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

DATE: June 13, 2017

TO: David Cohen, Acting Regional Director
Region 12

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

SUBJECT: Telemundo Television Studios, LLC
Case 12-CA-186493

177-2414-0100-0000
177-1650-0100-0000
512-5006-5053-0000
512-5012-0100-0000
512-5072-0100-0000

The Region resubmitted this case for advice as to whether the Employer violated Section 8(a)(1) of the Act by misclassifying performers in its Spanish-language soap operas as independent contractors under the General Counsel's theory in *Pacific 9 Transportation, Inc.*,[1] after conducting additional investigation pursuant to an Advice Memorandum dated April 5, 2017. We agree with the Region that the performers are employees, and we conclude that the evidence demonstrates that the Employer is derivatively liable, as a joint employer with its performers' talent managers, for misclassifying its performers. Therefore, the Region should solicit an amended charge from the Union naming as a joint employer any talent manager that has misclassified one or more of the Employer's performers as an independent contractor. The Region should process the amended charge and issue complaint, absent settlement, against the Employer and any talent manager whose agreement with one of the Employer's performers misclassifies the performer as an independent contractor during the 10(b) period.

FACTS

A. Background

Performers[2] for NBCUniversal's English-language dramatic scripted programming are represented by the Screen Actors Guild – American Federation of

[1] Case 21-CA-150875, Significant Advice Memorandum dated Dec. 18, 2015.

[2] We use the term "performers" to mean actors and other classifications in Union-represented bargaining units.

Television and Radio Artists (Union). These performers are employed by production companies as employees. Many also have talent agents that help them procure jobs. According to the Union, this structure is uniform among signatories to its collective-bargaining agreement.

NBCUniversal acquired Telemundo Television Studios, LLC (Employer) in 2001. At that time, the Employer began producing scripted dramatic Spanish-language programming, including Spanish-language soap operas known as telenovelas, at studio facilities in Miami, Florida. The work was performed non-Union, and, as described in more detail below, almost all of the performers have been employed through intermediary entities called "talent managers."[3]

In early 2016,[4] the Employer's performers began organizing with the Union. The Union initially requested that the Employer voluntarily recognize the Union. The Employer refused to do so and communicated to its performers that it believed that they should be able to vote in an NLRB election. Employer representatives also held an anti-Union meeting with the cast of one of its productions.

Subsequently, the Union continued its organizing campaign, which included publicizing the different working conditions of performers with English-language roles versus Spanish-language roles in the United States. In October, the Union filed the charge in the instant case, alleging that the Employer had unlawfully misclassified its performers as independent contractors.

In December, the Union filed a petition to represent the Employer's performers. The Employer challenged the appropriateness of the unit but stipulated that all of the individuals in the petitioned-for unit were the Employer's statutory employees. However, the stipulation specifically stated that it would have "no force or effect" in the instant case. The Region's Decision and Direction of Election found a unit including the Employer's main cast actors, guest actors, day players,[5] singers, dancers, and stunt persons to be appropriate and set an election for February 2017.

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[3] It appears that the term "talent manager" is used interchangeably with the term "talent agency."

[4] All subsequent dates are in 2016 until otherwise noted.

[5] Day players are also known as "figurantes."

After the Decision and Direction of Election, the Employer urged its performers to vote no. The Union filed unfair labor practice charges alleging that the Employer maintained an unlawful confidentiality rule and an unlawful rule prohibiting disparagement. The Region found merit to these allegations and issued a complaint.[6] The Region is still investigating the Union's allegation that the Employer has maintained a variety of other unlawful rules.[7]

On March 8, 2017, the Union won the election by just over 80%. The Union and the Employer held their first bargaining session on May 23, 2017, and are scheduled to bargain again on June 13, 2017.

B. The Employer's Employment Structure

The Employer exercises significant control over the working conditions of all of the performers in the bargaining unit. However, it directly employs only a small percentage of its main cast actors.[8] The Employer employs and compensates its remaining performers through agreements with their talent managers.

1. The Employer's Relationship With Talent Managers

The Employer's contracts with talent managers state that the talent manager will provide the Employer with personnel to perform for its telenovela projects. The Employer requires talent managers that provide guest actors and day players to agree to a Personnel Services Agreement (PSA). The PSA provides that the talent manager has the right to "direct, control and supervise" the performers supplied. However, this direction, control, and supervision must be consistent with the Employer's instructions or requirements and, in the event of a disagreement, the Employer's decision will be final. The PSA also requires that if the talent

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[6] Case12-CA-189102. The trial for this case is scheduled for September 18, 2017. The Employer, in its answer to the complaint, did not deny its employer status, but it did state that the alleged unlawful rules apply to employees and independent contractors.

[7] Case12-CA-197287.

[8] These actors are directly employed either through an exclusive contract or a Specific Project Services Agreement. The lists of performers provided by the Employer during the Representation Case proceeding (Exhibit 9E & the Voter List), herein referred to as "the performer list," indicate that the Employer directly employs approximately 8 of the 151 bargaining unit employees.

manager has more than four performers scheduled to work for a telenovela project for any one day, the talent manager will ensure that a coordinator is present, either on location or in the studio, to facilitate performers' management and supervision. The PSA also requires the talent manager to have a valid and binding written agreement with the performer, pursuant to which the talent manager has the right to provide the performer's services to the Employer.

The PSA also provides that the Employer will pay the talent manager a fee for the services provided by the supplied performer, and requires the talent manager to compensate the performer in conformance with all applicable state and/or federal wage and hour laws. The PSA includes a chart of various daily billing project rates, including six levels for guest actors and three levels for day players. The PSA also requires the talent manager to "cause [the performer(s)] to maintain his/her appearance as may be necessary to maintain continuity in the Picture." The Employer asserts in its January 2017 position statement that "these [talent managers] set all working terms and conditions for [day players and extras]."[9]

To obtain the services of certain main cast actors and certain guest actors, the Employer utilizes a "loan-out" agreement, under which the talent manager similarly agrees to provide the services of the "Artist," rather than a PSA. This loan-out agreement requires that the talent manager discharge the Employer of all obligations imposed on employers, including the payment of the actor's compensation; the withholding and payment of federal, state, and local taxes; payments relating to unemployment compensation or insurance; and worker's compensation.[10] The Employer asserts that it only engages performers through a loan-out agreement at the performer's request, though performers dispute this.

In June 2013, the Employer sent a letter to all talent managers stating that to do business with the Employer, they must: (1) be licensed as a "talent agency" in the state of Florida; (2) carry liability insurance with the Employer as an additional "Insured and Certificate Holder"; and (3) provide workers' compensation coverage for all talent represented. The letter stated that talent managers had

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[9] Extras are not in the bargaining unit and not at issue in the instant case.

[10] Additionally, in 2010 and 2013, these loan-out agreements had provisions stating that "no employment relationship between Artist and [Employer] is created by this Agreement." The Employer's more recent loan-out agreements do not have this language.

approximately sixty days to provide the Employer with proof of license and a domestic certificate of liability insurance.

2. <u>The Talent Managers' Relationship With Performers</u>

Talent managers have either written or verbal agreements with performers. Talent managers are involved with the Employer's hiring of a performer for a specific role in a telenovela project based on the Employer's needs, and in negotiating and determining the performer's pay. Once a performer's role and pay are determined, the talent manager instructs the performer regarding the time frame and schedule for production, provides initial scripts, and communicates other instructions from the Employer. As noted above, talent managers are responsible for receiving payment from the Employer for the performer's services, and then directly paying the performer. The talent managers utilized for the Employer's productions generally deduct a fee of 20% or 30% from the performer's compensation.[11] At least some talent managers provide performers with a 1099 tax form.

Talent managers also help to resolve issues that arise during production. The Employer's (b) (6), (b) (7)(C) testified during the Representation Case Proceeding that if day players, singers, dancers, or stunt persons violate the Employer's policies, (b) (6), (b) (will "talk to the [talent manager] . . . and say hey, we have this case where this person that is under your care violated this policy and I need you to take action in order to remedy it or we may ban this person from ever coming to the studios again."[12] (b) (6), (b) (7 further stated that if a main cast actor violated one of the Employer's policies, (b) (6), (b) (7) would conduct an investigation, including having a conversation with both the actor and, if the actor is represented, with their talent manager.[13]

Performers also have described their talent manager's role in helping to resolve issues arising during production. One performer states that if (b) (6), (b) (7) is asked to work beyond twelve hours, (b) (6), (b) (7 needs to call (b) (6), (b) (7) talent manager, who will then call the Employer to attempt to resolve the issue. Another performer states that

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[11] The Union asserts that the standard commission for a traditional talent agent in the industry is 10%.

[12] Tr. 459.

[13] Tr. 459-60.

talent manager assisted in getting time off to attend an out-of-town event. talent manager also assisted in gaining access to a trailer when had to wait around before filming began. Another performer states that has asked talent manager to inform the Employer that was running late. Talent managers also tell performers when they have to appear on one of the Employer's talk shows for an interview or attend a "wrap party."

The agreements between talent managers and actors also contain language about the employment status of the actors. The following summarizes the agreements currently in the investigative file:[14]

- A written contract between a performer and talent manager Palomera, effective 2016 through 2019, states that "[i]t is expressly understood that you are an independent contractor and not an employee."[15]

- A written contract between a performer and talent manager S.K. Ripstein, Inc., effective dates unknown, states: "[i]t is expressly understood that I am an independent contractor and not an employee."[16]

- A written contract between a performer and talent manager Century Entertainment, effective October 1, 2013, end date unknown, states that it is understood between the parties that the relation between the artist and representative will always be independent contractor and not employee.[17]

- A written contract between a performer and talent manager Ale Star Inc., effective 2012, end date unknown, states that "there is no implication of subordination/dependence because

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[14] In addition to the talent managers listed below, the performer lists indicate that a number of performers have relationships with talent managers such as High Hill, and others.

[15] The performer lists indicate that approximately five other employees in the unit have contracts with Palomera.

[16] It is unclear how many performers have contracts with S.K. Ripstein, Inc.

[17] The performer lists indicate that approximately seven other employees in the unit have contracts with Century Entertainment.

there is no labor relationship."[18]

- A written contract between a performer and talent manager BoboProductions/(b) (6), (b) (7)(C) effective August 6, 2015 through August 6, 2018, states that "the contracting parties agree that the representative will not be the employer either directly or indirectly."[19]

- A written contract between a performer and talent manager (b) (6), (b) (7)(C) (b) (6), (b) (7)(C) Jorvi/Moran Vidal, effective September 27, 2011, end date unknown, states that "the artist and representative recognize and accept that the present contract . . . is not a relationship of work between the parties."[20]

- Affidavit evidence indicates that a performer has a verbal contract with talent manager Star Talent; that Star Talent gives (b) (6), (b) (7) a 1099 tax form; and that (b) (6), (b) understands that (b) (6), (b) is an independent contractor.[21]

ACTION

We agree with the Region that the performers are employees and we conclude that the evidence demonstrates that the Employer is derivatively liable, as a joint employer with its performers' talent managers, for misclassifying performers as independent contractors. Therefore, the Region should solicit an amended charge from the Union naming as a joint employer any talent manager that has misclassified one or more of the Employer's performers as an independent contractor. The Region should process the amended charge and issue complaint, absent settlement, against the Employer and any talent manager whose agreement with one of the Employer's performer misclassifies the performer as an independent contractor during the 10(b) period.

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[18] The performer lists indicate that approximately six other employees in the unit have contracts with (b) (6), (b) (7)(C) Ale Star Inc.

[19] The performer lists indicate that approximately six other employees in the unit have contracts with BoboProductions (b) (6), (b) (7)(C)

[20] The performer lists indicate that approximately four other employees in the unit have contracts with BoboProductions/(b) (6), (b) (7)(C)

[21] The performer lists indicate that approximately sixteen other employees in the unit have contracts with Star Talent.

A. The Employer and Talent Managers are Joint Employers of the Performers

Initially, we agree with the Region that the Employer's performers are statutory employees rather than independent contractors, as the vast majority of the common-law factors and the independent business factor weigh in favor of employee status.[22] We also conclude that the Employer and the performers' talent managers are joint employers. In *BFI Newby Island Recyclery*, the Board reaffirmed 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."[23] The Board further explained, inter alia, that there are various ways in which joint employers may "share" control over terms and conditions of employment or "codetermine" them, such as conferring or collaborating directly to set a term of employment; exercising comprehensive authority over different terms and conditions of employment; affecting different components of the same term; or retaining the contractual right to set a term or condition of employment.[24]

Here, the Employer has already stipulated in the representation case that it is an employer with respect to the performers in the bargaining unit, who are statutory employees.[25] Further, the evidence overwhelmingly demonstrates that the talent managers are joint employers of the performers in their work for the Employer. The talent managers, among other things, sign agreements with the Employer to provide personnel and are the employer of record for the performers in their work for the Employer; recruit and hire the performers to perform work for the Employer; negotiate and co-determine compensation; determine the employment status of the performers and how much compensation to withhold for

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[22] *See, e.g., FedEx Home Delivery*, 361 NLRB No. 55, slip op. at 2, 11 (Sept. 30, 2014), *enforcement denied*, 849 F.3d 1123 (D.C. Cir. 2017).

[23] 362 NLRB No. 186, slip op. at 15 (Aug. 27, 2015).

[24] *Id.*, slip op. at 15 & n.80.

[25] We note also that the Employer has stipulated that it is an employer engaged in commerce within the meaning of Sections 2(6) and 2(7) of the Act and is subject to the jurisdiction of the Board. It is well established that the commerce data of joint or single employers may appropriately be combined for jurisdictional purposes. *See, e.g., 373-381 South Broadway Associates*, 304 NLRB 1108, 1108 (1991).

its service fee, as well as for taxes and other costs; purchase liability and workers' compensation insurance to cover the performers in their work for the Employer; provide performers with initial scripts and schedules; are responsible for ensuring that the performers maintain their appearance; have a contractual right to direct, control, and supervise the performers within the limits set by the Employer; are required to provide a coordinator to assist the Employer with management and supervision if they are providing more than four performers to work on a telenovela project for any one day; and are involved in problem solving when issues arise on the job. Thus, the talent managers are employers within the meaning of the common law[26] and have a significant and meaningful role in co-determining and affecting the performers' terms and conditions of employment.[27]

B. Talent Managers Violated Section 8(a)(1) By Misclassifying the Performers as Independent Contractors

Section 8(a)(1) makes it unlawful for an employer "to interfere with, restrain, or coerce employees in the exercise" of employees' Section 7 rights. Although the Board has never held that an employer's misclassification of statutory employees as independent contractors in itself violates Section 8(a)(1), several lines of Board decisions support such a finding. Specifically, the Board has held that the following violate the Act: (1) an employer's actions that preemptively strike at employees' ability to exercise their Section 7 rights;[28] (2) an employer's statements to employees

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[26] In the words of the *Restatement (Second) of Agency*, § 220(1), the performers are "employed to perform services in the affairs" of the talent managers and, "with respect to the physical conduct in the performance of the services," are "subject to [the talent managers'] control or right to control." *See, e.g., Retro Environmental, Inc./Green Jobworks, LLC*, 364 NLRB No. 70, slip op. at 3 & n.4, 4 (Aug. 16, 2016) (concluding that supplier company that primarily hired, fired, and assigned employees to project sites was an employer within the meaning of the common law).

[27] Compare *La Gloria Oil & Gas Co.*, 337 NLRB 1120, 1122 (2002) (rejecting argument that putative employer was a joint employer, where it provided merely administrative payroll services), *affirmed mem.*, 71 F. App'x 441 (5th Cir. 2003), *with Capitol EMI Music*, 311 NLRB 997, 998 n.7, 1017 (1993) (supplier of temporary employees that negotiated their wage rates was a joint employer), *enforced per curiam*, 23 F.3d 399 (4th Cir. 1994).

[28] *See, e.g.*, *Parexel International, LLC*, 356 NLRB 516, 518-19 (2011) (employer violated Section 8(a)(1) by discharging an employee to prevent her from discussing wages with other employees).

that engaging in Section 7 activity would be futile;[29] and (3) misstatements of law that reasonably insinuate adverse consequences for engaging in Section 7 activity.[30] Based on the foregoing principles, the Division of Advice concluded in *Pacific 9 Transportation*,[31] *Liberty Transportation Group*,[32] *Menard, Inc.*,[33] and *SOS International LLC*,[34] that employers violated Section 8(a)(1) by misclassifying their employees as independent contractors.

In the instant case, despite the performers' status as statutory employees, the evidence demonstrates that at least some of their talent managers have misclassified them as independent contractors in violation of Section 8(a)(1) under the *Pacific-9* theory articulated above. Specifically, Palomera, S.K. Ripstein, Inc., (b) (6), (b) (7)(C) Century Entertainment, (b) (6), (b) (7)(C) Ale Star Inc., BoboProductions/(b) (6), (b) (7)(C) Jorvi/Moran Vidal, and Star Talent have effectively communicated to the Employer's employees that they are independent contractors through written or verbal contracts and/or the provision of 1099 tax forms. This misclassification has and will operate as a restraint on, and

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[29] *See, e.g.*, *M.D. Miller Trucking & Topsoil, Inc.*, 361 NLRB No. 141, slip op. at 1 (Dec. 16, 2014) (concluding that employer's statement that employees' grievance would go nowhere constituted unlawful threat of futility); *North Star Steel Co.*, 347 NLRB 1364, 1365 (2006) (employer's statement that collective bargaining would not result in employees obtaining benefits other than what employer chose to give them and unionization would lead employer to choose to give them less violated Section 8(a)(1) because employees "could reasonably infer futility of union representation").

[30] *See, e.g.*, *BP Amoco Chemical-Chocolate Bayou*, 351 NLRB 614, 617-18 & n.22 (2007) (employer's flyer that misled employees by creating impression that employees would have to give up customary wage increases as a "lawful and ineluctable consequence" of collective bargaining violated Section 8(a)(1)); *Taylor-Dunn Mfg. Co.*, 252 NLRB 799, 799 n.2 (1980) (misstating law by implying that union would have right to demand that employees pay union fines and assessments and accede to contractual dues checkoff to retain their jobs was unlawful in context of other threats), *enforced mem.*, 679 F.2d 900 (9th Cir. 1982).

[31] Case 21-CA-150875, Advice Memorandum dated Dec. 18, 2015.

[32] Case 06-CA-162363, Advice Memorandum dated July 22, 2016.

[33] Case 18-CA-181821, Advice Memorandum dated Dec. 2, 2016.

[34] (b) (7)(A)

interference with, the performers' exercise of their Section 7 rights. Also, while the Employer has stipulated to the performers' status as employees for purpose of the representation case, it specifically exempted the instant case from that stipulation. It has also continued to maintain its structure of employing performers through talent managers, at least some of whom continue to classify the performers as independent contractors rather than employees.

C. The Employer and Talent Managers Are Liable as Joint Employers

As a general rule, joint employers are liable for each other's unfair labor practices.[35] 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."[36] The Board has repeatedly reaffirmed this principle of joint liability.[37]

Thus, in the instant case, because the Employer is a joint employer with its talent managers, it is liable for the talent managers misclassifying the performers as independent contractors in violation of Section 8(a)(1). We note that the Board's narrow exclusion from its general rule concerning joint employer liability, as stated in *Capitol EMI Music*, does not apply here because the violation does not depend on a

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[35] *Ref-Chem Co.*, 169 NLRB 376, 380 (1968), *enforcement denied on other grounds*, 418 F.2d 127 (5th Cir. 1969).

[36] *Id.* (manufacturer and its joint employer contractor violated Section 8(a)(5) by unilaterally changing wages and refusing to recognize the union that represented the predecessor contractor's employees).

[37] *See Whitewood Maintenance Co.*, 292 NLRB 1159, 1164 (1989) (joint employer liable for its co-employer's unlawful Section 8(a)(1) statements and interrogation), *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-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 checked-off dues to union after staffing agency became party to collective-bargaining agreement).

finding of unlawful motive.[38] Additionally, the Union's failure to name the talent managers as joint employers in its petition for representation does not affect the Union's ability to name them in an unfair labor practice charge or the Board's ability to find that they are liable.[39] (b) (5)

(b) (5)

D. Conclusion

Accordingly, the Region should solicit an amended charge from the Union naming as a joint employer any talent manager that has misclassified one or more of the Employer's performers as an independent contractor. The Region should process the amended charge and issue complaint, absent settlement, against the Employer and those talent managers whose agreements with one of the Employer's performers misclassified them as independent contractors during the 10(b) period.[41]

/s/
B.J.K.

ADV.12-CA-186493.Response.TelemundoII (b) (6), (b) (

[38] 311 NLRB at 1001 (rule excusing a joint employer of liability applies only where one employer supplies employees to work in the business of another and the unfair labor practice is dependent on findings of unlawful motive).

[39] *See, e.g., Aldworth Co.*, 338 NLRB 137, 139 (2002) (while union's naming only one employer on its election petition affects the parties' bargaining rights and obligations, the substantive issue of joint employer status and liability for unlawful conduct remains for the Board's determination), *enforced*, 363 F.3d 437 (D.C. Cir. 2004).

[40] For example, if the talent managers assert that they do not co-determine any terms and conditions of employment because they are merely playing an administrative role, or merely following instructions from the Employer, this would directly implicate the Employer for the decision to misclassify the performers as independent contractors.

[41] This includes agreements that were in effect during the 10(b) period, even if they were executed outside the 10(b) period.