

Adanac Coal Company, Inc and C & W Coal Company, Inc and International Union, United Mine Workers of America Case 9-CA-24043

March 15, 1989

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
JOHANSEN AND CRACRAFT

On September 30, 1987, Administrative Law Judge John H. West issued the attached decision. The General Counsel and the Charging Party filed exceptions and supporting briefs. Respondent C & W Coal Company filed an answering brief.

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,¹ findings,² and conclusions and to adopt the recommended Order.

In excepting to the judge's failure to find that Adanac and C & W Coal are alter egos, the Charging Party argues, inter alia, that the Board finds common ownership when ownership of two companies are held by members of the same family. In fact, when the ownership of two companies is held by members of the same family in varying proportions, the Board does not automatically find either that there is or that there is not common ownership for the purposes of an alter ego analysis. When, as in *Haley & Haley*,³ the overlap of ownership by the same family members is substantial (all shares of original company except one owned by family members and all shares of alter ego held by the original company) and the owners of one company exercise considerable financial control over the alter ego, the Board finds common ownership. On

the other hand, in a case such as *First Class Maintenance*,⁴ involving one company owned by parents and another owned by their son, who conducts his operations independently, the Board does not find common ownership. As the Board explained (ibid.)

[A] finding of substantially identical ownership is not compelled merely because a close familial relationship is present between the owner of two companies. *Victory Valley Heating & Air Conditioning*, 267 NLRB 1292, 1296-1297 (1983), *Shellmaker*, 265 NLRB 749, 754-755 (1982), *Friederich Truck Service*, 259 NLRB 1294, 1300 (1982). Rather, each case must be examined in the light of all the surrounding circumstances. In particular, the Board focuses on whether the owners of one company retained financial control over the operations of the other.

Here, Billy Ray Hall, the sole owner of C & W, owned only 10 percent of Adanac while Henry Hall owned 60 percent of Adanac. The judge found that Billy Ray "alone runs C & W" while Henry Hall "alone was responsible for selling and shipping coal, negotiating loans, and establishing the terms and conditions of employment at Adanac."⁵ Under these circumstances, we agree with the judge that the General Counsel did not establish by a preponderance of the evidence that C & W and Adanac had substantially identical ownership.

Moreover, even if substantially identical ownership were found in this case, the judge's findings regarding other factors relevant to an alter ego determination mitigate against a finding of alter ego status. Particularly significant is the judge's finding, which we adopt, that legitimate economic and business considerations, including the bank foreclosure on Adanac's equipment, forced Adanac to cease operations.⁶

¹ The Charging Party excepted to the judge's admission into evidence of two financial statements of Adanac. It argues that the financial statements are unsubstantiated hearsay as both statements contain disclaimers indicating that audits and reviews had not been conducted rather than the figures presented were based on management representations. We do not find reversible error in the judge's decision to admit these financial statements. Letters attached to these financial statements from the Respondent's accounting firm however indicate that these financial statements are compilations limited to presenting information that is the representation of management. Furthermore, the letter attached to the financial statements for the 12 months ending June 30, 1986 states management has elected to omit substantially all of the disclosures required by generally accepted accounting principles. In light of the foregoing we attach little weight to these financial statements in adopting the judge's conclusions.

² The judge inadvertently stated that a loan from Matewan National Bank to Adanac on August 5, 1985 was for \$1 million. The record indicates that the amount was \$100,000. The judge also inadvertently stated that the bank foreclosed on Adanac's equipment on August 19, 1987. The correct date is August 19, 1986. The correct citation for *P. J. Hamill Transfer Co.* is 277 NLRB 462 (1985).

³ 289 NLRB 649, 651 (1988).

⁴ 289 NLRB 484 (1988).

⁵ These facts are similar to those in *First Class Maintenance* supra at 485 in that the Board there found that the son was running his own business. In *Haley & Haley* on the other hand Larry Haley was found to be the moving force in both companies.

⁶ Chairman Stephens would also find that an apparent absence of an unlawful motive in Adanac's closing also distinguishes this case from *Haley & Haley* in which the Board found that Haley & Haley activated its subsidiary Oceanway to evade its responsibility under the Act to honor its collective bargaining agreement with the Union. Although there is some evidence concerning animus allegedly expressed by Henry Hall during the Union's organizing campaign at Adanac and by Adanac Supervisor Mahon several months before that campaign apparently began—matters essentially denied by the Respondent and on which the judge did not rule—it is clear that supervening financial difficulties including the threat of bank foreclosure caused Henry Hall to close and sell Adanac. Thereafter, the bank transferred the assets of Adanac to Flex Enterprises for a note and Flex renegotiated the real property lease formerly held by Adanac. Only then did Flex contract with Billy Hall, the sole owner of C & W, the alleged alter ego of Adanac, to mine coal at a

Continued

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed

former Adanac mine site Therefore unlike the circumstances in *Haley & Haley* unlawful motive was not shown to play a role in the closing of the original corporation

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DECISION

STATEMENT OF THE CASE

JOHN H WEST, Administrative Law Judge On a charge filed February 27, 1987, by International Union, United Mine Workers of America (Union), a complaint was issued April 14, 1987, alleging that on or about September 15, 1986,¹ Respondent C & W Coal Company, Inc (C&W) was established by the owners of Respondent Adanac Coal Company, Inc (Adanac) as a subordinate instrument to and a disguised continuance of Respondent Adanac, that Adanac and C & W are and have been at all times material alter egos and constitute a single employer within the meaning of the Act, that from on or about May 29 to on or about June 20 specified employees of Respondents, employed by Adanac, engaged in a strike seeking recognition of the Union as their collective bargaining agent, that on June 20 the aforementioned employees made an unconditional offer to return to their former positions of employment with Respondents, and that on or about September 25 and continuing thereafter, Respondents hired new employees rather than reinstate the employees described above and since that date have refused and failed to reinstate these employees to their former positions of employment in violation of Section 8(a)(1) and (3) of the National Labor Relations Act (Act) Adanac and C&W in separate answers, deny the alleged violations

A hearing was held in Williamson, West Virginia, on June 4, 1987 On the entire record in this case, including my observation of the demeanor of the witnesses, and consideration of the briefs filed by the General Counsel and C&W, I make the following

FINDINGS OF FACT

I JURISDICTION

At the trial Respondents stipulated to the jurisdictional allegations in the above described complaint as well as

the status of the Union as a labor organization within the meaning of Section 2(5) of the Act

II THE ALLEGED UNFAIR LABOR PRACTICES

A The Facts

Adanac was incorporated in West Virginia in 1964 by Henry Hall and three partners, with each owning 25 percent In 1969 Henry Hall bought out the three other partners, kept 60 percent of Adanac, and distributed the remaining interest equally to his four children, Bill Ray Hall, Frankie Hall, David Hall, and Claudine Hall Marcum² Henry Hall was the president of Adanac, David was vice president, and Bill Ray was its secretary/treasurer The father drew a monthly salary of \$3200 Billy Ray's annual salary was \$36,000

Adanac operated two coal mines and a tippel, all on leased property near Delbarton, West Virginia One of the mines was contracted out to Northland Resources in 1984 Five pieces of the equipment utilized by Adanac were leased from Henry Hall & Sons, a partnership consisting of the father and his three aforementioned sons, with each holding an equal interest The monthly lease rate was the amount owed on the equipment to the manufacturer

By all accounts, Henry Hall was in charge of running Adanac He alone was responsible for selling and shipping coal, negotiating loans, and establishing the terms and conditions of employment at Adanac Although he would go into the mines if there was a problem, the day to day responsibility for running the mines was handled by Billy Ray, who was the mine superintendent³ His brother Frank supervised the tippel⁴ Adanac's complement of employees ranged from 20 to a high of 40

Adanac sold coal on the spot market through brokers,⁵ it did not sell coal on a contract basis In its last year of operation Adanac got between \$22 50 and \$26 a ton Adanac did not transport the coal Rather it placed the coal in railroad cars at the aforementioned tippel Adanac's accountants were Hall McNeil & Williamson and its bookkeeper was Betty Walker

In 1984 when the coal industry suffered economically Adanac began to experience financial problems It had a layoff In September 1984 Adanac borrowed \$970 000 from the Matewan National Bank (Bank) In fiscal year 1985 Adanac lost \$330 496 Another loan was taken out at the Bank for \$1 million August 5, 1985

There was a union organizing campaign at Adanac in April or May 1986 Dotson testified that on May 27, 1986, Henry Hall asked him about the union bit and I

² Although the corporation ceased doing business it was never dissolved and it never filed for bankruptcy

³ He and his father testified that while he along with other supervisors could discharge an employee his father had to approve someone before the person was hired and that several times his father did not give his approval Former Adanac employee James Dotson testified that he was once hired on the spot by David Lee Hall Subsequently he conceded that he had worked for Adanac in the past and therefore had a track record with the Company

⁴ It was also referred to as the processing plant

⁵ The brokers named were John McCall Forsten Coal Sales Elliott Coal Sales and Continental Coal Sales

¹ All dates are in 1986 unless otherwise stated

said I didn't know and then he [Henry Hall] said he would have to shut down before long, and [h]e said that he would have to shut it down before he went union. Also according to Dotson's testimony Henry Hall said I know I couldn't afford it.⁶ Henry Hall testified that he did not remember telling Dotson that he Adanac, would close rather than go union.

Adanac laid off 28 employees on May 28, 1986. The following day its employees went out on a recognition strike. On June 4, 1986, the Union filed a representation petition. Although Adanac attempted to continue operations it could not fill its coal orders. Its cash flow stopped.

On June 20, 1986, the striking employees unconditionally offered to return to work. Two Dotson and Mort Crum, were brought back for 1 week.

Adanac's financial difficulties became such that it was no longer able to repay the bank other than the interest of the two above described loans. The bank required Adanac to provide first monthly and then weekly financial reports.⁷ The bank then advised Henry Hall that if he did not find a buyer it would foreclose. With Adanac's debt of \$1.9 million, Henry Hall was unable to find a buyer. Adanac ceased operating July 18, 1986, and the bank foreclosed on August 19, 1987. It purchased Adanac's assets at the onsite foreclosure sale for \$400,000. At the time of liquidation Adanac owed the bank \$776,000.

Henry Hall agreed with the bank that if it would pay for a night watchman, he would stay in the office during the day because there was some equipment belonging to Henry Hall & Sons at the site.⁸

The bank then agreed with Jim Bunn of Flex Enterprises, Inc. (Flex)⁹ on September 4, 1986, to transfer to him the assets of Adanac for a note in the amount of \$826,000 which included an additional \$50,000 work [sic] of working capitol into Flex to try to get them started. Flex renegotiated the real property lease Adanac formerly held.

Flex then entered into a verbal agreement with Billy Ray Hall to mine coal for Flex at the former Adanac mine 1 site. The agreement called for a set fee (originally \$17 a ton which was later reduced to \$16 a ton) to de-

liver the coal to the tipples¹⁰ and to destinations designated by Flex.¹¹ Also Flex verbally agreed with Billy Ray on C&W (1) to pay 60 cents a ton to haul Flex's refuse away and (2) to sell certain of the equipment Flex acquired from the bank for \$2 million which is being paid for by deducting \$1 a ton from the amount Flex agreed to pay Billy Ray or C&W under their above described agreement.¹² The parties do not have a written agreement regarding the length of time Billy Ray will mine coal for Flex.

Billy Ray incorporated C&W in West Virginia September 15, 1986.¹³ He is the only shareholder for C&W. He hired Joe York, Nanassis, Hensley and William Mahon. Hensley and Mahon formerly worked as supervisors for Adanac, York, a former employee of Adanac, crossed the picket line during the above described strike. At the time of the hearing C&W had approximately 20 employees and, not counting Bill Ray, three supervisors namely, Timmy Moore, Hensley, and Mahon. Moore was a supervisor at Adanac a year before it closed. Five former Adanac strikers were hired by C&W.¹⁴ And five former Adanac strikers asked C&W for a job but they were not hired¹⁵ because as testified to by Billy Ray, at the time C&W was just not hiring.¹⁶ C&W's wages range from \$8.75 to \$9.25 an hour. Adanac's ranged from \$9 to 11 an hour.

C&W mined about 3500 tons of coal every 2 weeks which would be about 91,000 tons a year.¹⁷

Henry Hall testified that in March 1987 he moved his files out of the mine office utilized by C&W, that in February 1987 he moved the tax returns and stuff from the office to his home, that Betty Walker prepared the W-2s for Adanac employees in January 1987 and some were mailed and some were taken to Billy's and left there¹⁸ that he neither worked for C&W nor provided any advice to or services for C&W,¹⁹ that when Billy

¹⁰ Flex paid Frank Hall an hourly rate to operate the tipples it acquired from the bank in the above described deal.

¹¹ Destinations for raw coal include GEX, Massey Tipples, Wolf Creek, Kermit and Raw Sales. Bunn testified that perhaps 2000 tons a month go to designated customers but he does not know about the remainder until Flex is notified it has a sale.

¹² Bunn testified that certain of the equipment Flex purchased from the bank which was formerly owned by Adanac was sold to specified parties not involved. And Billy Ray testified that Adanac used a lot of equipment that C&W was not using. C&W also leases equipment from Henry Hall & Sons paying on a monthly basis merely what is owed on the involved equipment.

¹³ To incorporate it utilized the same law firm that represented Adanac in this proceeding. C&W utilizes the same accounting firm as Adanac namely Hall, McNeil & Williamson and Billy Ray's wife is the bookkeeper. Whereas Adanac employed its own engineer, C&W uses an engineer provided by Flex.

¹⁴ Carry, Jude, Troy, Muncy, William, Adams, Millard, Hall, and Robert Chafin.

¹⁵ Glen Roddy, Rick Curry, Billy Jenkins, Dotson, and Johnny Springer. Billy Ray testified that when he saw Jenkins he smelled of alcohol.

¹⁶ Like Adanac, C&W did not take written applications for employment or keep a list of those who inquired about a job. In May 1987, C&W changed this practice and eventually Billy Ray went to the local employment office seeking employees.

¹⁷ Adanac mined about 264,000 tons of coal a year.

¹⁸ Dotson picked up his W-2 at C&W's mine office.

¹⁹ Mahon testified that Billy Ray ran C&W and that as far as he knew Henry Hall did not perform any services nor was he employed by C&W.

⁶ Dotson also testified that in January 1985 Adanac Supervisor William Mahon told him that Henry [Hall] would shut down before he'd turn union and there was no ifs ands and buts about it. Mahon who at the time he testified was a supervisor at C&W denied making this statement.

⁷ Adanac's financial report for the fiscal year ending June 30, 1986 shows a loss of \$365,737.

⁸ Dotson testified that he went to the site to ask for a job in August or September and Bill Ray told him he would have to speak to Henry Hall. When he did Henry Hall said Adanac no longer exists and that he did not have anything to do with it. Billy Ray testified that the conversation occurred early in August 1986 before C&W started mining and even before the Bank foreclosed on Adanac. Henry Hall testified that he did not remember talking to Dotson in August or September 1986 about Dotson becoming employed.

⁹ Until this time Flex was only a shell corporation incorporated in Virginia and authorized to do business in West Virginia. Jim Bunn who has known the involved Halls since 1981 was also a partner in Northland Resources which as noted above operated one of Adanac's mines under contract with it. Neither Henry nor Billy Ray Hall have any interest in or hold any position with Flex. And Flex did not enter into any agreement with Henry or Billy Ray Hall before purchasing Adanac's assets.

Ray started running C&W he, Henry Hall, would stop by the mine office almost every day when he was in the area, that since October 1986 he spent between 4 and 5 months out of the involved area, that while he did keep his files at C&W for a few months he did not have any office space there after the bank foreclosure on Adanac, that he was paid money by C&W to help him pay some of his personal debts because he did not have an income, and that he did not use the money he received from C&W to pay off debts of Adanac

From November 7, 1986, through April 27, 1987, Henry Hall received checks on a regular basis from C&W. The first five checks are each for the amount of \$1,093.92 and the checkstubs, General Counsel's Exhibit 6, are designated payroll. The next check is for \$1,131.92 and the checkstub is also designated payroll. The next two checks are for \$1,500 each, and while the stub for the first check does not indicate what the payment is for, the stub for the second check is designated comm' for commission. The last check, which is for \$1,000, is also designated comm. The checks total \$10,601.52. Regarding these checks, Billy Ray testified that they were a gift to his father, who did not have any income at the time, that his father did not perform any services for the money that at the time the only checkbook he had was a payroll checkbook,²⁰ that he began putting commission on the checkstub because his accountant indicated that this was the best way to do it, and that income taxes were withheld on those checks designated as payroll.

Henry Hall testified that he did not return any of this money to C&W and that he received a W-2 statement for 1986 from C&W.

Billy Ray testified that before he started mining coal he had to make certain repairs and Flex paid for 1,500 roof bolts, that C&W does not market any of its coal, that he was not involved in the marketing of Adanac's coal or in Adanac's finances that he alone is in charge of making financial decisions at C&W, that C&W took out two loans from the bank to meet payroll and he was personally responsible for the loans, that he provides his employees at C&W with health insurance from Great Southern while Adanac's health insurance plan was Mountain Trails that he purchases his materials from Raleigh Mine Supply, Buckhanon Mine Supply, BWB and Owens Roof Bolt, whereas Adanac never dealt with Buckhanon Supply or Raleigh Mine Supply and that Adanac's former suppliers were all owed money.

B Contentions

On brief the General Counsel contends that the evidence establishes that Respondents are alter egos and constitute a single employer within the meaning of the Act that two of the original three Hall family members are still engaged in deep mining coal at Respondent Adanac's former site, using the same equipment and supervisory staff that the two enterprises are essentially a single family operation that has continued to exist albeit

in a revised format, and thus constitute one entity, and that the Board has found in similar circumstances that closely held family corporations engaged in substantially similar enterprises may constitute alter egos even in the absence of identical corporate ownership interests among the family members.

C&W on brief, contends that Adanac and C&W are not alter egos and then, after treating the factors that must be considered in reaching this determination, C&W contends that no evidence was presented to show that Adanac's foreclosure and C&W's organization were part of a scheme planned by Henry Hall, Billy Ray Hall, Bunn and the bank to rid Adanac of its obligation to rehire economic strikers who had unconditionally offered to return to work. Also, C&W points out that the court in *Alkire v NLRB*, 716 F.2d 1014 (4th Cir. 1983) held that to impose alter ego status on two corporations, the National Labor Relations Board (Board) must determine whether the transfer of operations resulted in some expected or reasonably foreseeable benefit, and that it is ludicrous to claim that Adanac gained any benefit by having the bank foreclose on its assets because since some of those assets acquired by Flex have been sold to other entities, C&W is paying a fair market price to purchase equipment previously owned by Adanac, and C&W is obtaining substantially less per ton of coal selling to Flex than Adanac obtained selling to brokers.

C Analysis

Although the agreements between Flex and C&W are verbal which appears to be irregular such irregularities do not warrant a conclusion that we are dealing with a scheme such as that faced by the Board in *NLRB v Ozark Hardwood Co*, 282 F.2d 1 (8th Cir. 1960). There it was concluded that there was a disguised continuance in that the foreclosure there had been precipitated specifically as a means of enabling the owners to transfer its operations to another entity and that the transfer would not have occurred except for the existence of unfair labor charges against the original business and the desire of the owners to benefit by escaping the consequences of these charges while retaining control of the business.

Here almost 2 years before the union organizing drive, Adanac found itself in financial difficulty. It borrowed a great deal of money. Its financial statements indicate that its financial condition did not improve. Rather Adanac continued to lose money. The die was cast long before the introduction of the Union. Adanac took out a second loan. When it was obvious to all that Adanac was in serious financial straits the bank got involved. It has not been demonstrated that the subsequent foreclosure was precipitated specifically as a means of enabling the Halls to transfer their operations to another entity. Here the bank and another company Flex in which the Halls have no interest, played important roles between the time Adanac ceased operating and C&W commenced operations. It has not been demonstrated that the transactions between Henry Hall and the bank, and between the bank and Flex were other than arm's length transactions. And even the fact that Flex and C&W choose to rely on verbal agreements although apparently irregular does

²⁰ Although he had a personal bank account Billy Ray testified that he did not have enough money in it to pay his father the sums of money that C&W paid him.

not warrant a conclusion that their dealings are other than arm's length transactions. C&W is not a disguised continuance of Adanac.

As pointed out in *T E Elevator Corp*, 268 NLRB 1461 (1984), [A]bsent a disguised continuance, the Board generally has found alter ego status only where the two enterprises have substantially identical ownership, business purpose, management, supervision, customers, operation, and equipment.

Albeit there are certain similarities between Adanac and C&W, there are also major differences. Billy Ray Hall, who alone runs C&W and is the sole shareholder in C&W, held only 10 percent of stock source in Adanac, and his management role in Adanac was limited, as indicated above. Henry Hall, who ran Adanac, does not own a part of C&W and has no real connections with C&W. Adanac mined almost three times the amount of coal that C&W mines. Adanac's employee complement was up to twice as large as C&W's. The operations of these two corporations differ in that whereas Adanac leased the real property it mined, had its own tipple, and sold to a number of brokers, C&W does not hold any leases on real property, it does not operate a tipple, and it has only one customer, namely, the entity with which it had contracted to sell all the coal it mines, Flex.

In light of these differences, and because of the circumstances of Adanac's ceasing operations, in my opinion the General Counsel has not established by a preponderance of the evidence that the Board's alter ego criteria have been met. *P J Hamill Transfer Co*, 277 NLRB 462 (1985), *Eagle Express Co*, 273 NLRB 501 (1984), and *Chippewa Motor Freight*, 261 NLRB 455 (1982).

CONCLUSIONS OF LAW

- 1 Respondents are employers engaged in commerce as alleged.
- 2 The Union is a labor organization as alleged.
- 3 Respondents have not violated the Act as alleged.
- 4 The complaint will, therefore, be dismissed in its entirety.²¹

ORDER

I recommend that the complaint be dismissed in its entirety.

²¹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.