the Union]?" (b) (6), (b) (7)(C) said (b) (6), (b) (7)(C) knew what the discriminatee was up to and that (b) (6), (b) (7)(C) now had to go to court.

The Union had been investigating (b) (6), (b) (7)(C) and RJS Dean's operations since August and discovered that they were not paying prevailing wages. The Union contacted the City of Youngstown's prevailing wage coordinator on September 8 and learned that (b) (6), (b) (7)(C) had given the inspector a business card identifying (b) (6), (b) (7)(C) as (b) (6), (b) (7)(C) of RJS Dean.

ACTION

We conclude that RJS Dean and YGCCCI are not joint employers under either the current or proposed standards; rather, YGCCCI/ (b) (6), (b) (7)(C) is the sole employer of these employees. Nevertheless, we find that RJS Dean should be named in the complaint as a respondent due to its relationship with YGCCCI as joint venturers, that (b) (6), (b) (7)(C)

(b) (6), (b) (7)(C) and (b) (6), (b) (7)(C) should be individually named as proprietors of YGCCCI, and that (b) (6), (b) (7)(C) should also be named as an individual because (b) (6), (b) (7)(C) acted as a (b) (6), (b) (7)(C) on the R.T. Vernal contract.

Joint Employer Status

In determining whether two separate business entities may be regarded as joint employers, the Board examines whether the two businesses share or codetermine matters governing essential terms and conditions of employment.¹ To establish such status, a business entity must meaningfully affect matters relating to the employment relationship, such as “hiring, firing, discipline, supervision, and direction.”² As recently noted by the Board in *CNN America, Inc.*, the Board and the courts have also considered other factors in making a joint employer determination, including a putative joint employer’s influence over decisions relating to wages and compensation, the number of job vacancies to be filled, work hours, the assignment of work and equipment, and employment tenure, and an employer’s involvement in the collective bargaining process.³

Recently, the General Counsel has urged the Board to return to its traditional joint employer standard.⁴ Under that standard, the Board finds joint employer status where, under the totality of the circumstances, including the way the separate entities have structured their commercial relationship, the putative joint employer wields sufficient influence over the working conditions of the other entity’s employees such that meaningful bargaining could not occur in its absence. This approach makes no distinction between direct, indirect, and potential control over working conditions and results in a joint employer finding where “industrial realities” make an entity essential for meaningful bargaining.

In the present case, RJS Dean is not a joint employer under either the current standard or the proposed standard. RJS Dean does not meaningfully affect any

¹ *CNN America, Inc.*, 361 NLRB No. 47, slip op. at 3 (Sept. 15, 2014) (citing *TLI, Inc.*, 271 NLRB 798, 798 (1984), *aff’d mem sub nom. General Teamsters Local Union No. 326 v. NLRB*, 772 F.2d 894 (3d Cir. 1985), citing *NLRB v. Browning-Ferris Industries of Pennsylvania*, 691 F.2d 1117, 1123-24 (3d Cir. 1982)).

² *Id.* (citing *Laerco Transportation*, 269 NLRB 324, 325 (1984)).

³ *CNN*, 361 NLRB No. 47, slip op. at 3 n.7 & 7.

⁴ See Amicus Brief of the General Counsel, *Browning-Ferris Industries of California d/b/a BFI Newby Island Recyclery*, Case 32-RC-109684 (June 26, 2014) at 2, 16-17.

matters pertaining to the employment relationship between YGCCCI and its employees. RJS Dean plays no role in YGCCCI's decisions regarding hiring, firing, disciplining, or supervising employees, nor does RJS Dean affect wages, raises, or benefits of employees. RJS Dean is also not involved in setting work hours or work rules of YGCCCI employees. Finally, RJS Dean plays no role in ensuring that the work YGCCCI performs on its behalf is carried out appropriately; its owner does not visit the job site, instruct YGCCCI on how to carry out the work, or otherwise perform any direction or supervision. Thus, because RJS Dean does not directly or indirectly control or influence employees' terms and conditions of employment and meaningful collective bargaining between YGCCCI and its employees could occur in RJS Dean's absence, RJS Dean is not a joint employer under either the current or proposed standards.

RJS Dean's Liability

We conclude that RJS Dean is liable for the unfair labor practices of (b) (6), (b) (7)(C) and YGCCCI by virtue of their joint venture. The law regarding liability of parties to joint ventures is based on the rules governing partnerships.⁵ Each member of the joint venture is liable for both its individual conduct and for acts of the other members within the general scope of the enterprise.⁶ Thus, in *Great Lakes Dredge and Dock Company*, the Board held that the named respondent Great Lakes Dredge and Dock Company would be liable for any unfair labor practices committed by the joint venture, GLABVO, that it had entered into with two Dutch firms.⁷ The joint venture agreement provided that each of the joint venturers were jointly and severally liable for all obligations under the agreement.⁸ Hiring for the joint venture was done by a Great Lakes employee, who continued to be paid (b) (6), (b) base salary by Great Lakes but also received pay and a bonus from GLABVO.⁹ GLABVO employees were paid by the joint venture.¹⁰ The Board found that the Section 8(a)(3) the complaint was not fatally defective even though the complaint failed to name GLABVO as a

⁵ *Great Lakes Dredge and Dock Co.*, 240 NLRB 197, 198 (1979), supplemented by 244 NLRB 164 (1979).

⁶ *Id.*

⁷ *Id.* at 197, 199.

⁸ *Id.* at 197.

⁹ *Id.* at 198.

¹⁰ *Id.*

respondent.¹¹ Since the alleged discriminatory hiring was done in furtherance of the joint venture, Great Lakes would be liable as a principal of that joint venture for any unfair labor practice jointly and severally as specified in the joint venture agreement.¹²

Similarly, in the present case, RJS Dean should be held liable as a principal of the joint venture for the unfair labor practices committed by (b) (6), (b) (7)(C) and YGCCCI because (b) (6), (b) (7)(C) acted on behalf of the joint venture when (b) (6), (b) (7)(C) hired, interrogated, and fired the Charging Party. The joint venture agreement also specifies that RJS Dean and YGCCCI are jointly and severally liable for the obligations of the joint venture. Accordingly, RJS Dean is liable for the unfair labor practices committed on behalf of the joint venture.

We further conclude that RJS Dean is liable for the unfair labor practices committed by (b) (6), (b) (7)(C) and YGCCCI based on agency law. Agency authority may be either actual or apparent. Actual authority is created when the agent is given power to act on the principal's behalf by the principal's manifestation to the agent.¹³ A principal is responsible for an agent's conduct if the action is done in furtherance of the principal's interest and is within the agent's general scope of authority, even if the principal did not authorize the particular act.¹⁴

In the present case, RJS Dean granted YGCCCI and (b) (6), (b) (7)(C) actual authority to act on its behalf. The joint venture agreement designates RJS Dean as the sponsoring joint venturer and states that the construction contracts covered will be performed at the direction of RJS Dean through RJS Dean's officers, employees, or *agents*. RJS Dean, as the sponsoring joint venturer, then granted (b) (6), (b) (7)(C) actual authority to perform those contracts in furtherance of the joint venture. (b) (6), (b) (7)(C) (as YGCCCI), acting pursuant to that actual authority, then hired employees, including the discriminatee, supplied the materials and equipment, and performed the labor on the contracts. Although RJS Dean did not specifically authorize (b) (6), (b) (7)(C) or YGCCCI to commit unfair labor practices, (b) (6), (b) (7)(C) nevertheless did so within the scope of (b) (6), (b) (7)(C) authority; RJS Dean did not have any involvement in hiring and firing of employees on its projects, and entrusted these acts to (b) (6), (b) (7)(C) and YGCCCI. Accordingly, RJS

¹¹ *Id.* at 199.

¹² *Id.*

¹³ *Communication Workers Local 9431 (Pacific Bell)*, 304 NLRB 446 n.4 (1991).

¹⁴ *Bio-Medical of Puerto Rico*, 269 NLRB 827, 828 (1984).

Dean is liable for the unfair labor practices committed by its agents, (b) (6), (b) (7)(C) and YGCCl.

Although an alternative argument could be made that RJS Dean also vested (b) (6), (b) (7)(C) with *apparent* authority to act on its behalf, we have concluded that the Region should not make that argument. Apparent authority results from a manifestation by the principal to a third party that another is (b) (6), (b) (7)(C) agent.¹⁵ The Board's test for determining whether a person is an employer's agent is whether, under all the circumstances, the union or employees would have reasonably believed that the person was acting on management's behalf when taking the action in question.¹⁶ Statements by the putative agent are not evidence of apparent agency status.¹⁷ Here, RJS Dean provided (b) (6), (b) (7)(C) with a business card identifying (b) (6), (b) (7)(C) as

¹⁵ *Communication Workers Local 9431 (Pacific Bell)*, 304 NLRB at 446 n.4 (finding dissident union officials had a reasonable basis for believing that union stewards had the apparent authority from the union to make threats of violence even though the stewards had no actual authority to so act on the union's behalf).

¹⁶ *Mastec DirecTV*, 356 NLRB No. 110, slip op. at 1-2 (Mar. 11, 2011) (prounion employees did not have apparent authority to speak on behalf of the union where the union did not tell any employee that the prounion employees were acting as the union's representatives and the employees were not members of any organizing committee or associated with the union other than being supporters) (citing *Corner Furniture Discount Center*, 339 NLRB 1122, 1122 (2003) (prounion employee did not have apparent authority to speak on behalf of the union where the union did not make any manifestation to employees that would lead them to believe it had authorized the prounion employee to speak on its behalf)); *California Gas Transport*, 347 NLRB 1314, 1317 (2006) (nonsupervisory employee who promised employees a raise if they voted against the union did not have apparent authority to speak on the employer's behalf where the employer did not do anything to manifest the employee's authority as its agent).

¹⁷ See *California Gas Transport*, 347 NLRB at 1317 (citing *MPG Transport, Ltd.*, 315 NLRB 489, 493 (1994) (employee who led meeting to discuss what employees would want from the employer to avoid unionization did not have apparent authority to speak on the employer's behalf where he had not conveyed messages from the employer in the past and where he set up the meeting on his own without assistance from the employer), *enforced mem.* 91 F.3d 144 (6th Cir. 1996); *Virginia Mfg. Co.*, 310 NLRB 1261, 1266 (1993) (finding employee who told employees it was futile to strike did not have apparent authority to speak on the employer's behalf where there is no evidence that the employer sent him to speak on its behalf, and the statements of the alleged agent do not constitute evidence of agency status), *enforced mem.* 27 F.3d 565 (4th Cir. 1994)).

(b) (6), (b) (7)(C) of RJS Dean, but it is not clear that (b) (6), (b) (7)(C) ever passed on these cards to employees.¹⁸ There currently is evidence only that (b) (6), (b) (7)(C) provided the business card to the prevailing wage inspector. Moreover, while (b) (6), (b) (7)(C) gave the discriminatee the impression that (b) (6), (b) (7)(C) was working for RJS Dean on the repaving projects, (b) (6), (b) (7)(C) own statements are not sufficient to create apparent authority. Absent evidence of a manifestation by RJS Dean to employees that (b) (6), (b) (7)(C) was acting on its behalf, the Region should not argue in the alternative that (b) (6), (b) (7)(C) had apparent authority to act on RJS Dean's behalf vis-à-vis the employees.

Individual Liability of (b) (6), (b) (7)(C) and (b) (6), (b) (7)(C)

In cases involving sole proprietorships or partnerships, complaint is issued against “all responsible individuals” doing business on behalf of the enterprise.¹⁹ Additionally, the Board has stated that when individuals continue to operate a dissolved corporation as if it were still in existence, the individuals are to be held liable for the “corporate” obligations.²⁰ In the present case, (b) (6), (b) (7)(C) and (b) (6), (b) (7)(C) continued to run YGCCCI as if it were still a corporate entity, even though its corporate status was cancelled by the State of Ohio in April 2011. (b) (6), (b) (7)(C) signed the joint venture agreement on behalf of YGCCCI, and both (b) (6), (b) (7)(C) and (b) (6), (b) (7)(C) signed certified payroll forms on behalf of RJS Dean Enterprise—YGCCCI. Thus, (b) (6), (b) (7)(C) and (b) (6), (b) (7)(C) should be named as individual respondents doing business as YGCCCI.

Additionally, (b) (6), (b) (7)(C) performed work on the R.T. Vernal contract under the guise of YGCCCI, but sent invoices to R.T. Vernal under the name (b) (6), (b) (7)(C) and (b) (6), (b) (7)(C) requested and cashed checks made out by R.T. Vernal to (b) (6), (b) (7)(C) as (b) (6), (b) (7)(C). (b) (6), (b) (7)(C) therefore held (b) (6), (b) (7)(C) out as a (b) (6), (b) (7)(C) with regard to the flagging work performed on the R.T. Vernal contract.

¹⁸ Cf. *G.E. Maier Co.*, 349 NLRB 1052, 1052 (2007) (finding an individual had apparent authority to sign an agreement on the employer's behalf recognizing the union and agreeing to abide by its collective-bargaining agreements where the employer provided that individual with business cards identifying him as its “Vice-President Installations” and authorized him to hire workers and to take any necessary steps to complete work at a jobsite, and the individual passed on the business card to a union organizer and hired an apprentice through the union).

¹⁹ See ULP Manual § 10264.3(b).

²⁰ See *Total Property Services, Inc.*, 317 NLRB 975, 979 (1995) (finding individual liability where the individuals Peter M. Daigle and James T. Lawson continued to operate Total Property Services, Inc. after its corporate structure was dissolved; the complaint named Peter M. Daigle, d/b/a Total Property Services, Inc. and James T. Lawson, d/b/a Total Property Services, Inc.).

Conclusion

Accordingly, the Region should issue the complaint against the following entities: RJS Dean Enterprise, LLC; (b) (6), (b) (7)(C) and (b) (6), (b) (7)(C) proprietors, d/b/a Youngstown General Construction Company, Inc.; and (b) (6), (b) (7)(C), an Individual.

/s/
B.J.K.

H: ADV.08-CA-139052.Response.RJS Dean Enterprise (b) (6), (b) (7)(C)