

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

## Advice Memorandum

S.A.M.

DATE: May 24, 2016

TO: Harold A. Maier, Acting Regional Director  
Region 4

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

SUBJECT: Trump Entertainment Resorts, Inc., et al. and  
Icahn Enterprises, et al., Joint Employers  
Cases 04-CA-143464, et al.

**Employer Status**

133-8200

177-1650

530-6067-4000

530-6067-4033

530-6067-4055

596-0175-8100

867-2520-7567-5000

867-2540-8367

These cases were resubmitted for advice as to how to proceed after the United States Court of Appeals for the Third Circuit affirmed a bankruptcy court order that authorized at least some of the unilateral changes at issue here. We conclude that the Region should issue complaint as to those meritorious allegations that were not affected by the affirmed bankruptcy court order, including the allegations of unlawful unilateral changes that were not clearly authorized by the bankruptcy court order, and should name both of the joint employers as respondents. The Region should continue to hold in abeyance the allegations affected by the bankruptcy court order, pending the completion of the ongoing litigation over that order.

### FACTS

The facts and background of these cases are more fully set forth in our prior memorandum, dated July 1, 2015. In brief, these cases involve several unilateral changes expressly authorized by a bankruptcy court order, as well as other allegedly unlawful conduct, including Section 8(a)(1) statements, Section 8(a)(3) discrimination, Section 8(a)(5) denials of access and information to the Union, and other Section 8(a)(5) unilateral changes—allegations separate from the unilateral changes authorized by the bankruptcy court order. In our prior memorandum, which issued while the bankruptcy court order was on appeal to the Third Circuit, we concluded that: (1) Trump Entertainment Resorts, Inc. and its subsidiaries (“Trump”) and Icahn Enterprises and its subsidiaries (“Icahn”) are joint employers with respect to the employees at issue here, due to Icahn’s influence over collective bargaining between

Trump and UNITE HERE Local 54 (the Union); and (2) the Region should hold the case in abeyance until the Third Circuit issued a decision as to the bankruptcy court order.

On January 15, 2016, the Third Circuit affirmed the bankruptcy court order in its entirety. Most significantly, the Third Circuit affirmed the order's provisions authorizing Trump to reject the terms of its expired collective-bargaining agreement with the Union and implement the terms and conditions of its proposal, specifically including authorization to withdraw from the Health and Welfare, Pension, and Severance Funds; implement an unpaid 30-minute meal break; change the full-shift guarantee for banquet bartenders from 8 to 4 hours; reduce holiday pay; and "to expand its right to direct and control employees, such as by consolidating jobs, by determining and re-determining job content and determining the assignment of work, in order to allow for a more flexible use of staff and generate cost-savings." In addition, the court affirmed the order's provisions containing general release and injunction language limiting the judicial and administrative claims of private parties subject to the bankruptcy court order, particularly those entities that agreed to be bound by the bankruptcy plan of reorganization.

On April 14, 2016, the Union filed a petition for a writ of certiorari to the Supreme Court, seeking to overturn the bankruptcy court order. The Union's petition is still pending.

In light of the Third Circuit's affirmance of the bankruptcy court order, the Region has resubmitted these cases for advice as to: (1) which meritorious charges are affected by the bankruptcy court order, and on which the Region should issue complaint; (2) whether the Region should proceed against both Trump and Icahn as joint employers, and (3) how the Region should proceed on the charges affected by the bankruptcy court order, particularly as the Third Circuit's affirmance of that order is still subject to a pending writ of certiorari to the Supreme Court.

### **ACTION**

We conclude that the Region should issue complaint as to those meritorious allegations that were not affected by the bankruptcy court order, including the allegations of unlawful unilateral changes that were not clearly authorized by the bankruptcy court order, and should name both of the joint employers as respondents. The Region should continue to hold in abeyance the allegations affected by the bankruptcy court order, pending the completion of the ongoing litigation over that order.

**The Region should issue complaint as to those meritorious allegations that were not affected by the affirmed bankruptcy court order.**

Initially, we conclude that the Region should issue complaint as to those meritorious allegations of unlawful unilateral changes that were not clearly authorized by the bankruptcy court order.<sup>1</sup> The bankruptcy court order authorized Trump to reject the terms of its expired collective-bargaining agreement with Local 54 and implement the terms and conditions of its proposal, specifically including withdrawing from the Health and Welfare, Pension, and Severance Funds; implementing an unpaid 30-minute meal break; changing the full-shift guarantee for banquet bartenders from 8 to 4 hours; reducing holiday pay; and “to expand its right to direct and control employees, such as by consolidating jobs, by determining and re-determining job content and determining the assignment of work, in order to allow for a more flexible use of staff and generate cost-savings.” Thereafter, based on the bankruptcy court’s order, Trump implemented several changes, including retroactively ceasing its contributions to the healthcare, pension, and severance funds; an unpaid 30-minute meal break; reducing the full-shift guarantee for banquet bartenders from 8 to 4 hours; reducing holiday pay; increasing work assignments for housekeepers; and consolidating some bellman/doorman positions.

The bankruptcy court order issued under Section 1113 of the Bankruptcy Code, which permits a bankruptcy court to authorize a debtor’s rejection of a collective-bargaining agreement but places important restrictions on that power.<sup>2</sup> As relevant here, Section 1113 requires that a court only approve a debtor’s application for such relief if: (i) the debtor made a proposal to the employees’ representative that, among other things, provides for modifications that are necessary for reorganization and treats all creditors and affected parties fairly; (ii) the employees’ representative refuses the proposal without good cause; and (iii) the balance of equities clearly favors rejection.<sup>3</sup> When a court orders relief under that section, as the bankruptcy court did

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<sup>1</sup> All of our conclusions regarding the scope and effect of the bankruptcy court order were arrived at in consultation with, and with the agreement of, the Contempt, Compliance, and Special Litigation Branch (CCSLB). To the extent that any particular questions arise in the litigation of these cases concerning the effect of the bankruptcy court order, the Region may wish to contact CCSLB for their assistance and litigation advice.

<sup>2</sup> See 11 U.S.C. § 1113; *Wheeling-Pittsburgh Steel Corp. v. United Steelworkers of Am.*, 791 F.2d 1074, 1081-84, 1086-89 (3d Cir. 1986) (detailing the history of the provision).

<sup>3</sup> 11 U.S.C. § 1113(c).

here, the debtor is no longer obligated to comply with the contract, and any resulting breach-of-contract damages are converted to an unsecured prepetition claim.<sup>4</sup>

Given this legal framework, to the extent Trump's changes were clearly authorized by the bankruptcy court order, the Region should not issue complaint over them, but should instead hold these allegations in abeyance, pending the conclusion of the litigation over the Union's pending petition for a writ of certiorari seeking to overturn the bankruptcy court order.<sup>5</sup> Should the Union's petition be denied, or the bankruptcy court order otherwise finally determined to be valid, the Region should dismiss these allegations, as the unilateral changes at issue were specifically authorized by the bankruptcy court order.<sup>6</sup> Should the bankruptcy court order be found invalid, the Region should contact the Division of Advice for instructions as to how to proceed on the allegations being held in abeyance.

In addition to the above unilateral changes clearly authorized by the bankruptcy court order, however, Trump also engaged in other allegedly unlawful conduct, including Section 8(a)(1) statements, Section 8(a)(3) discrimination, Section 8(a)(5) denials of access and information to the Union, and other Section 8(a)(5) unilateral changes—allegations separate from the unilateral changes authorized by the bankruptcy court order. Nothing in the bankruptcy court order authorized any of this allegedly unlawful conduct, and nothing in the bankruptcy court order precludes complaint on these allegations. Indeed, at no time were these issues ever considered in the bankruptcy proceedings. This is most evident as to the individual instances of

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<sup>4</sup> 11 U.S.C. § 365(g)(1) (deeming breach to occur immediately before date of petition). In this regard, the Union itself may have a right to bring an independent action seeking liquidated unsecured damages resulting from the changes, but the Board would appear to have no role in any such litigation.

<sup>5</sup> While we recognize that the changes here were authorized by the bankruptcy court *after* the expiration of the parties' collective-bargaining agreement, the Third Circuit expressly affirmed the validity of the order notwithstanding that distinction. Therefore, absent a Supreme Court decision invalidating the bankruptcy court order, we will consider Trump's changes made pursuant to that order to have been duly authorized, and not unlawful under the Act. (b) (5)

<sup>6</sup> If the bankruptcy court order is ultimately found to be valid as a matter of law, the Region need not use any special language in dismissing charge allegations because Trump acted pursuant to the order. In these circumstances, insofar as Trump acted based on a valid bankruptcy court order, its actions were not unlawful under Section 8(a)(5) of the Act.

Section 8(a)(1) statements, Section 8(a)(3) discrimination, and Section 8(a)(5) denials of access and information to the Union that occurred after the bankruptcy court order issued, but is equally the case as to the unilateral changes Trump made that were not part of its bankruptcy proposal or covered by the bankruptcy court order. For example, after the bankruptcy court order issued, Trump unilaterally made numerous changes to employees' schedules, scheduling and terms of employees' breaks, and bidding procedures for schedules. While the bankruptcy court order authorized Trump to "determin[e] the assignment of work," it does not appear to have included any provisions authorizing these unilateral changes in the scheduling of work, including employees' breaks, or the unilateral changes in bidding procedures. Therefore, to the extent these and other of Trump's unilateral changes were made independently from any clear authorization of the bankruptcy court order, they should be treated the same as any other employer's unlawful unilateral changes, and complaint should issue on these allegations.

We note that nothing else in the bankruptcy court order would preclude such a complaint. In particular, while the bankruptcy court order included provisions containing general release and injunction language limiting the judicial and administrative claims of private parties subject to the bankruptcy court order, particularly those entities that agreed to be bound by the bankruptcy plan of reorganization, none of these provisions were intended to interfere with the Board's authority to proceed against unfair labor practices. Indeed, assuming *arguendo* that the bankruptcy court order had intended to preclude the Board from enforcing the Act generally, such an order would have been of dubious legality.<sup>7</sup>

**Trump and Icahn are joint employers, both liable for the unfair labor practices at issue here.**

We further conclude that Trump and Icahn are joint employers with respect to the employees at issue here. In our prior memorandum, we made this conclusion under the then-extant standard,<sup>8</sup> based primarily on Icahn's influence over collective

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<sup>7</sup> See, e.g., *NLRB v. Baldwin Locomotive Works*, 128 F.2d 39, 44 (3d Cir. 1942) ("The jurisdiction of a United States District Court in bankruptcy does not embrace the power to treat with a debtor's unfair labor practices which affect commerce. [N]or is such a court's leave to the Board to proceed in [an] appropriate manner required."); *W. T. Grant Regional Credit Center*, 225 NLRB 881, 881 n.1 (1976) (stating that the proposition that "Board proceedings are subject to a general restraining order issued by a court of bankruptcy has been uniformly rejected in both court and Board decisions").

<sup>8</sup> See, e.g., *CNN America, Inc.*, 361 NLRB No. 47, slip op. at 3 (Sept. 15, 2014).

bargaining between Trump and the Union. In particular, we emphasized that Icahn's involvement in the collective-bargaining process meaningfully affected various matters relating to the employment relationship between Trump and the employees, including employees' wages, employees' work hours, and the assignment of work, and that Icahn inserted itself into the negotiations, making public statements designed to influence the bargaining process and playing a direct role in the unilateral changes at issue here. Consequently, we concluded that Icahn "shared or codetermined these key matters with Trump, and therefore is a joint employer."

Since we issued our prior memorandum, the Board clarified its joint employer standard.<sup>9</sup> In *BFI Newby Island Recyclery*, the Board reaffirmed the long-standing rule that two or more employers are joint employers of the same employees if (1) they are "both employers [of a single workforce] within the meaning of the common law" and (2) they "share or codetermine those matters governing the [employees'] essential terms and conditions of employment."<sup>10</sup> In discussing the common-law agency test, the Board emphasized that "the Board properly considers the existence, extent, and object of the putative joint employer's control,"<sup>11</sup> as well as that, "[u]nder common-law principles, the right to control is probative of an employment relationship—whether or not that right is exercised."<sup>12</sup> In this regard, the Board expressly held that it would no longer require that a joint employer both *possess* the authority to control employees' terms and conditions of employment and *exercise* that authority directly, immediately, and "not in a 'limited and routine' manner."<sup>13</sup> Rather, the Board concluded, it would also find joint employer status where the putative employer has the *right* to control, in the common-law sense, "the means or manner of employees' work and terms of employment," or actually exercises such control, "either directly or [indirectly] through an intermediary."<sup>14</sup> However, the Board also noted, if a putative

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<sup>9</sup> *BFI Newby Island Recyclery*, 362 NLRB No. 186, slip op. at 2 (Aug. 27, 2015).

<sup>10</sup> *Id.*, slip op. at 15.

<sup>11</sup> *Id.*, slip op. at 12.

<sup>12</sup> *Id.*, slip op. at 13.

<sup>13</sup> *Id.*, slip op. at 15-16 (overruling Board decisions, including *TLI, Inc.*, 271 NLRB 798 (1984), *enforced mem. sub nom. Teamsters Local 326 v. NLRB*, 772 F.2d 894 (3d Cir. 1985) and *Laerco Transportation*, 269 NLRB 324 (1984)).

<sup>14</sup> *Id.*, slip op. at 2, 3-6, 15-16, 18-20 (finding that two statutory employers were joint employers of a single workforce where, per their agreement, the supplier employer recruited, selected, and hired employees for the user employer which could, in turn, reject and discharge employees and exert control over their wages, work shifts, and

employer's control over terms and conditions of employment is too limited in scope or significance to permit meaningful collective bargaining, the Board may decline to find a joint employer relationship.<sup>15</sup> In any case, the Board made it clear in *BFI Newby Island Recyclery* that its intent was to broaden, rather than limit, the scope of its joint employer standard.

In the instant cases, there is nothing in *BFI Newby Island Recyclery* that would provide any basis for altering our previous conclusion that Trump and Icahn are joint employers of the employees at issue here. Thus, as we previously concluded, both employers shared or codetermined key matters of employees' terms and conditions of employment, and both employers meaningfully affected various matters relating to the employment relationship.<sup>16</sup> Therefore, we reiterate our adherence to our previous conclusion that Trump and Icahn are joint employers, and that Icahn is liable as well as Trump for any unfair labor practices found here.

We recognize that it might be argued that, while Trump and Icahn are certainly joint employers responsible for remedying each other's unlawful bargaining conduct, only Trump should be liable for any other unfair labor practices, such as violations of Section 8(a)(1) or (3) of the Act. In this regard, while the Board's general rule is that joint employers are liable for each other's unfair labor practices,<sup>17</sup> the Board did

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productivity and safety standards, even though the agreement specified that the supplier was the sole employer).

<sup>15</sup> *Id.*, slip op. at 16.

<sup>16</sup> We note that, while our prior memorandum contained arguments in support of finding joint-employer status based on "economic realities," this approach was expressly rejected by the Board in *BFI Newby Island Recyclery*. *Id.*, slip op. at 12-13 n.68. Therefore, the Region should not rely on such an analysis.

<sup>17</sup> See, e.g., *Ref-Chem Co.*, 169 NLRB 376 (1968), *enforcement denied on other grounds*, 418 F.2d 127 (5th Cir. 1969). In *Ref-Chem Co.*, the Board rejected a joint employer's Section 10(b) defense, explaining that a charge against one of the employers effectively constituted a charge against both of the employers, as "each is responsible for the conduct of the other and whatever unlawful practices are engaged in by the one must be deemed to have been committed by both." *Id.* at 380. The Board has repeatedly reaffirmed this principle of joint liability. See, e.g., *Whitewood Maintenance Co.*, 292 NLRB 1159, 1164 (1989) (joint employer liable for its co-employer's unlawful Section 8(a)(1) statements), *enforced*, 928 F.2d 1426 (5th Cir. 1991); *Mar del Plata Condominium*, 282 NLRB 1012, 1012 n.3 (1987) (joint employer liable for co-employer's unlawful Section 8(a)(3) discipline and 8(a)(1) statements); *Windemuller Electric*, 306 NLRB 664, 666 (1992) (joint employer liable for its co-

create a narrow exception to this general rule in *Capitol EMI Music*.<sup>18</sup> In *Capitol EMI Music*, the Board found that a staffing agency that referred a temporary employee to a recording products company was not liable for the latter company's unlawful termination of the temporary employee, despite the fact that the companies were joint employers, where the reasons given to the staffing agency for his removal made no mention of his union activity.<sup>19</sup>

In reaching this holding, the Board expressly noted that, where joint employers “perceive a mutual interest in warding off union representation from the jointly managed employees[.]” then “one joint employer, by its unlawful conduct, might reasonably be regarded as acting in the ‘interest’ of its co-employer by chilling the union activity of its employees.”<sup>20</sup> In such a situation, the Board might prevent a “seemingly ‘innocent’ joint employer” from reaping the benefits of its co-employer's unlawful conduct “by holding that seemingly innocent joint employer vicariously liable.”<sup>21</sup> Such is not the case, however, where one employer merely provides employees to its co-employer and takes no part in the daily direction or oversight of the employees and has no representatives present at the worksite, as was the case in *Capitol EMI Music*.<sup>22</sup> In those circumstances, the Board held, it would be unreasonable to automatically hold the labor supplier liable for the unlawful acts of its co-employer.<sup>23</sup> The Board emphasized in *Capitol EMI Music* that this new rule applies only to the type of joint employer relationships in which one employer supplies employees to work in another employer's business and to unfair labor practices dependent on findings of unlawful motive.<sup>24</sup>

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employer's 8(a)(1) violations and discriminatory 8(a)(3) layoffs), *enforced in relevant part*, 34 F.3d 384 (6th Cir. 1994); *Branch International Services*, 313 NLRB 1293, 1300 (1994) (co-employers jointly liable for staffing agency's refusal to remit check-off dues to union after staffing agency became party to collective-bargaining agreement).

<sup>18</sup> 311 NLRB 997 (1993), *enforced per curiam*, 23 F.3d 399 (4th Cir. 1994).

<sup>19</sup> *Id.* at 997-98.

<sup>20</sup> *Id.* at 999.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 1000.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 1001.

In the years since *Capitol EMI Music* issued, the Board has generally applied the rule announced in that case primarily in the context of labor supplier-user relationships<sup>25</sup> and only to unfair labor practices that turn on an unlawful motive. For example, in *D&F Industries*, the Board took care to distinguish the analysis regarding the labor supplier's alleged 8(a)(3) violations from that applied to its alleged 8(a)(1) violations.<sup>26</sup> Thus, the Board explained that the labor supplier was liable for the user's discriminatory actions under the *Capitol EMI Music* test, while it found the labor supplier liable for the user's coercive statements simply based on its joint employer status, citing to an earlier decision that relied on *Ref-Chem*.<sup>27</sup>

Moreover, the Board has clearly distinguished *Capitol EMI* and found joint liability in cases where the "nonacting" employer was not "innocent" and had an interest in preventing union representation of its co-employer's employees. For example, in *Mingo Logan Coal Co.*, involving a mining company and one of the mining company's on-site contractors, the Board upheld the ALJ's finding that *Capitol EMI Music* was "clearly distinguishable."<sup>28</sup> The ALJ had observed that the two employers perceived "a mutual interest in warding off union representation," and as such the contractor was not an "innocent" employer within the meaning of *Capitol EMI Music*.<sup>29</sup>

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<sup>25</sup> In the exceptional cases in which the Board has applied *Capitol EMI Music* outside of the context of a "user-supplier" joint employer relationship, it has nonetheless found joint liability for all of the unfair labor practices at issue. Thus, in *Le Rendezvous Restaurant*, 332 NLRB 336, 336-37 (2000), while the Board acknowledged that *Capitol EMI Music* had involved a "user-supplier" joint employer relationship, it used the analysis contained therein to find joint liability for a hotel and a separate company to which the hotel had subcontracted the operation of its restaurant. And, in *Adams & Associates, Inc.*, 363 NLRB No. 193, slip op at 1 n.7 (May 17, 2016), the Board cited *Capitol EMI Music* in finding joint liability to be appropriate, also in the context of a subcontracting relationship.

<sup>26</sup> 339 NLRB 618, 618 n.2 (2003).

<sup>27</sup> *Id.* (citing *Windemuller Electric*, 306 NLRB at 666).

<sup>28</sup> 336 NLRB 83, 108 (2001), *enforced in relevant part*, 67 F. App'x 178 (4th Cir. 2003).

<sup>29</sup> *Id.* See also *Hobbs & Oberg Mining Co.*, 316 NLRB 542, 542 (1995) (in compliance proceeding, Board found order against two contractor joint employers for unlawful conduct of a third co-employer, a mining company, to be "consistent" with *Capitol EMI Music*, as all three were "engaged in an unlawful scheme to oust the [u]nion").

Here, of course, Icahn is not merely an uninterested supplier of employees to Trump, or the type of “innocent” employer to which the *Capitol EMI Music* analysis was intended to apply.<sup>30</sup> Unlike the staffing agency in *Capitol EMI Music*, which itself had no connection with the recording products company apart from leasing employees to it, Icahn is a substantial creditor and investor in Trump, publicly and privately involved in Trump’s dealings with the Union, and highly likely to benefit from its joint employer’s unlawful conduct. Thus, the exception set forth in *Capitol EMI Music* is inapplicable here, and Icahn should be held jointly liable for all of the unfair labor practices at issue.

This conclusion is consistent with long-standing Board law recognizing that a creditor can be a joint employer of a debtor’s employees.<sup>31</sup> Thus, for example, in *Sussex*, the Board concluded that a principal creditor and source of working capital “in fact control[ed] the business and labor policies” of the debtor company, and therefore was a joint employer with the debtor company.<sup>32</sup> For all these reasons, we conclude that Icahn is a joint employer with Trump, also liable for all of the unfair labor practices at issue here.

(b) (5) [REDACTED]

(b) (5) [REDACTED]

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<sup>30</sup> See *Capitol EMI Music*, 311 NLRB at 999-1000.

<sup>31</sup> See, e.g., *Sussex Dye & Print Works, Inc.*, 34 NLRB 625, 629-33 (1941).

<sup>32</sup> *Id.* at 632-33.

<sup>33</sup> (b) (5) [REDACTED]

(b) (5)



Accordingly, the Region should issue complaint, absent settlement, as to those meritorious allegations that were not affected by the bankruptcy court order, naming both of the joint employers as respondents. The Region should continue to hold in abeyance the allegations clearly affected by the bankruptcy court order, pending the completion of the ongoing litigation over that order.

/s/  
B.J.K.

ADV.04-CA-143464.Response.TrumpEntertainment

(b) (5), (D)

cc: Contempt, Compliance, and Special Litigation Branch