No.10-60749

UNITED STATES COURT OF APPEALS
FOR THE FIFITH CIRCUIT

OAKTREE CAPITAL MANGEMENT, L.P.,
TBR PROPERTY, L.L.C. d/b/a TURTLE BAY RESORTS
AND BENCHMARK HOSPITALITY, INC.

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

ON PETITION FOR REVIEW AND CROSS- APPLICATION
FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

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STATEMENT REGARDING ORAL ARGUMENT

The Board believes that oral argument would be of assistance to the Court.

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THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case is before the Court on the petition of Oaktree Capital Management L.P. ("Oaktree"), TBR Property, L.L.C. ("TBR") d/b/a Turtle Bay Resorts ("the Resort"), and Benchmark Hospitality, Inc. ("Benchmark"), collectively "the Company," to review and set aside, and on the cross-application of the National

Labor Relations Board ("the Board") to enforce, a Board Order issued against the Company.

The Board had jurisdiction over the unfair labor practice proceeding under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)) ("the Act"), which authorizes the Board to prevent unfair labor practices affecting commerce. The Board's Decision and Order, issued on August 27, 2010, and reported at 355 NLRB No. 147 (2010), is a final order with respect to all parties under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)). The Board's Decision and Order adopts and incorporated by reference the Board's previous decision, issued on March 31, 2009 and reported at 353 NLRB 1242 (2009).[1]

The prior decision was issued by a two-member quorum of the Board. The Company petitioned this Court for review of that Order and the Board cross-applied for enforcement (Case No. 09-60327). The parties fully briefed the case. The Supreme Court, on June 17, 2010, issued a decision in *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010), holding that Chairman Liebman and Member

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[1] "D&O (2010)" refers to the Board's 2010 Decision and Order; "D&O" refers to its 2009 Decision and Order. "Tr." refers to the transcript of the hearing before the administrative law judge. "GCX" and "RX" refer, respectively, to General Counsel and Respondent exhibits introduced at the hearing. "Br." refers to the Company's brief. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

Schaumber, acting as a two-member quorum of a three-member group delegated all the Board's powers in December 2007, did not have authority to issue decisions when there were no other sitting Board members, as they did in the prior decision here. Thereafter, the Court granted the Board's unopposed motion to remand the case based on *New Process*. The Board then issued its August 27, 2010 Decision and Order.

The Company filed its petition for review of the Board's Order on September 13, 2010; the Board cross-applied on October 22, 2010. The Company's petition and the Board's cross-application were timely; the Act imposes no time limitation on such filings. The Court has jurisdiction over the application and petition pursuant to Section 10(e) and (f) of the Act because Benchmark is headquartered in Texas.

STATEMENT OF THE ISSUES PRESENTED

1. Whether the Board is entitled to summary enforcement of its uncontested findings.

2. Whether substantial evidence supports the Board's finding that Oaktree and TBR are a single employer.

3. Whether substantial evidence supports the Board's findings that the Company violated Section 8(a)(5) and (1) of the Act by unilaterally changing the access provision of the collective-bargaining agreement and thereafter preventing union representatives from collecting union dues.

STATEMENT OF THE CASE

Acting on unfair labor practice charges filed by Unite Here! Local 5 ("the Union"), the Board's General Counsel issued a consolidated complaint, alleging that the Company had committed numerous unfair labor practices against union representatives and its employees during the Union's attempt to secure a new collective-bargaining agreement in 2004 and 2005. (D&O 1, 6-7; Tr. 404, GCX 1(a)-(jjj), (eeee), (gggg).) A Board administrative law judge conducted a hearing and found that the Resort had committed most of the violations alleged in the complaint. (D&O 6-47; Tr. 135-36, 404-05, 2052-55.) The Resort filed exceptions to the judge's decision and recommended order. On March 31, 2009, a

two-member Board issued its Decision and Order affirming, as modified, the judge's rulings, findings and conclusions.

Following the Supreme Court's decision in *New Process*, a three-member panel of the Board, Chairman Liebman and Members Schaumber and Hayes, issued the Decision and Order that is now before the Court. The Board's Decision and Order adopted and incorporated by reference the previous two-member decision finding the Company had committed numerous violations of the Act. (D&O 1 (2010)).

STATEMENT OF FACTS

I. THE BOARD'S FINDINGS OF FACT

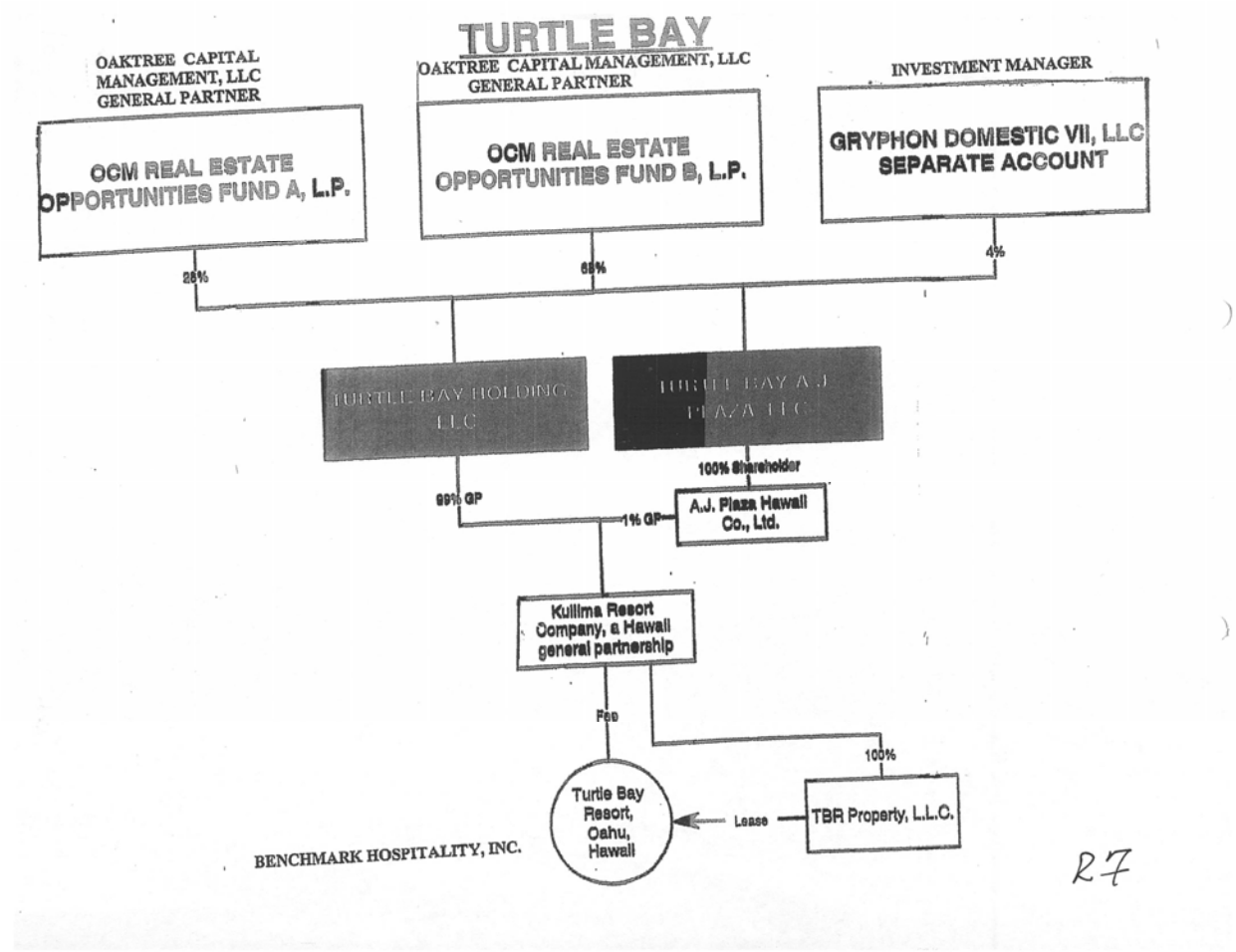
A. Background; the Resort's Operations and Ownership

Oaktree purchased the Resort in 2000. (D&O 7; Company's brief to the Administrative Law Judge p. 4, GCX 10 p. 14.)[2] Thereafter, Oaktree invested $50 million to renovate and upgrade the Resort, which is located on the island of Oahu in Hawaii. (D&O 7; Tr. 143, 145, 247, GCX 16, 19.) The Resort has 535 employees, of which 360 are union members. They are covered by a collective-bargaining agreement from a predecessor employer that was extended by the

[2] The Board has lodged with this Court page 4 of the Company's brief to the Administrative Law Judge.

Resort through November 25, 2003. (D&O 1, 7, 9; Tr. 6, 143-44, 158, 250, 1148-50, 3336, GCX 2, 54.)

The ownership and control of the Resort, as shown in the Resort's exhibit reproduced here, is maintained through several intermediate companies, including TB Holding, TBR, and Kuilima. (RX 7.)



In sum, Oaktree, through three separate funds or accounts, owns Turtle Bay Holding, LLC ("Turtle Bay Holding") and Turtle Bay AJ Plaza, LLC ("AJ Plaza"). The partnership of Turtle Bay Holding (99 percent) and AJ Plaza Hawaii, Co., Ltd.

(1 percent), a wholly owned subsidiary of AJ Plaza, owns Kuilima Resort Company ("Kuilima"). Kuilima is the record owner of the Resort. TBR is a wholly owned subsidiary of Kuilima, and it leases the Resort from Kuilima. In turn, TBR entered into a management agreement with Benchmark for Benchmark to manage and operate the Resort. (D&O 7, 8, 9; Tr. 139-40, 142, 1574-75, 1589-90, 1654, GCX 17, 18.) Benchmark's staff handbook states that it manages the Resort for Oaktree, the Resort's owner. (GCX 10 p. 14.)

Russell Bernard, Marc Porosoff and Stephanie Schulman hold multiple roles in the entities. Bernard serves as a: 1) principal of Oaktree and portfolio manager for its real estate funds, which include the Resort; 2) general partner of Kuilima; 3) president of TBR; and 4) asset manager for the Resort. (D&O 7; Tr. 1598, 1602-04, 1610-11, 1618-19, 1634-36.) Porosoff serves as: 1) senior vice-president, legal, of Oaktree; and 2) vice-president and treasurer of TBR. (D&O 7; Tr. 1566, 1614-15, 1641.) Schulman serves as: 1) in-house counsel for Oaktree, through which she works with Porosoff; and 2) vice-president and secretary of TBR. (D&O 7; Tr. 1642.)

The lease agreement was executed on behalf of both Kuilima and TBR by Oaktree "its manager," and the management agreement was executed on behalf of TBR by Oaktree "its manager." Both were signed by Bernard, as the principal of Oaktree, and Porosoff, as the senior vice-president of Oaktree. (D&O 7; Tr. 1615-

16, GCX 17 p. 44, GCX 18.) Porosoff assisted in negotiating the management agreement. (D&O 7; Tr. 1643, 1645.) The management agreement listed TBR at the same address as Oaktree, with correspondence to TBR in "C/O Oaktree," "Attention Russell [] Bernard and Marc Porosoff." (GCX 17 p. 37.)

The management agreement between TBR and Benchmark provides that TBR remains liable for all operating expenses of the Resort, including all payroll and employee benefits. (D&O 7; GCX 17 pp. 5-6, 16-17, 22-24.) All revenues Benchmark derives from its management and operation of the Resort are deposited into accounts that TBR controls. Bernard and Porosoff are signatories on those accounts and can withdraw funds from them. (D&O 7; Tr. 1618-19, GCX 17 pp. 22-24.) Oaktree requires production companies to obtain insurance protecting Oaktree before they can film at the Resort. (D&O 8; Tr. 2617-21, GCX 69.) Oaktree also executed an "Employment Practices Insurance Application" on behalf of the Resort. (D&O 8; Tr. 2625, GCX 71.)

Hy Adelman, a representative of Oaktree, maintains an office and residence on the Resort's grounds, and is the "the person responsible for the overall resort." (D&O 7; Tr. 143, 2593, 2596, GCX 65.) Oaktree is required to approve equipment leases for the Resort. Adelman meets with Abid Butt, Benchmark's vice president, and the Resort's general manager, concerning the Resort's operation and management. (D&O 7-8; Tr. 2576, 2591-92, 2596.) Adelman handles these

matters, in one case authorizing and approving an equipment lease signed by TBR. Adelman also approves purchases of housekeeping supplies for the Resort. (D&O 8; Tr. 2629-32, GCX 72, 73.)

TBR and Benchmark "have control over labor relations or personnel matters" at the Resort. (D&O 8; GCX 1(ttt) p. 2 n.1, (uuu) p. 2 n.1, (bbbb) p. 2 n.1, (dddd) p. 2 n.1, (iiii)-(kkkk).) The management agreement requires TBR to authorize and approve any negotiations with a labor union and any proposed collective-bargaining agreement. (D&O 8; GCX 17 pp. 20-21.)

Bernard required the Resort's Human Resources Director Nancy Ramos to provide information on the Resort's employees and their salaries to him for an "owners report." (D&O 8; Tr. 407-08.) Bernard participated in at least two negotiating sessions with the Union in which he was primarily involved in discussing and approving the Resort's economic package. (GCX 63, Affidavit of Eileen Santoli pp. 6, 8.) In addition, union representative Eric Gill has spoken to Bernard about open issues, and Bernard "reviewed and approved" a subcontracting proposal before it was sent to the Union. (Tr. 1677-78, GCX 63, Affidavit of Eileen Santoli p. 13 and Exhibits 4, 5(a).)

In an April 24, 2003 letter written on Oaktree letterhead addressed to his "partners," and signed as a "principal," Bernard discussed the status of negotiations with the Union. (GCX 16.) Bernard wrote:

> You may have recently received correspondence from [the Union that represents] employees at our [ ] Resort. . . . We would like to assure you that, contrary to the [U]nion's assertions, we have been acting in good faith to reach a fair and equitable agreement with [the Union]. . . . Since our funds acquired 100% ownership and control of the [ ] Resort in the fourth quarter of 2000, we have worked diligently to turn around the property, guided by the principle that if the hotel is successful, then the employees will be among the beneficiaries of that success. . . . [W]e have invested approximately $50 million over the last two years to renovate [the Resort]. . . . We wish [the Resort's] performance allowed us to offer [the Union] the generous contract it wants. However, the hotel has not been profitable for years, which is the main reason we were able to buy it at an attractive price. . . . Before we can give [the Union] the contract it wants, the hotel must make money. . . . In the meantime, we believe we have offered [the Union] a fair and equitable agreement.

(GCX 16.)

B. The Company's Overbroad Restrictions on Employee Solicitation and Access to the Resort; the Union's Right to Access the Resort

The Company's handbooks restrict employee solicitation and distribution in working and public areas. They also restrict when employees can be at the Resort and require management approval before employees or their families can visit. (D&O 10-11; GCX 9 p. 2, GCX 10 pp. 33, 37-38, 40-41.)

The expired collective-bargaining agreement, most of whose terms the Company does not dispute survived its expiration,[3] states that "[a]uthorized

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[3] *See U.S. Steel Wkrs. of America, AFL-CIO v. Asarco, Inc.*, 970 F.2d 1448, 1452 (5th Cir. 1992); *NLRB v. Great Western Coca-Cola Bottling Co.*, 740 F.2d 398, 403-04 (5th Cir. 1984).

representatives of the Union shall be free to visit the hotel at all reasonable hours and shall be permitted to carry on their duties, provided they shall first notify the management or its designated representative, and there shall be no interference with the normal conduct of business." (D&O 9; GCX 2 p. 7.) Since 2002, when Business Agent Marian Marsh was assigned to the Resort, she has gone to the Resort about twice a week for union-related matters. Marsh regularly met with employees in the employee cafeteria during their breaks and lunchtime. Occasionally, other union representatives also went to the Resort. (D&O 9, 10; Tr. 699-708, 752-53, 872-73, 889, 1164-65.)

C. On February 12, 2004, the Company Precludes Union Representatives and Employees From Holding a Rally On a Public Beach Adjacent to the Resort

Public beaches are located on either side of the Resort. Because the Resort controls the land over which the public needs to travel to access those beaches, it has dedicated a separate parking lot at its facility for members of the public who want to use the public beaches, and it gives passes to those who want to access the public beaches. (D&O 11-12; Tr. 3380-84, GCX 8, RX 46.)

In February 2004, the Union and the Resort were engaged in bargaining over a new collective-bargaining agreement. (D&O 11; Tr. 728.) On February 12, 2004, Marsh and Union representative Claire Shimabukuro led approximately 50 employees and 25 union supporters in a 15-minute rally at a public beach to

demonstrate support for the Union's bargaining efforts. (D&O 11; Tr. 727-29, GCX 8.) The participants carried signs, chanted slogans, and gave speeches. (D&O 11; Tr. 729, 896-97.)

Although the group remained on the public beach, the noise led three men congregating at the Resort's pool area to confront the group in a "belligerent" and threatening way. (D&O 11; Tr. 729-30.) Security officers at the Resort witnessed the men demand the demonstrators leave the beach, try to pull a sign away from Marsh, wrestle a bullhorn from Shimabukuro's hands, and threaten to throw her into the ocean. (D&O 11; Tr. 730-31.)

Chief of Security Thomas Dougher eventually interceded and told the men that he would handle the situation. (D&O 11; Tr. 731-32, 905, 3361.) Dougher told Marsh, "This is illegal. You shouldn't be here. You have to leave." (D&O 11; Tr. 905-06.) Marsh and Shimabukuro then led the group off the public beach, with the intention of resuming the demonstration on the public beach located on the other side of the Resort's property. (D&O 11; Tr. 732, 906.) As the group proceeded along the access road toward that beach, they were blocked by Dougher and other security officers. Dougher told the group that they could not go to the beach, and a security officer told them that needed a pass to enter the beach. (D&O 11; Tr. 732-33.) The demonstrators went to the Resort's entrance to obtain a pass, but upon arriving, were met by police officers summoned by the security

officers who told them that the Company wanted them to leave the property and warned of arrest unless they complied. (D&O 12; Tr. 733-36, 1367.) The group disbursed. (D&O 12; Tr. 735-37.) As Marsh was going to her car, a police officer told her the Resort was preparing a trespass notice for her. She told the officer that the Resort could fax it to her and left. (D&O 12; Tr. 736-37.)

D. On February 14 and February 18, the Company Evicts Union Representative Marsh from the Resort and Issues Trespass Notices to Her

On February 14, Marsh was meeting with employees in the employee cafeteria when Dougher told Marsh that she was not permitted on the Resort's property because she was trespassing, and because she had already received a verbal trespass notice on February 12. (D&O 12; Tr. 744-45, 3623-24, GCX 46.) The security office also notified the police. (D&O 12; Tr. 744-45, GCX 46.) Marsh ultimately complied with Dougher's directive and left. (D&O 12; GCX 46.) Dougher and the security officers followed Marsh to her car. Dougher told Marsh, "I'm trespassing your car." (D&O 12; Tr. 745.) The security officers escorted Marsh down the Resort's access road and out to the highway. (D&O 12; Tr. 744-45, GCX 46.)

On February 18, Marsh and Shimabukuro were in the employee cafeteria speaking to a unit employee. (D&O 12; Tr. 747-48, 750, 931-32, GCX 47.) A security officer issued them trespass notices, and directed them to leave.

(D&O 12; Tr. 747-48, GCX 47.) The security officer explained that whenever a union representative came to the Resort, he was under orders from Dougher to call the police, issue trespass notices, and escort them off the Resort's property. (D&O 12; Tr. 749-51, 754-55, 931, GCX 47.)

E. On March 25, the Company Photographs or Videotapes Union Representatives and Employees as They Gather in Front of the Resort Prior to a Lawful Demonstration

On March 25, approximately 50 people, mostly union members from other locations, gathered on a highway outside the Resort's grounds to rally in support of the employees' efforts to obtain a new bargaining agreement. (D&O 13; Tr. 981-85, 1051-52, 1277, 1314-15, 3321, GCX 8, 50.) As the group gathered, two security guards held video cameras pointed toward the group, appearing to videotape them. (D&O 13; Tr. 985, 991-92, 1078.)

F. On April 28, the Union Requests Information from the Company

On April 28, the Union, in connection with the ongoing negotiations, sent a letter to a Resort attorney requesting information on condominiums being built at the Resort. (D&O 28; GCX 42.)

G. On May 6, the Company Informs the Union that It Cannot Collect Union Dues at the Resort, and Thereafter the Company Prevents the Union From Collecting Union Dues

The collective-bargaining agreement between the Company and the Union required the Resort to deduct union dues, as authorized, from employees' wages.

In April 2004, after the agreement expired, the Company declined to comply with that provision. (D&O 16; Tr. 957, 1159, 3798, GCX 2 p. 4.)[4] Marsh posted a notice to employees that the Union would collect dues. (Tr. 777, 951, 1159-60.) During a May 6 telephone conversation, Director of Human Resources Ramos told Marsh that the Union was prohibited from collecting dues on the Resort's grounds because union dues collection constituted solicitation, and the Resort had a "no solicitation" policy. (D&O 9, 16; Tr. 140, 776-77.) Ramos confirmed her statement in a May 6 letter to Marsh, which stated, "Please be advised that we will not be allowing Business Agents or . . . [union] staff[] on property to solicit union dues from our employees." (D&O 16; Tr. 170-71, GCX 3(a).)

On May 24, two union representatives went to the Resort's cafeteria to collect union dues. A few minutes after they arrived, Dougher ordered them to leave and called the police. After a discussion with the police officers, the union representatives left the Resort. (D&O 16-17; Tr. 1787-97.)

On June 22, Shimabukuro was at the Resort's cafeteria collecting union dues. A security officer, followed by Dougher, told Shimabukuro that she could not collect dues on the Resort property. She left after police officers called by the Resort directed her to leave, and after a security officer issued her a "Trespass

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[4] There is no allegation that such conduct was unlawful. The Board has held that an employer's dues-checkoff obligation terminates at contract expiration. *Tampa Sheet Metal Co.*, 288 NLRB 322, 326 n.15 (1988).

Warning." (D&O 18; Tr. 1269-74, 3217-22, GCX 37 (b).) The notice "advised" Shimabukuro that she could not return to the Resort "for purposes of union dues collection or solicitation or for any activities that are disruptive or interfere with the normal conduct of [the Resort's] business, for a period of one (1) year." (GCX 37 (b).)

H. The Union Requests Information from the Company on August 30 and September 13; In October, the Company Reiterates that the Union Cannot Collect Dues at the Resort and Threatens to Close In Response to Union Activity

On August 30, the Union sent another letter to the Resort requesting additional information on the condominiums it was building. (D&O 28; GCX 43.) On September 13, the Union sent a letter to the Resort requesting monthly gross earnings paid to bargaining unit members. (D&O 28; GCX 40.)

In an October 3 letter from Ramos to Marsh, Ramos reiterated that the Resort "will not allow union dues to be collected on resort property." (D&O 16; GCX 3 (c).)

On October 22, Benchmark Vice-President and the Resort's General Manager, Abid Butt, distributed a memorandum that criticized the Union's tactics in seeking to reach a new agreement. (D&O 20; GCX 6.) The memo stated, in part, "the [U]nion has made a terrible mistake. We would rather close the Resort. . . . .[,]" and warned employees not "to stand by in silence while you watch your jobs disappear[.]" (D&O 20; GCX 6.)

I. During February and March 2005, Security Officers at the Resort Follow Union Business Agent Harmon and Eavesdrop on Her Conversations With Employees; on March 5 Dougher Disparages Harmon and Threatens to Discipline Employees for Talking to Her

In January 2005, Kimberly Harmon replaced Marsh as the union business agent at the Resort. (D&O 20; Tr. 1392, 1403.) On February 10, Harmon was talking to an employee about a work issue when they noticed two security officers following and observing them. (D&O 22; Tr. 1451-55, 1822-27.) The employee immediately ended the conversation and departed. (D&O 22; Tr. 1453-54, 1822-23, 1826-27.) One of the security guards admitted to Harmon that he was following her. (D&O 22; Tr. 1454.)

On March 3, a security officer stopped within a few feet of Harmon as she talked to four employees in the parking lot about work issues. (D&O 22; Tr. 1538-44, 1828-33.) Three of the employees ended their conversation with Harmon and got into a car. (D&O 22; Tr. 1543-44, 1833-34.) As Harmon continued to talk to the fourth employee, the security officer said, “That’s enough, that’s enough,” and the employee ended her conversation with Harmon. (D&O 22; Tr. 1833-36, 1853.) Later that day, Harmon tried to meet with another employee in the cafeteria, but the conversation ended when they saw a security officer sitting at the table next to them. (D&O 22; Tr. 1455-59, 1461, 1533-34.)

On March 5, Harmon was conducting union business in the cafeteria when Dougher entered. (D&O 22; Tr. 1473.) In a loud voice Dougher repeatedly called Harmon stupid, stated that he could tell Harmon where she could and could not go, and asserted that he would discipline any employee that Harmon spoke to outside of the cafeteria. (D&O 22; Tr. 1476-82, 1493.) Dougher also angrily stated, "The NLRB doesn't run me" (D&O 22; Tr. 1481) and "I'm not interested in the NLRB or the rights or anything right now" (D&O 22; Tr. 3558, 3684).

On March 10, Harmon met with an employee at the loading dock, so the employee could give Harmon signed petitions that supported the Union's bargaining efforts. (D&O 22; Tr. 1463-64, 1867-68.) They saw a security officer watching them, and he continued to follow them as they walked to the parking lot and the employee's car. The employee, as inconspicuously as he was able, gave the petitions to Harmon, all the while being monitored by a security officer. (D&O 22; Tr. 1464-73, 1868, 1910-11.)

J. On May 30, the Company Disciplines Union Supporter Jeannie Martinson; On June 10, It Suspends Union Supporter Timothy Barron For Using the Word "Scab" in a Conversation With Another Employee

On May 21, the Resort employees engaged in a one-day strike. (D&O 23; Tr. 323, 448.) Participating employees included Jeannie Martinson, a 25-year employee, and Timothy Barron, a 28-year employee who was a union steward. (D&O 23; Tr. 342, 447-48.) Thereafter, the Resort issued a warning to Martinson

(D&O 23; GCX 21), and suspended Barron for saying "scab" in a conversation with another employee (D&O 23; GCX 23, 24, 29(a)).

K. On July 1, the Company Discharges Union Supporter Mark Feltman

On February 22, 2005, Ramos saw Mark Feltman wearing a union button, and stated, "I thought you signed the antiboycott petition that [another employee] was circulating around the hotel." (D&O 24-25; Tr. 367, 516.) Feltman said, "No," and Ramos replied, "Oh, oh." (D&O 24-25; Tr. 516.) A few weeks later, another manager saw Feltman wearing a union button and told him, "I thought you were [a] more sensible guy, but who am I." (D&O 25; Tr. 140, 517, GCX 65.)

On May 21, Feltman participated in the one-day strike by walking the picket line with other employees in front of the Resort. (D&O 25; Tr. 521.) Dougher observed Feltman on the picket line. (D&O 42; Tr. 521.)

On July 2, the Resort discharged Feltman for allegedly swearing at another employee. (D&O 25, 26; GCX 27, 28.)

L. On September 14 and 15, the Resort Provided Information that the Union Had Requested a Year Earlier

On September 14 and 15, 2005, the Resort provided information about the condominiums that the Union had requested on August 30 and October 22, 2004. It did not provide information about earnings the Union requested on September 13, 2004. (D&O 29; RX 27, 28.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board found, in agreement with the administrative law judge, that the Company violated Section 8(a)(1) of the Act by:

- Maintaining overly broad no-solicitation rules in its "Rules and Regulations" and "Staff Handbook";
- Preventing union representatives and employees from going to the public beaches adjacent to the Resort's property to engage in union activity;
- On February 14 and 18, 2004, telling union representatives that they were trespassing and had no right to be on the Resort's property, issuing trespass notices to them, evicting them from the Resort, and summoning law enforcement officials to remove or assist in removing them;
- On March 25, photographing or videotaping union representatives and employees who were engaged in a lawful demonstration;
- Since May 6, 2004, telling the Union that it could not collect dues at the Resort;
- On October 22, 2004, threatening to close the Resort in response to union activity;
- On February 10, and March 3 and 10, 2005, following union representatives and eavesdropping on their conversations with employees; and
- On March 5, 2005, disparaging union representatives and threatening to discipline employees for talking to union representatives.

(D&O 3-4, 44-45.)

The Board found, in agreement with the judge, that the Company violated Section 8(a)(5) and (1) of the Act by:

- Failing and refusing to furnish, or by unreasonable delay in furnishing, the information requested by the Union in its letters of April 28, August 30, and September 13, 2004;
- On February 14 and 18, 2004, unilaterally changing the access provision of the collective-bargaining agreement.

(D&O 3, 45.)

Additionally, the Board found, in agreement with the judge, that the Resort violated Section 8(a)(3) and (1) of the Act by taking adverse action against employees because of their protected union activity by:

- Issuing a warning to employee Martinson;
- Suspending employee Barron;
- Discharging employee Feltman.

(D&O 4, 45.)

The Board's Order requires the Resort to cease and desist from engaging in the unfair labor practices found and from in any like or related manner interfering with, restraining, or coercing its employees in the exercise of their statutory rights. (D&O 3.) Affirmatively, the Board's Order requires the Resort to rescind its overly broad rules, provide the information requested by the Union, and continue the access provision of the collective-bargaining agreement until an agreement is reached or there is an impasse on all mandatory subjects of bargaining. (D&O 4.) Additionally, the Order requires the Resort to offer reinstatement to Feltman, to make Feltman and Barron whole, and to expunge from its files any reference to the

unlawful actions taken against Feltman, Barron, and Martinson. (D&O 4.) Finally, the Order requires the Company to post a remedial notice. (D&O 4.)

SUMMARY OF ARGUMENT

1. Applying settled principles, the Board is entitled to summary enforcement of its uncontested findings of numerous statutory violations and of the corresponding portions of its remedial order.

2. Substantial evidence supports the Board's finding that Oaktree and TBR are a single employer, and therefore jointly and severally liable with TBR to remedy the unfair labor practices. After Oaktree purchased the Resort, it established TBR as a nominal intermediary between it and the Resort. The two entities shared common ownership, common management, interrelationship of operations, and centralized control of operations. Oaktree and TBR did not operate at arms-length from each other. To the contrary, Oaktree and TBR acted as a single, integrated and virtually indistinguishable enterprise.

3. Ample record evidence supports the Board's finding that the Company acted unlawfully when it denied the Union its contractual right of access on February 14 and 18, 2004, and thereafter prevented union representatives from collecting union dues. Thus, the evidence establishes that the Union had a contractual right of access to the resort, and that the Company had a past practice of allowing the Union access. Yet, on February 14 and 18 the Company forced

union representatives engaged in union business to leave the Resort. Similarly, the Company thereafter precluded union representatives from collecting union dues, simply because they were collecting union dues.

ARGUMENT

I. THE BOARD IS ENTITLED TO SUMMARY ENFORCEMENT OF ITS UNCONTESTED FINDINGS

Where an employer does not challenge in its opening brief the Board's findings regarding a violation of the Act, those unchallenged issues are waived on appeal, and the Board is entitled to summary enforcement of the portions of its order based on these unchallenged findings. *See Sara Lee Bakery Group, Inc. v. NLRB*, 514 F.3d 422, 429 (5th Cir. 2008); *California Gas Transport, Inc. v. NLRB*, 507 F.3d 847, 853 n.3 (5th Cir. 2007), and cases cited. *See generally* Fed R. App. P. 28(a)(9)(A).

The Board is entitled to summary enforcement of the portions of its remedial order based on the uncontested Section 8(a) (5), (3) and (1) findings described on pages 20-22.[5]

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[5] The Company's meritless challenge to the Section 8(a)(5) and (1) findings pertaining to union access and union dues collection described above on pp. 14-16, 20 is discussed below at pp. 36-42.

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT OAKTREE AND TBR CONSTITUTE A SINGLE EMPLOYER

A. Introduction

The responsibility for remedying the unfair labor practices committed by the Company centers on the intertwined relationship among three entities: Oaktree, which purchased the Resort and invested $50 million to renovate it; TBR, which also has a property interest in the Resort; and Benchmark, which operates the Resort through a management agreement.

Before this Court, the Company (Br. 9) does not dispute the Board's finding (D&O 1 n.1, 8-9 and n.3) that TBR is a joint employer with Benchmark because of the control that the two separate entities have over the Resort's employees. Nor does the Company dispute that, as a joint employer, TBR and Benchmark are jointly and severally liable for remedying the unfair labor practices. *See Emsing's Supermarket, Inc.*, 284 NLRB 302, 304 (1987), *enforced* 872 F.2d 1279, 1287-89 (7th Cir. 1989).

The only issue before this Court regarding liability for the unfair labor practices is whether Oaktree and TBR are a single employer. Single employer status "'exists where two nominally separate entities are actually part of a single integrated enterprise so that, for all purposes, there is in fact only a single employer.'" *NLRB v. Western Temporary Services*, 821 F.2d 1258, 1266 (7th Cir.

1987) (citation omitted). If so, then Oaktree is jointly and severally liable with TBR to remedy the unfair labor practices. *See Vance v. NLRB*, 71 F.3d 486, 489 (4th Cir. 1995); *Emsing's Supermarket, Inc.*, 284 NLRB 302, 304 (1987), *enforced* 872 F.2d 1279, 1288-89 (7th Cir. 1989); *Carrier Corp. v. NLRB*, 768 F.2d 778, 781 (6th Cir. 1985). Substantial record evidence supports the Board's finding that Oaktree and TBR are sufficiently integrated to deem them a single employer.

B. General Principles and Standard of Review

There is no dispute (Br. 19) that in determining whether single employer status exists, the Board considers four factors: common management, common ownership, interrelation of operations, and centralized control of labor relations. *See Radio and Television Broadcast Technicians Union Local 1264 v. Broadcast Service of Mobile, Inc.*, 380 U.S. 255, 256 (1965); *NLRB v. DMR Corp.*, 699 F.2d 788, 790-91 (5th Cir. 1983). Not all of these factors need to be present before the Board can find single employer status, and no one factor is controlling. *See DMR Corp.*, 699 F.2d at 791.

As this Court has explained, "[s]ingle employer status ultimately depends on 'all the circumstances of the case' and is characterized as an absence of an 'arm's length relationship found among unintegrated companies.'" *DMR Corp.*, 699 F.2d at 791 (citation omitted). *See also Naperville Ready Mix, Inc. v. NLRB*, 242 F.3d 744, 752 (7th Cir. 2001) (The Board's single employer test is "a contextual inquiry

and no one factor is determinative. . . . The listed factors merely help to guide the Board as it assesses 'whether there exists overall control of the critical matters at the policy level.'") (citations omitted).

Therefore, although centralized control of labor relations is one of the controlling factors, it is not, as the Company asserts (Br. 21-24), "'critical' in the sense of being the *sine qua non* of 'single employer' status." *Local 627, Int'l Union of Operating Engineers v. NLRB*, 518 F.2d 1040, 1046 (D.C. Cir. 1975). *See id*. (setting forth Board cases where the Board has found single employer status absent evidence of various factors, including common control of labor relations), *affirmed in relevant part sub nom. South Prairie Constr. Co. v. Operating Engineers, Local 627*, 425 U.S. 800 (1976). *Accord Naperville Ready Mix, Inc.*, 242 F.3d at 752. Rather, as the numerous Board cases the Company cites in its brief recognize, the Board examines all of the circumstances with the key question being whether the parties lack an arms-length relationship. *See, for example, In re Mercy Hosp. of Buffalo*, 336 NLRB 1282, 1284 (2001) (Br. 22 n.12, 24 n.14) (Single employer status ultimately depends on 'all of the circumstances of a case' and is characterized by the absence of an 'arm's-length relationship among the unintegrated companies'") (citation omitted).

A Board finding of single employer status is essentially a factual one and not to be disturbed provided substantial evidence in the record supports the Board's

findings. *See DMR Corp.*, 699 F.2d at 791. The Board's finding is therefore entitled to affirmance if "it would have been possible for a reasonable jury to reach the Board's conclusion." *Allentown Mack Sales & Service, Inc. v. NLRB*, 522 U.S. 359, 366-67 (1998).

C. Oaktree and TBR Constitute a Single Employer

The Board (D&O 1 n.5) found that Oaktree and TBR were a single employer. Indeed, the record amply supports the Board's conclusion (D&O 8) that in the relationships among Oaktree, TBR, Kuilima, Benchmark, and the Resort, "the overbearing presence in these relationships is Oaktree, the effective owner of the Resort, which must be consulted, either directly or through TBR [], before any significant decisions are made by or at [the Resort], including decisions on labor matters."

1. Common ownership

Oaktree purchased the Resort in 2000. (D&O 7; Company's brief to the Administrative Law Judge p. 4, GCX 10 p. 14.) Thereafter, Oaktree attempted, unsuccessfully, to separate itself from direct control of the Resort. It set up a multi-layered corporate structure under which Oaktree, through its funds, owns the owner of Kuilima, which, in turn, owns the Resort. TBR, a wholly owned subsidiary of Kuilima, leases the Resort from Kuilima. TBR, in turn, has an agreement with Benchmark to manage the Resort. However, as the Board found

(D&O 8), TBR "seems to be a shell corporation with no purpose other than to provide insulation to Kuilima and Oaktree from [TBR's] selection of Benchmark as the operator and manager of the [R]esort."

Despite the corporate hierarchy between Oaktree and TBR, the evidence establishes that Oaktree and TBR acted as a single employer regarding ownership of the Resort. Thus, Russell Bernard, the principal of Oaktree, and Mark Porosoff, the senior vice-president of Oaktree, executed the lease between Kuilima and TBR, signing for Oaktree on behalf of both parties. Similarly, they both executed the management agreement between TBR and Benchmark, signing in their capacity as Oaktree officials. As the Board explained (D&O 8), it would be "unusual" to have an Oaktree representative sign the lease and management agreement "because Oaktree was not ostensibly a party to those agreements, unless the parties to those agreements recognized that Oaktree was the entity in control of TBR[], Kuilima, and [the Resort]."

Indeed, Bernard's letter to his partners about the union negotiations confirms not only that Oaktree is the "effective" owner of the Resort, but that it, not TBR, is the entity in control of the Resort. Thus, Bernard, in a letter that made no mention of TBR, wrote that, since "our funds acquired 100% ownership and control" of the Resort, "we have invested approximately $50 million" in the Resort, and he explained, "we have offered" the Union a "fair and equitable agreement."

(GCX 16.)

There is no merit in Oaktree's repeated claim (Br. 2, 5, 6, 13, 20, 27) that it is a mere investment advisor to the funds that own the Resort, and that (Br. 2, 3, 7, 13, 18, 20) "the funds" are the "indirect" owner of the Resort. While Oaktree may have used various corporate forms to hold the Resort in a web of subsidiaries, Oaktree is, as the Board found (D&O 7, 8), its "effective" owner, as these entities did not operate at arms-length with one another. The evidence of common ownership helps to demonstrate that Oaktree and TBR are a single employer. *See NLRB v. Palmer Donavin Mfg*., 369 F.3d 954, 957 (6th Cir. 2004) (finding that two entities were a single employer due, in part, to the parent company wholly owning a subsidiary).

2. Common management

Oaktree does not dispute that it and TBR share common management. Indeed, as the Board found (D&O 8), "the principals and officers of Oaktree are the principals and officers of [TBR]." Bernard is the principal of Oaktree and the president of TBR; Porosoff is the senior vice-president of Oaktree and the vice-president and treasurer of TBR; Stephanie Schulman is the in-house counsel for Oaktree and the vice-president and secretary of TBR. The common management between Oaktree and TBR supports a finding that they are a single employer. *See Palmer Donavin Mfg*., 369 F.3d at 957.

Moreover, TBR and Oaktree share a mailing address and mail is sent to TBR in care of Oaktree, which suggests that Oaktree managers effectively run the Resort. Indeed, as shown, Oaktree officials, in their capacity as Oaktree officials, executed the relevant documents relating to Kuilima, TBR, the Resort, and Benchmark. (GCX 16, 17, 18.)

Whatever the merits of the Company's general claim (Br. 14, 17, 31-49) that officers of related entities can act on behalf of each entity while wearing several hats, it has not cited a scintilla of evidence that Oaktree officials acted on behalf of the Resort on a matter of substance in their capacity as TBR officials. Indeed, the Board's characterization (D&O 8) of TBR as a "shell corporation" is amply supported by the testimony of Oaktree official Porosoff, who had difficulty recalling his positions at TBR (Tr. 1614-15) and was unsure of his duties as TBR's vice-president and treasurer (Tr. 1642). Likewise, had TBR not been a shell corporation, Porosoff presumably would have been able to testify about quarterly meetings between TBR and Benchmark required by the management agreement. Instead, Porosoff was unaware of a single meeting between TBR and Benchmark in the 4 years since Oaktree entered into the management agreement on TBR's behalf. (Tr. 1635-36, RX 8 p. 26.)[6]

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[6] Thus, the cases relied on by the Company are inapposite as this is not a case where each entity had separate officers who made respective operating decisions,

In sum, as the brief of Oaktree, TBR, and Benchmark to the judge stated (D&O 8), TBR is "nothing more that the legal lessor of the property where [the Resort] is situated," a statement fully consistent with the judge's finding (D&O 8) that Oaktree and TBR not only share common management, but also that Oaktree is the "overbearing presence" in their relationship. *See Royal Typewriter Co. v. NLRB*, 533 F.2d 1030, 1041 (8th Cir. 1976) (conglomerate was a single employer with subsidiary where officers and directors of subsidiary came from parent and where subsidiary had "no real operational function of its own and was created primarily for tax purposes").

3. Interrelationship of operations

Here, the evidence amply supports the Board's finding (D&O 8) that Oaktree and TBR have interrelated operations. As an initial matter, as the Board found (D&O 8), there is no evidence that TBR has any employees except for those who are also officers, principals, or employees of Oaktree, such as Bernard, Porosoff, and Schulman. Moreover, as the Board further found (D&O 8), there is no evidence that TBR "has any purpose other than to act as Oaktree's conduit through which the [R]esort is managed and operated by Benchmark."

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see Dow Chemical Co., 326 NLRB 288, 288 (1998) (Br. 25 n.25); *Western Union Corp.*, 224 NLRB 274, 274-75 (1976), *affirmed sub. nom United Telegraph Workers, AFL-CIO v. NLRB*, 571 F.2d 665 (D.C. Cir. 1978) (Br. 25 n.15); *Frank N. Smith Associates, Inc.*, 194 NLRB 212, 218 (1972) (Br. 24 n.14, 25 n.15, 45).

Indeed, Abid Butt, Benchmark's vice-president and the Resort's general manager, conceded that "the person responsible for the overall resort" is Hy Adelman, who maintains an office and residence on the Resort's grounds. (D&O 7; Tr. 2593, 2596). Adelman is an Oaktree representative who met regularly with Butt and approved leases and the purchase of housekeeping supplies.

Significantly, the Company does not dispute that Adelman plays a vital role in the Resort's daily operation. Instead, the Company asserts that the Board erred by finding that Adelman was employed by Oaktree (Br. 43 & n.19), and claims that Adelman actually worked for an employment agency (Br. 43 n.19). The Board (D&O 7) did not find that Adelman was an Oaktree employee, only that he was an Oaktree representative. That finding was a reasonable synthesis of testimony from the Resort's Human Resources Director, Ramos (Tr. 143), and its General Manager, Butt, that Adelman was an Oaktree employee (Tr. 2593, 2596), and from Oaktree Vice-President Porosoff's testimony (Tr. 1656) that Adelman worked for Kuilima, which is owned by Oaktree.[7]

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[7] The Company's reliance (Br. 43 n.19) on *Lusk v. FoxMeyer Health Corp.*, 129 F.3d 773, 779 n.5 (5th Cir. 1997), to discount testimony regarding Adelman's role is misplaced. In *Lusk*, the Court recognized that testimony created possible confusion about which entity was referenced because the corporate entities shared a common name. Here, there is no such name confusion. Oaktree and TBR do not

The interrelation of operations among Oaktree, TBR, and the Resort is further demonstrated by the fact that the management agreement with Benchmark lists TBR's mailing address as "in care of Oaktree" at Oaktree's address; that Oaktree requested information from the Resort about employee salaries for an "owners" report; that Oaktree requires production companies to obtain insurance protecting Oaktree before they can film at the Resort; and that Oaktree executed an employment practices insurance application on behalf of the Resort.

In sum, as the Board explained (D&O 8), "[e]very act and right to act by TBR[] is known by and controlled by the ultimate owner of TBR[]—Oaktree. Thus, to the limited extent that TBR[] engages in any operations, those operations are controlled by and closely interrelated with the operations of Oaktree."

4. Centralized control of labor relations

There can be no dispute that TBR controls labor relations at the Resort. Indeed, Oaktree, the Resort, and Benchmark conceded in their answers to the General Counsel's complaint that TBR and Benchmark "have control over labor relations or personnel matters" at the Resort. In addition, the management agreement between TBR and Benchmark—that was signed by Oaktree principals—reserves to TBR the control over labor negotiations and agreements.

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share names, and several witnesses unambiguously connected Adelman to Oaktree, not TBR.

However, the Board found (D&O 8) the different responsibilities of Oaktree, TBR, and Benchmark in labor and personnel matters "are more fluid than solid."

The fluidity is demonstrated by Oaktree's involvement in the labor negotiations and daily operations at the Resort. Thus, whether it is Oaktree officials signing all of the relevant documents relating to TBR, Benchmark, and the Resort, or Oaktree principal Bernard taking responsibility for negotiations with the Union in a letter to his partners, or Oaktree representative Adelman having an undisputedly significant role in the Resort's daily operations, Oaktree's presence in the relationship among it, TBR, Benchmark, and the Resort is ubiquitous. Therefore, the Board was fully warranted in finding (D&O 8) that "labor relations are centralized through TBR[] and Oaktree." *See NLRB v. Cofer*, 637 F.2d 1309, 1313 (9th Cir. 1981); *Asher Candy, Inc*., 348 NLRB 993, 996 (2006), enforced 258 Fed App'x 334 (D.C. Cir. 2007).

Contrary to the Company's contention (Br. 13, 19-31, 44-45), Oaktree does not need to be found directly responsible for the unfair labor practices before it can be found to have control over labor relations. The Board's decision does not turn on whether Oaktree directed Benchmark managers and the Resort's security officers to commit unfair labor practices. The salient issue is whether Oaktree is sufficiently connected to TBR, as it is, so that Oaktree is jointly liable for TBR's unfair labor practices. Oaktree cannot act as a single employer, but then "expect to

avoid the consequences . . . ." *Royal Typewriter Co. v. NLRB*, 533 F.2d 1030, 1043 (8th Cir. 1976).

The decisions of this and other courts are not to the contrary. For example, in *Lusk v. FoxMeyer Health Corp.*, 129 F.3d 773 (5th Cir. 1997), the Court simply found no evidence, despite three 3 overlapping executives, that the parent company was involved in the daily decision-making or operation of its subsidiary. Specifically, the evidence was "replete with examples" of how the executives from the subsidiaries "devised and implemented every aspect of the [reduction in force]," and that any action taken by the three overlapping directors in connection with the plan was done only in concert with officials of those subsidiaries, with "scant" evidence that the parent was involved in the plan. *Id*. at 780.[8] On those facts, the Court found no liability for the parent regarding a claim that it, along with its subsidiary, had violated the ADEA. *Id*. at 780. Here, by contrast, there is ample evidence that Oaktree is the controlling party in its relationship with TBR and TBR's relationship with the Resort.

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[8] In this context, the Court recognized that a common address is evidence of interrelated operations, but not, standing alone, sufficient to establish an interrelationship of operations. *See Lusk* 129 F.3d at 781 (shared headquarters is "indeed evidence of interrelated operations"). *Accord Johnson v. Crown Enters., Inc.* 398 F.3d 339, 343 (5th Cir. 2005). Therefore, contrary to the Company's contention (Br. 46-47), the Board did not err by relying on the fact that Oaktree and TBR shared the same address as evidence of an interrelationship of operations. The common address was simply one of many shared components of the integrated enterprise.

Similarly, in *NLRB v. Transcontinental Theaters, Inc.*, 568 F.2d 125 (9th Cir. 1977) (Br. 16, 22, 33), the court recognized that control and single-employer status exists when the parent sets the policies and participates in negotiations. In that case, unlike here, the court found no parent involvement.

III. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(1) AND (5) OF THE ACT BY ITS CONDUCT AT THE RESORT ON FEBRUARY 14 AND 18, 2004, AND VIOLATED SECTION 8(a)(5) BY PROHIBITING THE UNION FROM COLLECTING DUES AT THE RESORT

A. Applicable Principles

Section 7 of the Act (29 U.S.C. § 157) grants employees the right to "self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." Those rights are enforced through Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)), which provides that "[i]t shall be an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise" of their Section 7 rights. An employer violates Section 8(a)(1) when its conduct tends to coerce or threaten employees in the exercise of their Section 7 rights. *See TRW-United Greenfield Div. v. NLRB*, 637 F.2d 410, 415 (5th Cir. 1981).

Section 8(a)(5) of the Act makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees."

29 U.S.C. § 158(a)(5). This prevents an employer from making unilateral changes to terms and conditions of employment that are mandatory subjects of bargaining without first giving notice to and bargaining with the employees' representatives. *NLRB v. Katz*, 369 U.S. 736, 743 (1962); *NLRB v. Pinkston-Hollar Constr. Serv., Inc.*, 954 F.2d 306, 310 (5th Cir. 1992).[9] A collective-bargaining provision allowing union access is a term and condition of employment that survives the expiration of the agreement. *See NLRB v. Great Western Coca-Cola Bottling Co.*, 740 F.2d 398, 403-04 (5th Cir. 1984); *Facet Enterprises, Inc. v. NLRB*, 907 F.2d 963, 983 (10th Cir. 1990).

B. Despite the Union's Contractual Right of Access at the Resort, the Company Unlawfully Ordered Union Representatives Off the Resort on February 14 and 18, 2004

As an initial matter, the Board (D&O 1 n.6) relied only on events from February 14 and 18, 2004, to find that the Company departed from its past practice of permitting union representatives to access the Resort. Yet, the Company primarily argues (Br. 53-56, 62-63) that the General Counsel failed to meet its burden of proof on dates other than February 14 and 18. Those arguments are irrelevant, and the Court may disregard them. Here, ample evidence supports the

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[9] A Section 8(a)(5) violation results in a derivative violation of Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)). *See Tri-State Health Serv., Inc. v. NLRB*, 374 F.3d 347, 350 n.1 (5th Cir. 2004).

Board's finding that the Company acted unlawfully on the two dates on which the Board actually found violations.

Thus, it is undisputed that despite the collective-bargaining agreement's expiration, the union access provisions were still in effect in February 2004, and provided that "[a]uthorized representatives of the Union shall be free to visit the hotel at all reasonable hours and shall be permitted to carry on their duties, provided they shall first notify the management or its designated representative, and there shall be no interference with the normal conduct of business." (D&O 9; GCX 2 pp. 7-8.) Nor is there any dispute that since 2002, union representatives regularly went to the Resort, where they conducted union business with employees in the cafeteria during their breaks and lunch. Indeed, even those company witnesses whose testimony about limited access for union representatives was discredited (D&O 1, 9-10) conceded that union representatives could meet with employees in the cafeteria. (D&O 10; Tr. 1017-18, 2112-13, 2196-98, 2237-41, 2671-72, 2877-88, 3188-91, 3268-71, 3315.)

Despite the Union's contractual right and the parties' past practice, on February 14 and 18, 2004, the Company ordered union representatives to leave the cafeteria. Thus, on February 14, a company official told a union representative who was meeting with employees in the cafeteria, that she was not permitted on the Resort's property because she was trespassing, and escorted her off the

property. Similarly, on February 18, a security officer issued union representatives trespass notices, called the police, and directed them to leave the cafeteria where they were talking to an employee. Since the Company does not claim that the Union forfeited its contractual right of access by interfering with business at the Resort on those dates, it follows that its prohibition on union access on those dates was an unlawful unilateral change. *See Frontier Hotel & Casino*, 309 NLRB 761, 766 (1992).

Such conduct also unlawfully interfered with employees' communication with their union representatives and coerced them in the exercise of their statutory rights. *See Frontier Hotel & Casino*, 309 NLRB at 766; *Fabric Warehouse*, 294 NLRB 189, 192 (1989), *enforced sub nom. Hancock Fabrics v. NLRB*, 902 F.2d 28 (4th Cir. 1990); *Jerry Cardullo Ironworks, Inc*., 340 NLRB 515, 515 (2003). As the Board explained (D&O 32), the Company's "conduct either had the indirect impact on employees of interfering with union-related communications or directly coerced and restrained employees who were engaging in the union activity of conversing with their bargaining representative."

Contrary to the Company's claim (Br. 57-59), this is not a case where an employer is alleged to have changed a past practice upon taking ownership; rather, the issue is whether the Company changed its 4-year practice at the Resort. As such, the Board's finding regarding union access was not dependent on the

testimony of a former union representative "under the prior operation." Moreover, there is no dispute that the Union had a contractual right of access and that the Union regularly carried out that right under the Company's regime by meeting with employees in the Resort's cafeteria.

To the extent that the Company claims (Br. 60-61, 74-75) that its restrictions on union access did not have "significant consequences," that claim is frivolous. The Company deprived the union representatives their contractual right to meet with employees. Moreover, the Company's actions occurred in the context of numerous uncontested violations, ranging from surveilling and threatening union representatives, to suspending and discharging employees for union activity. In these circumstances, the Company's actions bear little relation to the types of cases relied on by the Company (Br. 60-61). *See*, *for example*, *Peerless Food Products*, 236 NLRB 161 (1978) (employer did not act unlawfully where it limited the right of a union representative to converse with employees on the production floor on matters unrelated to employment issues). Likewise, its claim (Br. 62-64)—that because its unlawful conduct did not fully dissuade the union representatives from attempting to carry out their duties, the violation is de minimis (Br. 4, 15, 73) or does not materially interfere with statutory rights—borders on the absurd.

Finally, the Company's attempt (Br. 3, 4, 10-11, 15, 65-70) to justify the eviction of the union representatives from the cafeteria on February 14 and 18

based on the February 12 rally at a public beach is utterly devoid of merit. Before the judge (D&O 35), the Company did not dispute that it unlawfully interfered with union representatives and employees engaged in protected activity on the public beach on February 12. Before this Court, it does not dispute the Board's finding that its conduct that day violated the Act.

The Company misrepresents the record evidence by claiming that the union representatives on February 12 had disrupted Resort business and guests and therefore, days later, it was privileged to throw the union representatives out of the cafeteria. This claim was discredited by the Board (D&O 35), which found there was no inappropriate conduct by the rally participants. As such, the cases relied on by the Company (Br. 69) do not support its claim. *See*, *for example*, *Nynex Corp.*, 338 NLRB 659, 662 (2002) (union engaged in unprotected activity when its confrontational conduct in a work area caused a 2-hour cessation of the employer's operation, and such conduct justified subsequent limits on access).

C. Despite the Union's Contractual Right of Access at the Resort, the Company Unlawfully Prohibited the Union from Collecting Union Dues

The collective-bargaining agreement contained a broad access provision for union representatives to conduct union duties. The Company does not dispute the Board's findings (D&O 35) that "[c]ollecting dues from its members is one of the duties of the Union," or (D&O 16) that the Company regularly allowed various

solicitations at the Resort. Indeed, company officials (Tr. 3730-31, 3740-41, 3662-67, 3798-3800) conceded that union officials could collect dues, unless they were disorderly and harassing.[10] Nevertheless, on May 6, 2004, the Company issued a blanket directive that prohibited the Union from collecting union dues at the Resort. On May 24 and June 22, union representatives were prohibited from collecting union dues in the cafeteria, although there was no claim that they had engaged in any improprieties. Accordingly, the Company's blanket prohibition on collecting union dues at the Resort constituted an unlawful unilateral change. *See Frontier Hotel & Casino*, 309 NLRB at 766.

[10] The Company's claim (Br. 58-59) that the General Counsel failed to establish a past practice for dues collection thus borders on the frivolous.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court enter judgment denying the Company's petition for review and enforcing the Board's Order in full.

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UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

OAKTREE CAPITAL MANAGEMENT, L.P.	*	
TBR PROPERTY, L.L.C. d/b/a TURTLE BAY	*	
RESORTS AND BENCHMARK HOSPITALITY,	*	
INC.	*	
	*	
Petitioners/Cross-Respondents	*	Nos. 10-60749
	*	
v.	*	
	*	
	*	Board Case No.
NATIONAL LABOR RELATIONS BOARD	*	37-CA-06601
	*	
Respondent/Cross-Petitioner	*	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its final brief contains 9,538 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2003.

CERTIFICATE OF VIRUS SCAN

The board certifies that the electronic copy of the brief submitted in Portable Document Format (PDF) has been scanned for viruses using the Symantec Antivirus Corporation Edition, program version 10.0.2.2000 (12/9/2009 rev. 2) and no virus has been detected.

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CERTIFICATE OF SERVICE

I hereby certify that on January 11, 2011, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system.

I certify that the foregoing document was served on all those parties or their counsel of record through the CM/ECF:

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