Advance Electric, Inc. and its Alter Ego Beacon Electric, Inc. *and* IBEW Local No. 124 affiliated with International Brotherhood of Electrical Workers, AFL-CIO. Case 17-CA-11380

21 February 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

On 15 August 1983 Administrative Law Judge Lowell Goerlich issued the attached decision. The Respondent, the Charging Party, and the General Counsel filed exceptions and supporting briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The complaint in this proceeding alleges, inter alia, that Advance Electric, Inc. (Advance) and its alter ego Beacon Electric, Inc. (Beacon) violated Section 8(a)(1), (3), and (5) of the Act by withdrawing recognition from the Union, repudiating its collective-bargaining agreement with the Union, and discharging employees because of their union membership, activities, or support. The judge found that Beacon was not an alter ego of Advance and therefore dismissed all of the 8(a)(5) allegations.[1] For the reasons stated below, we find merit to the General Counsel's and the Charging Party's exceptions to each of those findings.

From about 1968 until 17 December 1982, Advance engaged in residential and commercial electrical contracting work in the construction industry. At all material times, Bob H. Shoots (Bob) was president and treasurer of Advance, Ruby J. Shoots (Ruby), Bob's wife, was its secretary, and Thomas B. Shoots, Bob's brother, was its vice president. Bob and Ruby as joint tenants owned 52 percent of the stock in Advance. Bill Shoots (Bill), another of Bob's brothers, owned the remaining 48 percent of the stock. In 1968 Advance executed a letter of assent authorizing the National Electrical Contractors Association, Inc. (NECA), to be Advance's collective-bargaining representative and agreeing to be bound by the collective-bargaining agreement between the Union and the local NECA chapter. On or about 6 August 1980 Advance executed a "Letter of Assent-A" authorizing NECA to bargain on its behalf concerning all matters contained in or pertaining to the residential labor agreement between the Union and NECA. Pursuant to these letters of assent, at all material times through 17 December 1982, Advance abided by the various collective-bargaining agreements in effect between NECA and the Union.

Beacon was incorporated in 1980 for "tax purposes." Originally Ruby held 52 percent and Bill 48 percent of the stock in Beacon. Later, about March 1982 Bill returned his stock to the corporation and Ruby became sole owner of Beacon, as well as its president and treasurer. Between its incorporation and December 1982[2] Beacon basically was a dormant corporation that transacted very little business.[3]

Around early December Bill told Bob that he had decided to leave Advance and to go into business for himself. About the same time Bob decided that it was no longer economically feasible to operate Advance. After discussions with Ruby, however, they decided to remain in the electrical contracting business by activating Beacon. During their discussions concerning "starting Beacon up again" Bob and Ruby decided that in order to make a profit they would have to reduce the overhead expense. They further decided that the primary cost of business which could be cut was employee wages.

On 2 December Bob interviewed Bonnie Selby for the position of Advance's receptionist-office manager. Selby, who was hired for the job, was told by Bob that he (Bob) had not made any money from Advance in the past year and that he "was in the process of becoming a non-union shop." On 5 December Bob placed a newspaper advertisement for a "house wireman." The next day, Selby was instructed by Bob to advise all job applicants that the job was "non-union" and paid $7 per hour. On 8 December Bob interviewed several applicants who had responded to the newspaper advertisement. On 9 December Bill told Advance's three electricians that he was leaving Advance to go into business for himself and that Bob was "going to close the doors" and would be "going non-union, opening another shop." Bill's statement was confirmed the following day when Bob met with Advance's three electricians. Bob stated that Advance was not making any money and that "the only way he could curb the situation was either to go out of business entirely or close

[1] The judge did find that Beacon violated Sec. 8(a)(3) and (1) by its refusal to hire three employees because they refused to forgo their union affiliation. While we agree that a violation of Sec. 8(a)(3) occurred here, we do so solely for the reasons expressed infra.

[2] Unless otherwise noted, all dates hereafter are in 1982.

[3] Bob estimated that Beacon transacted about $10,000 worth of business in 1981 and 1982, mostly small jobs that Advance refused to accept because the client owed Advance considerable sums of money.

down and open up non-union." Bob explained that he already had placed an advertisement for electricians and had "contacted individuals to come on board," and that the new employees would work for $8 per hour with no benefits. Bob offered to hire each of Advance's three electricians if they would work "non-union" for those same wages. All three declined asserting that they wanted to remain with the Union. On the same day, Bob notified the Union that due to economic reasons Advance would be closing permanently on 24 December. However, on Friday, 17 December, Bob announced to the electricians that they were terminated as of that date because Advance had run out of money.

On the following Monday, 20 December, Bob told Selby to answer the telephone "Beacon Electric, Inc." and to advise confused callers that Beacon was "formerly Advance." Bob explained to Selby that the signs on the building and the trucks would be changed to Beacon Electric. On the same date three newly hired electricians began work. Two received wages of $8 per hour and one was paid $6 per hour; none received fringe benefits. The newly hired employees were assigned to finish the work in progress started by Advance, utilizing the same vehicles, tools, equipment, and materials previously used by Advance.

To settle his 48 percent interest in Advance, Bill received one of Advance's four trucks, "some" tools and materials, and an unspecified amount of cash. All remaining assets of Advance were turned over to or utilized by Beacon. Insofar as the record reflects, no inventory was prepared showing what tools, materials, and other assets of Advance were assumed by Beacon, and no formal sale or other transaction accompanied the transfer. Bill has no interest in or connection with Beacon and has started his own electrical contracting business, Bill Shoots Electric.

In analyzing the foregoing facts, the judge set forth the proper standard utilized by the Board and the courts to determine whether two facially independent employers constitute alter egos for purposes of the Act, to wit:

> The legal principles to be applied in determining whether two factually separate employees are in fact *alter egos* are well settled. Although each case must turn on its own facts, we generally have found *alter ego* status where the two enterprises have "substantially identical" management, business purpose, operation, equipment, customers, and supervision, as well as ownership.

Denzil S. Alkire, 259 NLRB 1323, 1324 (1982).[4] Accord: *NLRB v. Campbell-Harris Electric*, 719 F.2d 292 (8th Cir. 1983). Other factors which must be considered in determining whether an alter ego status is present in a given case include "whether the purpose behind the creation of the alleged alter ego was legitimate or whether, instead, its purpose was to evade responsibilities under the Act." *Fugazy Continental Corp.*, 265 NLRB 1301 (1982).

Here, the judge concluded that Beacon was not the alter ego of Advance. The judge reasoned that, upon the cessation of business by Advance, its operations were "bifurcated" by Bill's decision to go into business on his own and that Bill's departure "rendered it impossible for Advance to continue as Beacon with the same identity, management, supervision, and ownership." We do not agree. Rather we find that the facts of the instant case illustrate "a mere technical change in the structure or identity" of the predecessor employer. *Howard Johnson Co. v. Detroit Local Joint Executive Board*, 417 U.S. 249, 259 fn. 5 (1974); *NLRB v. Campbell-Harris Electric*, supra.

Initially, we note that there can be no dispute but that Beacon shared Advance's business purpose and mode of operation. Both companies engaged in electrical contracting work in the construction industry, both conducted business in the same geographical area, both purchased materials from the same supplier and both maintained accounts at the same bank. Additionally, Beacon utilized the same physical facility and telephone numbers and equipment that had been used by Advance. Although Advance performed both residential and commercial electrical contracting while Beacon worked exclusively in the residential field, it is uncontradicted that less than 10 percent of Advance's business was commercial in nature. Hence, we find that the two enterprises had at least a "substantially identical" business purpose and mode of operations.[5]

It is also clear that Beacon and Advance shared a "substantially identical" customer base. Despite the judge's finding, based on Bob's uncorroborated testimony, that Bill took 80 percent of Advance's customers and left Beacon with only about 20 percent of Advance's extant customers, we find that the business records maintained by Advance and Beacon clearly indicate the existence of the requisite degree of customer identity required by our de-

[4] The court denied enforcement of the Board's order on the basis that the Board had not considered whether the employer "obtained, or reasonably expected" an economic benefit as a result of the transfer of its operations to the alleged alter ego. *Denzil S. Alkire v. NLRB*, 716 F.2d 1014 (4th Cir. 1983). Such an economic benefit is present in this case as is explained below.

[5] Our finding in this regard is buttressed by the fact, noted above, that Beacon undertook to complete all of Advance's work in progress.

cisions. Those business records show that about 75 percent of Beacon's customers previously were customers of Advance. When viewed in dollars and cents, the extent to which Beacon relied on customers of Advance is even more striking; over 93 percent of Beacon's dollar volume of business was attributable to ex-Advance customers.[6] Moreover, Beacon's sales for the first 4 months of 1983 totaled $59,187.27, while Advance's sales for the first 4 months of 1982 totaled $64,707.96. In addition, Advance's four largest customers, accounting for 68 percent of Advance's sales, all became customers of Beacon and accounted for 53 percent of Beacon's sales. Carried further, five of Advance's six largest customers were customers of Beacon, accounting for 77 percent and 79 percent of Advance's and Beacon's sales, respectively.[7] Based on these total sales figures and the statistics set forth above, it is apparent, and we find, that Beacon served customers formerly associated with Advance to a more than sufficient extent to satisfy this element of our alter ego standard.

With respect to common equipment, it is uncontradicted that *all* of Beacon's equipment formerly was utilized by Advance including the motor vehicles which were merely repainted with Beacon's name. Additionally, all of the materials used by Beacon, at least until replenishment was necessary, formerly was inventory of Advance. Furthermore, Beacon used the same premises as had been used by Advance—the only change being that Beacon's name was painted on the office door in lieu of Advance's. Under these circumstances, and particularly as there was not even an attempt to observe any business formalities such as contracts or bills of sale in connection with these transactions, we find that this portion of the test for alter ego status also is satisfied notwithstanding the fact that one of Advance's four trucks and "some" of its tools and equipment were transferred to Bill.

Concerning the element of common management, we expressly reject the judge's finding that Bill was the "main force" in the management of Advance. Indeed, the overwhelming weight of evidence in the record clearly shows that it was Bob who was responsible for and exercised the management of both Advance and Beacon. Thus it was Bob who signed the letters of assent with NECA, handled all labor relations matters both with the Union and with Advance's three electricians, hired and fired office clerical employees, signed all checks, and executed all business documents required by the State of Missouri and by the collective-bargaining agreement with the Union. Moreover, it was Bob, in consultation with his wife, who decided to close Advance and activate Beacon. On the other hand, Bill was not an officer or director of Advance and spent most of his time performing "hands-on" work. Accordingly, we find that Beacon and Advance shared "substantially identical" management and that this factor too supports a finding of alter ego in this case.[8]

Turning to the factor of supervision, it is clear that Bill, who was responsible for the immediate supervision of Advance's employees, was not an employee of Beacon. However, the record reveals that Bill basically functioned as a working foreman while employed by Advance and that the ultimate supervisory authority at all times rested with Bob. As mentioned above, Bill spent most of his time performing hands-on work. Bill's supervisory role mostly consisted of assigning each electrician to a certain worksite. All of Advance's electricians were journeymen and once assigned a worksite required no supervision. Rather upon being assigned to a particular job, each electrician would determine independently what materials and equipment were required, obtain that material and equipment from the warehouse, proceed to the job and do the work, and then return to the shop in the evening. In the event that a problem arose on the jobsite the electrician would call Advance's office and speak to either Bill or Bob—"whoever was there and answered." Under these circumstances we accord little weight to the fact that Bill functioned as the immediate supervisor of Advance's employees while Bob filled that role for Beacon. Another indication that Bill did not perform the crucial role in the operations of Advance is the fact that on 16 December David Cary, one of Advance's electricians, was asked by Bob to take over Bill's job for Beacon.[9] In any event there is no indication that Beacon's *method* of supervision differed from Advance's in any significant way.[10] We therefore find

[6] These statistics are based on Beacon's sales journal for the first 4 months of 1983, the only period in evidence, as compared to a list of Advance's 1982 customers compiled from its sales journal.

[7] These percentages are based on a comparison of Advance's sales journal for the last 4 months of 1982 with Beacon's sales journal for the first 4 months of 1983.

[8] In finding that Bill was the main force in the management of Advance, the judge emphasized Bob's testimony that he had retired in 1981 and worked only limited hours. We note the judge did not resolve the conflict between Bob's description of his working hours as ending about noon and Selby's testimony that Bob normally left the office about 3 p.m. We find it unnecessary to resolve this conflict since Selby's uncontradicted testimony reveals that Bob's working hours did not change following the transformation of Advance into Beacon. As Bob admittedly was the "management" of Beacon, his limited hours of work, whether ending at noon or 3 p.m., provide no basis for a finding that another individual must have been the "management" of Advance.

[9] Cary declined Bob's offer on the ground that he (Cary) "would rather stick with the union. . . ."

[10] See *NLRB v. Campbell-Harris Electric*, supra.

that Beacon's supervision did not substantially differ from Advance's.

The judge further based his finding of a lack of alter ego status on what in his view was an absence of common ownership. As noted above, Bob and Ruby held a 52 percent, and Bill a 48 percent, interest in Advance. Since March 1982 Ruby has owned all of Beacon's stock. At all times all stock in both corporations was owned by members of the Shoots family and all corporate officers and directors also were members of that family. In such circumstances the Board and the courts find ownership and control of those companies to be "substantially identical" for purposes of determining alter ego status. *Crawford Door Sales Co.*, 226 NLRB 1144 (1976). See also *All Kind Quilting*, 266 NLRB 1187 1983); *Campbell-Harris Electric*, 263 NLRB 1143 (1983), enfd. 719 F.2d 292 (8th Cir. 1983). Accordingly, we find that Advance and Beacon share "substantially identical" ownership for purposes of determining alter ego status.

Having found that all factors which must be examined support a finding that Beacon is the alter ego of Advance, there remains for consideration an examination of the purpose behind the activation of Beacon, i.e., whether its purpose was to evade responsibilities under the Act. It is substantially undisputed that Beacon was activated for the purpose of eliminating the high costs associated with operating Advance as a union contractor. In this regard, Bob's own testimony shows that, when he and Ruby discussed whether to remain in the electrical contracting business, their main concern was how to reduce their overhead or costs of doing business, and that they decided the only way to achieve the desired savings would be to reduce the expense of employee wages and benefits. Bob further testified that he "would still be a union contractor" if "economic conditions" permitted him to do so. Also, both during his 2 December conversation with Selby and his 10 December meeting with Advance's electricians, Bob attributed his decision to close unionized Advance and open nonunion Beacon to the higher expenses associated with operating a unionized shop. Finally, Bob's 10 December notification to the Union attributed his decision to close Advance to "economic reasons," and made no reference to either Bill's departure or Bob's intention to open a similar business. Given these circumstances, we find that, while Bill's decision to leave Advance may have prodded Bob into examining the status of Advance, the true purpose for which Beacon was formed was to evade Advance's responsibility under the Act to honor its collective-bargaining agreement with the Union. Such a motivation supports an alter ego finding. *J. M. Tanaka Construction v. NLRB*, 675 F.2d 1029 (9th Cir. 1982).

Based on our consideration of all the factors outlined above, we find and conclude that Beacon is and was at all times since 20 December the alter ego of Advance and, as such, is and was obligated to bargain with the Union as the representative of its employees and is and was bound by the collective-bargaining agreement[11] entered into between NECA and the Union at a time when Advance had assented to NECA as its collective-bargaining representative. By not doing so but instead withdrawing recognition from the Union and repudiating the above-mentioned collective-bargaining agreement, Beacon violated Section 8(a)(5) and (1) of the Act. We further find that Beacon violated Section 8(a)(3) and (1) of the Act by conditioning the employment of its electricians on their working without union representation and for wages below those specified in the collective-bargaining agreement applicable to them, and that those electricians, having chosen to forgo their employment rather than accept those unlawful conditions, were thereby constructively and unlawfully discharged. *Redlands Construction Co.*, 265 NLRB 586 (1982); *Campbell-Harris Electric*, supra; *Electric Machinery Co.*, 243 NLRB 239 (1979), and cases cited therein.

CONCLUSIONS OF LAW

1. Respondent Advance Electric, Inc. and Respondent Beacon Electric, Inc. are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. IBEW Local No. 124 affiliated with International Brotherhood of Electrical Workers, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent Beacon Electric, Inc. is, for the purpose of this proceeding, the alter ego of Respondent Advance Electric, Inc.

4. All full-time and regular part-time employees employed by Advance Electric, Inc. and by its alter ego Beacon Electric, Inc., but excluding clerical employees, guards and supervisors as defined in the Act, constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act.

5. At all times material herein, the Union has been the exclusive collective-bargaining representative of the employees in the appropriate unit within the meaning of Section 9(a) of the Act.

6. By failing and refusing to recognize and bargain with the Union as the exclusive representative

[11] The most recent collective-bargaining agreement by its terms was effective from 1 September 1982 to 31 August 1983.

of its employees in the appropriate unit, by failing to honor the collective-bargaining agreement with respect to such employees, and by failing to apply to such employees the terms and conditions of the agreement, the Respondent has violated Sections 8(a)(5) and (1) and 2(6) and (7) of the Act.

7. By constructively discharging employees Joe Abbate, Sam G. Younger, and David Cary by conditioning their employment on working without union representation and for wages below those called for in the collective-bargaining agreement, the Respondent has violated Section 8(a)(3) and (1) of the Act.

8. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent has violated Section 8(a)(1), (3), and (5) of the Act, we shall order that they cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

It has been found that Respondent constructively discharged its employees Joe Abbate, Sam G. Younger, and David Cary on 17 December 1982. We will therefore order the Respondent to restore the status quo ante by offering said individuals their former jobs or, if those jobs no longer exist, substantially equivalent jobs, without prejudice to their seniority and other rights and privileges, dismissing, if necessary, any employees hired on or since 17 December 1982 to fill any of said positions, and make them whole for any loss of earnings suffered by reason of the discrimination against them by payment to them of sums of money equal to that which they normally would have earned absent the discrimination, less net interim earnings during such period, computed on a quarterly basis in the manner established by the Board in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest computed as described in *Florida Steel Corp.*, 231 NLRB 651 (1977).[12]

Having also found that Respondent Beacon is the alter ego of Respondent Advance and has continued to operate its business, but has failed and refused to recognize the Union as the collective-bargaining representative of its employees or to apply the terms of the collective-bargaining agreement between the Union and Respondent Advance, we shall order Respondent Beacon to recognize the Union as the representative of its employees and to honor and apply the terms of that agreement, and any subsequent agreement,[13] to its employees. In addition, we shall order the Respondent to make whole its employees by making the contractually established payments to the various trust funds established by the collective-bargaining agreement,[14] and by reimbursing employees for any expenses ensuing from the Respondent's unlawful failure to make such required payments, as provided in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 1 (1980), enfd. 661 F.2d 940 (9th Cir. 1981).[15]

ORDER

The National Labor Relations Board orders that the Respondent, Advance Electric, Inc., and its alter ego Beacon Electric, Inc., Grandview, Missouri, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to recognize and bargain with the Union as the exclusive representative of its employees in the appropriate unit with respect to wages, hours, working conditions, or other terms and conditions of employment of said employees, and refusing to honor the collective-bargaining agreement applicable to those employees.

(b) Discouraging membership in the Union, or any other labor organization, by constructively discharging its employees through the imposition of illegal conditions of employment, or by otherwise discriminating against any of its employees in regard to hire, tenure of employment, or other terms and conditions of their employment.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

[12] See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

[13] Bob testified, and it is undisputed, that Advance never terminated or attempted to terminate the "Letter of Assent-A" it executed in 1980, and that said letter remains in full force and effect. Accordingly, the Respondent is bound to the terms of any subsequent collective-bargaining agreement between NECA and the Union until such time as the Respondent shall give proper and timely written notice to terminate their authorization to NECA, and then to the expiration of that agreement. *Rayel Electric Co.*, 260 NLRB 1327 (1982); *Pacific Intercom Co.*, 255 NLRB 184 (1981); *Nelson Electric*, 241 NLRB 545 (1979).

[14] Because the provisions of employee benefit fund agreements are variable and complex, the Board does not provide for interest at a fixed rate on fund payments due as part of a "make-whole" remedy. We therefore leave to further proceedings the question of how much interest the Respondent must pay into the benefit fund in order to satisfy our "make-whole" remedy. These additional amounts may be determined, depending upon the circumstances of each case, by reference to provisions in the documents governing the fund at issue and, where there are no governing provisions, to evidence of any loss directly attributable to the unlawful action, which might include the loss of return on investment of the portion of funds, withheld additional administrative costs, etc., but not collateral losses. See *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979).

[15] See also *F. Landon Cartage Co.*, 265 NLRB No. 177 (Dec. 16, 1982) (Not reported in volumes of Board decisions.)

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Joe Abbate, Sam G. Younger, and David Cary immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(b) Remove from its files any reference to the unlawful discharges and notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(c) Comply with the terms and conditions of the collective-bargaining agreements between NECA and the Union to which the Respondent is bound, retroactively to 17 December 1982 and prospectively until such time as proper and timely notice of cancellation is given pursuant to the Letter of Assent-A executed by Respondent Advance in 1980, including making the appropriate trust funds, the employees, and the Union whole in the manner described in the remedy section of this decision.

(d) Upon request, recognize and bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment:

> All full-time and regular part-time employees employed by Advance Electric, Inc. and its *alter ego* Beacon Electric, Inc., but excluding clerical employees, guards and supervisors as defined in the Act.

(e) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Post at its facility, in Grandview, Missouri, copies of the attached notice marked "Appendix."[16] Copies of the notice, on forms provided by the Regional Director for Region 17, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(g) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[16] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT constructively discharge our employees by forcing them to quit rather than accept wages less than those required by the contract with IBEW Local No. 124 affiliated with International Brotherhood of Electrical Workers, AFL–CIO, or by forcing them to quit rather than accept continued employment without representation by the Union.

WE WILL NOT refuse to recognize and bargain with the above-named Union as the exclusive representative of our employees in the following appropriate unit:

> All full-time and regular part-time employees employed by Advance Electric, Inc. and its *alter ego* Beacon Electric, Inc., but excluding clerical employees, guards and supervisors as defined in the Act.

WE WILL NOT repudiate the collective-bargaining process by withdrawing recognition from the above-named Union as the exclusive collective-bargaining representative of our unit employees, and WE WILL NOT refuse to follow the collective-bargaining agreements applicable to our unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union as the exclusive representative of all the employees in the appropriate unit concerning rates of pay, wages, hours of work, and other terms and conditions of employment.

WE WILL offer Joe Abbate, Sam G. Younger, and David Cary immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed and WE WILL make them whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL notify each of them that we have removed from our files any reference to his discharge and that the discharge will not be used against him any way.

WE WILL make whole our unit employees by transmitting the contributions owed to the Union's health and welfare, pension, vacation and holiday, and apprenticeship and training funds pursuant to the terms of our collective-bargaining agreement with the Union, and by reimbursing unit employees for any medical, dental, or any other expenses ensuing from our unlawful failure to make such required contributions. This shall include reimbursing employees for any contributions they themselves may have made for the maintenance of the Union's health and welfare, pension, industry, and apprenticeship funds after we unlawfully discontinued contributions to those funds; for any premiums they may have paid to third-party insurance companies to continue medical and dental coverage in the absence of our required contributions to such funds; and for any medical or dental bills they have paid directly to health care providers that the contractual policies would have covered.

ADVANCE ELECTRIC, INC. AND ITS ALTER EGO BEACON ELECTRIC, INC.

DECISION

STATEMENT OF THE CASE

LOWELL GOERLICH, Administrative Law Judge: The charge filed by IBEW Local No. 124 affiliated with International Brotherhood of Electrical Workers, AFL-CIO (the Union), on December 22, 1982, was personally served on Advance Electric, Inc. (Advance), and its alter ego Beacon Electric, Inc. (Beacon), Respondents, on January 5, 1983. A complaint and notice of hearing was issued on January 27, 1983. In the complaint it was alleged that Respondents violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act, as amended (the Act), among other things, by withdrawing recognition of the Union, discharging union members, and repudiating its alleged contract with the Union.

Advance and Beacon filed separate timely answers denying that they had engaged in or were engaging in the unfair labor practices alleged.

The case came on for hearing in Kansas City, Kansas, on May 23 and 24, 1983. Each party was afforded full opportunity to be heard, to call, to examine and cross-examine witnesses, to argue orally on the record, to submit proposed findings of fact and conclusions, and to file briefs. All briefs have been carefully considered.

I. THE BUSINESS OF ADVANCE

Respondent Advance is a Missouri corporation which engaged in electrical contract work in the construction industry and maintained an office at 308 Blue Ridge, Grandview, Missouri.

Beacon Electric, Inc. is a Kansas corporation having its principal place of business at 308A Blue Ridge Boulevard, Grandview, Jackson County, Missouri.

Respondent Advance and Respondent Beacon, in the course and conduct of their business operations within the State of Missouri, annually collectively sell goods and services valued in excess of $50,000 directly to customers located outside the State of Missouri.[1]

II. THE LABOR ORGANIZATION INVOLVED

The Union is, and at all times material herein has been, a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

The main thrust of the General Counsel's complaint is that Beacon is the alter ego of Advance.

The Facts

First: On December 17, 1982, Advance ceased doing business. At the time of its closure Bob H. Shoots (Bob) and his wife Ruby J. Shoots (Ruby) jointly owned 52 percent of the stock in advance. Bill Shoots (Bill), a brother of Bob H. Shoots and an employee of Advance, owned the remaining 48 percent of the stock. Bob was Advance's president and treasurer; Thomas B. Shoots, vice president; and Ruby J. Shoots, secretary. All officers were family members.

Advance operated out of a building which was owned by Ruby. About a year before Advance's closure, Ruby, to whom Advance owed money from a loan made before she was married to Bob, foreclosed on the building and thereafter leased it to Advance as well as to other tenants.

On October 30, 1980, Beacon was incorporated as a Kansas corporation. According to Bob it was incorporated "for tax purposes." He thought "it might be a tax break . . . . It didn't turn out that way." Ruby and Bill were the owners. Bill owned 48 percent of the stock in Beacon. All officers of Beacon were relatives. According to Bob, Bill bought "six or seven thousand dollars worth of stock" at the time Beacon was organized. Bill sold the

[1] Admitted by Respondent. Beacon's Sales Journal (G.C. Exh. 11) offered in evidence discloses that Beacon's operation meets the jurisdictional requirements for coverage by the Act.

stock to the Company "a year and a half ago." Ruby became the sole stockholder of Beacon.[2]

Bob "guessed" that Beacon transacted about $10,000 worth of business in 1981 and 1982. Bob testified that one employee, Scott Conley, "would get 20 hours a week in, something like that" in 1982.[3]

Bob retired in 1981[4] and thereafter did not fully participate in the operations of Advance; however, he appeared at Advance's offices sometimes in the morning. Bob thus described his functions:

> Well, when I come to town I would come to the office about 8:30 or so and wait around there, take the mail and wait till the girl got there and when the girl got there I'd go out and have coffee and come back about 10 or 10:30 or something, and take a call if a call would come in and I'd leave about noon and normally wouldn't come back the rest of the day and that's about the way it was till December of 1982.

Bob was out of town "two or three months" of the year. To Bill was left the ordering of inventory, the supervision of the employees, and the general management of the business. Bill's wife, Martha, was Advance's secretary, bookkeeper, and receptionist.

Apparently Bill became disenchanted with the running of Advance, for in October 1982 he advised his brother, Bob, that he was considering going into business for himself. As related by Bob:

> From October to December when he finally told me he was for sure going to go into business for himself that I had nobody that could take his place that could operate the business and I'd retired in 1962, I mean, 61, and I figured he would run the business, but instead of that he decided to go into business for himself. Any of the employees I had, they weren't capable of doing his work and I wasn't going to work it, so that's it, and the economic reasons I decided to close Advance Electric.
>
> I took a look at the checkbook and it had about $500 in it. I said that's it.

Apparently Bob's wife, who was familiar with the construction industry, had different ideas. She questioned why Bob did not "operate Beacon Electric and acquire some help to see if we couldn't make a few bucks out of it."

Bonnie J. Selby testified that at a job interview on December 2, 1982, with Bob, Bob said that because of losses he had made no money in the past year; "he was in the process of becoming a nonunion shop."[5]

On December 5, 1982, Bob placed an ad in the Kansas City Star for a "house wireman."

On December 6, he directed Selby to advise job applicants that the job was "nonunion" and paid $7 an hour. On December 8, 1982, Bob interviewed some job applicants.

On December 9, 1982, a conversation occurred between Bill and Advance's three electricians, Joe Abbate, Sam G. Younger, and David Cary. Bill told the employees that he was contemplating going into business for himself and that Bob was "going to close the doors, that the shop wasn't making any money . . . going nonunion, opening another shop." Bill said that he would no longer work for Advance.

On December 10, 1982, Bob addressed Advance's three electricians. Bob told the employees that Advance was not making any money. He said that "the only way he could curb the situation was either to go out of business entirely or close down and open up non-union. He explained that Bill had decided that he wasn't going to stay with the shop and said he already put an ad in the paper and had contacted individuals to come on board." Bob indicated that the applicants would work for $8 an hour with no benefits and asked whether the three electricians would work for that amount. The three declined, asserting that they wanted to remain with the Union.

Also on December 10, 1982, Bob informed the Union by letter that Advance could no longer remain in business.

On December 17, 1982, the three electricians and Bill were terminated from employment.

According to Selby by Monday, December 20, Advance "had become Beacon." Bob instructed Selby to answer the phone Beacon Electric, Inc. He also informed her the lettering would be changed on the door and that he was taking one of the vans to have it painted with the name Beacon. He also said he had sent Russell Christopher and Darryl Brinks to finish a job that the three electricians had commenced. For the pay week of December 20, 1982, Phil Shippley, Darryl Brinks, Russ Christopher, and Selby were on the payroll. Brinks was paid $6 an hour and Christopher and Shippley were paid $8 an hour. Work performed by these employees was billed through Beacon.

During the year 1982 Bob and Bill, in order to cut costs on the Acuff and Rhoades jobs, worked out an arrangement with the three electricians to work 8 hours for 6 hours' pay. Pension and welfare payments were continued and paid to the Union. Otherwise Advance conformed with the labor agreement between the Union and Kansas City Division, Greater Kansas City Chapter, NECA, Inc.

Bob was of the opinion that he coud not operate Advance without Bill. According to Bob, Bill left Advance because "he was tired of having . . . to put up with [Bob] or sponge off of [him] as he put it . . . ."

Bob personally had invested no money in Beacon. Ruby, Bob's wife, furnished the money. "She had always been involved in the construction business with her former husband." According to Bob, Ruby "put eighty

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[2] A domestic corporation report (State of Kansas) dated April 28, 1982, discloses that Ruby owned 7,800 shares of stock and Bill 7,200 shares of stock. Ruby was listed as president and treasurer, and Lela B. Amel as secretary. Ruby was listed as sole member of the board of directors.

[3] Beacon's records indicate Conley worked 233 hours during 1982.

[4] Bob was 63 years of age.

[5] Selby was hired as a secretary-receptionist-bookkeeper for Advance, the job which Bell's wife had previously filled.

some hundred in the day Beacon was formed and then she loaned it $5,000 sometime in December or January."

Apparently after Advance closed Bill formed Bill Shoots, Inc., through which work of the same nature as that of Advance was performed. Abbate, a former Advance employee, commenced employment with Bill Shoots, Inc. on February 4, 1983. Although Bill is a union member, Bill Shoots, Inc., operates as a nonunion shop.

When Advance closed, Bob and Bill "took part of the equipment . . . to settle [their] holdings." Bob took two trucks and Bill took one truck on which he placed his name. Material and tools were also divided. In addition Bill was given cash. Ruby and Bob bought the two trucks. Around May 14, 1983, the remaining assets of Advance were offered at a liquidation auction.

Bill had never worked for Beacon. He had withdrawn his investment of $4,700 on March 12, 1982.

After Advance ceased business operations Bill's company ended up with 80 percent of Advance's customers. Beacon finished some of Advance's work in progress and did perform some new work.[6] At the time of the hearing Beacon employed one employee.

Ninety percent of Advance's electrical work had been residential. Its commercial work went with Bill. Bill was the only person connected with Advance who held a commercial license.

Second: Both the General Counsel and the Charging Party insist that Beacon is the alter ego of Advance. The Board has lately said in the case of *Denzil S. Alkire*, 259 NLRB 1323, 1324 (1982):

> The legal principles to be applied in determining whether two factually separate employers are in fact *alter egos* are well settled. Although each case must turn on its own facts, we generally have found *alter ego* status where two enterprises have "substantially identical" management, business purpose, operation, equipment, customers, and supervision, as well as ownership.

While the General Counsel and the Charging Party have cited a number of cases in their briefs touching on the alter ego rationale, they have quoted no facts from these cases which, as here, involve a predecessor employer whose operations were bifurcated upon its cessation of business. Alter ego contemplates that there be a substantial identity between the predecessor and the successor to the extent that it may be concluded the second employer is actually the first employer. Here the "second" is two employers, neither of which is identical with Advance. The extant management, supervision,[7] 80 percent of the customers, all the commercial business (10 percent), a substantial part of the assets, a truck, and one employee of Advance ended up with Bill Shoots, a 48-percent stockholder, and his company, Bill Shoots, Inc. Additionally, Advance's decease was perpetrated by Bill's withdrawal as the operational manager of Advance. Under these circumstances, his departure rendered it impossible for Advance to continue as Beacon with the same identity, management, supervision, and ownership. Thus, Beacon was not and could not be Advance's "other self." Accordingly, Beacon is not the alter ego of Advance. Those allegations of the complaint based on the claim that Beacon is the alter ego of Advance are dismissed.

Third: The General Counsel further contends that "Respondent Beacon unlawfully failed to hire employees Abbate, Cary, and Younger solely because they refused to accept non-union terms and conditions of employment." The Supreme Court in the case of *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 187 (1941), settled the proposition that an employer's refusal to hire a person solely because of his affiliation with a union was an unfair labor practice under Section 8(a)(3) of the Act.[8] Beacon's refusal to hire the three employees, for which it had work, was solely because they chose to remain affiliated with the Union and did not want to become nonunion workers. That they forgo their union affiliation and accept nonunion status were unlawful conditions which Beacon could not demand without running afoul of Section 8(a)(3) of the Act. Accordingly, Respondent Beacon's conduct in this regard was in violation of Section 8(a)(1) and (3) of the Act. See *F.M.L. Supply, Inc.*, 258 NLRB 604, 616, 617 (1981); *Florida Steel Corp.*, 214 NLRB 264 (1974); *Redlands Construction Co.*, 265 NLRB 586 (1982); *Owen Lee Floor Service*, 250 NLRB 651 (1980); *Campbell-Harris Electric*, 263 NLRB 1143 (1982).

CONCLUSIONS OF LAW

1. Respondent Beacon is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and it will effectuate the purposes of the Act for jurisdiction to be exercised herein.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By unlawfully rejecting for hire Joe Abbate, Sam G. Younger, and David Cary on December 20, 1982, Respondent Beacon engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act.

4. All full-time and regular part-time employees employed by Respondent Beacon but excluding clerical employees, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

[6] Bob described this work as follows:

> Beacon wired one new house for, roughed in, one new house for Stratford. They roughed in one new house for Bopp, and they roughed in three new houses for Masters. That's all the new rough ins work that Beacon has done.

[7] Bill was the main force in the management and supervision of Advance.

[8] The Court said, 313 U.S. at 185:

> Discrimination against union labor in the hiring of men is a dam to self-organization at the source of the supply. . . . In a word, it undermines the principle which, as we have seen, is recognized as a basis to the attainment of industrial peace.

THE REMEDY

It having been found that Respondent has engaged in certain unfair labor practices, it is recommended that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. It having been found that Respondent Beacon unlawfully refused to hire Joe Abbate, Sam G. Younger, and David Cary on December 20, 1982, in violation of Section 8(a)(3) of the Act, it is recommended that it offer the foregoing persons immediate employment to the positions to which they would have been entitled had they been offered employment on December 20, 1982, or, if such positions no longer exist, to substantially equivalent employment, without prejudice to their seniority or other rights and privileges dismissing, if necessary, any employees, hired on or since December 20, 1982, to fill any of said positions. Each of said persons shall be made whole for any loss of earnings he may have suffered by reason of Respondent Beacon's acts herein detailed, by payment to each of a sum of money equal to the amount he would have earned from the date of the unlawful refusals to hire, to the date of an offer of employment as aforesaid, less net earnings during such period, with interest thereon, to be computed on a quarterly basis, in the amount and manner established by the Board in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *Florida Steel Corp.*, 231 NLRB 651 (1977).[9]

Had not Respondent Beacon discriminated against the above-named persons, it would have become the employer of employees in an appropriate unit where a majority of the employees would have been members of the Union and Respondent Beacon would have been obligated to bargain with the Union on request. Respondent Beacon thus avoided its bargaining obligation by engaging in unlawful discrimination. Accordingly, it is recommended that, in order to remedy Respondent Beacon's 8(a)(3) violations effectively, Respondent Beacon also be ordered to bargain with the Union upon request as soon as it employs any discriminatee. See *Piasecki Aircraft Corp.*, 123 NLRB 348, 350 (1959).

[Recommended Order omitted from publication.]

[9] See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).