

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

MIDWESTERN PERSONNEL SERVICES, INC
and TRANSPORT LABOR
CONTRACT/LEASING, INC., A Single
Employer
and

Cases 25-CA-25503-2
25-CA-25823-3
25-CA-25978-5

CHAUFFEURS, TEAMSTERS AND HELPERS
LOCAL UNION NO. 215, a/w INTERNATIONAL
BROTHERHOOD OF CHAUFFEURS, TEAMSTERS,
WAREHOUSEMEN AND HELPERS OF AMERICA

ACTING GENERAL COUNSEL'S ANSWERING BRIEF
TO RESPONDENT'S EXCEPTIONS TO
THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

Comes now Counsel for the Acting General Counsel and respectfully submits this
Answering Brief to Respondent's Exceptions to the Decision of the Administrative Law Judge
issued on July 25, 2011.

I. STATEMENT OF THE FACTS

A. Underlying Unfair Labor Practices

Midwestern Personnel Services, Inc. (herein referred to as "MPS") is a corporation which
formerly had an office and place of business in Olive Grove, Mississippi. (G.C. Ex. #1(a))
Respondent was engaged in the business of providing personnel and personnel services to other
businesses. One of the businesses to whom Respondent supplied personnel was River City
Holdings, Inc, a concrete mix provider (herein referred to as RCH). Respondent supplied drivers

to RCH. (G.C. Ex. #1(a)). About April 1997 RCH notified MPS that it had secured a contract at the AK Steel job in Indiana and would need additional employees from MPS. RCH also notified MPS that the AK Steel job was a union jobsite and that the MPS employees who worked at that site would need union cards. MPH had a collective bargaining agreement with Teamsters Local 836 located in Middletown, Ohio and attempted to enter into an agreement with that union to cover the AK Steel job. The employees were also instructed by MPS to sign authorization cards for Teamsters Local 836. In July and August 1997 several of the MPH drivers working for RCS signed authorization cards for Chauffeurs, Teamsters and Helpers Local 215, a/w International Brotherhood of Teamsters, AFL-CIO (herein referred to as "the Union"). In August or September 1997, Teamsters Local 836 informed MPS that it would not represent the drivers assigned by MPS to RCH. On October 1, 1997 the Union made a demand for recognition to MPS stating that it represented a majority of the MPS drivers assigned to RCH. (G.C. Ex. #1(a))

MPS refused to recognize the Union as the collective-bargaining representative of the drivers in question. There were then rumors that the employees in question would engage in a strike. MPS President Sam Ware told employees that the contract with Teamsters Local 836 had a no-strike clause and that anyone who went on strike would be discharged. The employees commenced an unfair labor practice strike on January 17, 1998 in protest of the threats made by MPS and its efforts to force them to be represented by Teamsters Local 836. The Union made an unconditional offer for the strikers to return to work on March 27, 1998 at which time there were 26 strikers. MPS refused to reinstate the strikers.

B. Procedural History

The General Counsel issued a consolidated complaint against MPS which alleged, inter alia, that the strike which commenced on January 17, 1998 was an unfair labor practice strike

and that MPS violated Section 8(a)(1) and (3) of the Act when it refused to reinstate the 26 unfair labor practice strikers on March 27, 1998. On September 20 and 21, 1999, a hearing was held before an administrative law judge on the allegations contained in the consolidated complaint. On February 9, 2000 the judge issued a decision finding, inter alia, that the January 17, 1998 strike was an unfair labor practice strike and that MPS violated Section 8(a)(1) and (3) of the Act when it refused to reinstate the strikers. That decision was upheld by the National Labor Relations Board on June 21, 2000, and the Board ordered MPS to reinstate the 26 strikers and to make them whole for any loss they suffered as a result of Respondent's failure to reinstate them. (G.C. Ex. #1(a)) On March 11, 2003 the Seventh Circuit of the United States Court of Appeals granted enforcement of that Board order. (G.C. Ex. #1(b))

On June 30, 2003 the General Counsel issued a compliance specification in this matter which set forth the backpay owed to each of the discriminatees. (G.C. Ex. #1(c)). On November 17, 2003 and March 22-24, 2004, a hearing was held on the compliance specification before an administrative law judge. On July 22, 2004 the judge issued a decision in which he set forth the amount of backpay owed to each of the individual discriminatees. This totaled \$649, 593.93. On February 28, 2006 the National Labor Relations Board in a Supplemental Order upheld the judge's decision and his backpay figures for each of the discriminatees. On November 8, 2007 the Seventh Circuit of the United States Court of Appeals granted enforcement of the Board's Supplemental Order issued on February 28, 2006. (G.C. Ex. #1(d))The liquidated backpay total in this matter is, therefore, \$649, 593.93 plus interest. On February 28, 2011 the Acting General Counsel issued a Supplemental Compliance Specification and Notice of Hearing in this matter alleging that TLCL and MPS are a single employer. On July 25, 2011 Administrative

Law Judge Arthur Amchan issued a decision finding that TLCL and MPS were a single employer.

C. Single Employer Relationship

Transport Labor Contract/Leasing, Inc. (herein referred to as TLCL) is a corporation based in Brooklyn Center, Minnesota. (TR 15). TLCL is primarily engaged in supplying outsourced human resources services to small and midsize trucking companies. (TR 18) TLCL has no customers of its own but instead operates through a number of subsidiaries. The customers have contracts with the subsidiaries of TLCL, and those subsidiaries become the administrative employer of the customer's employees and handle all human resource functions for the customer. (TR 18) TLCL currently has three operating subsidiaries, TLC, Payroll Plus Corporation, and Labor Source, Inc. Since at least 1996 TLCL has operated in this fashion with all work for customers being performed by a subsidiary of TLCL.

At a TLCL board meeting on December 16, 1997 TLCL's board authorized the acquisition of a company called Associated Companies, Inc (herein referred to as ACI). (G.C. Ex. #2, TR 23) That purchase was accomplished on February 18, 1998 when TLCL purchased the assets of ACI from its owner Samuel Ware. (G.C. Ex. 3, TR 23) ACI was engaged in providing the same types of services to customers as TLCL but had a different client base concentrated on more family-owned small businesses as opposed to TLCL's trucking customers. (TR 24) ACI, like TLCL, also operated through subsidiaries. The three subsidiaries of ACI at the time of the purchase by TLCL were ATS, ATS Inc. of Georgia, and MPS.

After ACI was purchased by TLCL, Sam Ware continued to function as an officer of ACI, which also had a Chief Financial Officer named Larry Phillips. Ware served at the discretion of and under the control of the TLCL board of directors to whom he reported. (TR 27)

At a TLCL board meeting on January 27, 2000, the TLCL board approved a number of changes to the structure of ACI that would be effective as of January 1, 2000. Namely, ACI was dissolved, ATS, Inc. of Georgia and ATS were merged and would be referred to as ATS, Inc., and the new ATS, Inc. and MPS were made direct subsidiaries of TLCL. (G.C. Ex. #2, TR 27-28) On March 14, 2000 Sam Ware resigned as Director of ATS, Inc and MPS, and on that same day the TLCL board appointed Richard Dyer to be the new Director of both ATS and MPS. (G.C. Ex 2, TR 29-30) Dyer was the Chief Executive Officer/ President of Payroll Plus Corporation, a wholly-owned subsidiary of TLCL. Payroll Plus Corporation's primary customer base was Allstate Insurance agencies. (TR 32) TLCL's Chief Financial Officer/Treasurer Tim Coughlin was also appointed Treasurer of MPS. (TR 39)

After Ware left the company, a number of MPS's customers also departed but its customer base remained steady in 2001, 2002 and into 2003 when the final customers of MPS left the company. (TR 33) Beginning in 2000 TLCL also made the decision to stop marketing MPS and did not seek to add any new customers to MPS. (TR 76-77) On November 2, 2000 the Board of TLCL decided to move the location of ATS and MPS from Olive Grove, Mississippi to Memphis, Tennessee where they would share a facility with Payroll Plus Corporation which was being moved from Allentown, Pennsylvania. (G.C. Ex. #2, TR 34-35) The TLCL board also authorized TLCL's Chief Financial Officer and Treasurer Tim Coughlin to enter into a lease on behalf of TLCL for a facility in Memphis to house ATS, MPS and Payroll Plus Corporation. In the latter part of 2002 Richard Dyer left his position, and TLCL appointed Tim Coughlin to be President of MPS. (TR 41)

During the period of 2000 to 2003, MPS had no internal employees of its own. All of the services performed for customers of MPS was done by employees of other TLCL subsidiaries.

(TR 72) There were no contracts between MPS and the other subsidiaries to perform these services and it was handled on an informal basis. (TR 75-76) Charges for these services were simply allocated at the end of the year by TLCL for tax purposes. (TR 74) There was no actual exchange of money between MPS and the subsidiaries which performed all of MPS's work. MPS had no money because all funds it received from its customers were swept up by TLCL, along with all monies generated by TLCL's other subsidiaries, into a single account controlled by TLCL. (TR 75) TLCL collected all the money, paid all the bills, and then prepared a single tax return at the end of the year that covered TLCL and all of its subsidiaries including MPS. (TR 73-75)

II. ARGUMENT

A. Cessation of the Business of MPS

In its exceptions and brief in support of exceptions, Respondent addresses the issue of the reasons for the cessation of MPS's business. The Acting General Counsel has never argued that TLCL stopped marketing MPS or stopped directing new customers in an effort to force MPS out of business so that MPS would be unable to remedy the underlying unfair labor practices in this matter. The Acting General Counsel's position is that TLCL's reasons for ceasing to market MPS or to direct new customers to MPS are irrelevant to the matter at hand. Rather, the Acting General Counsel relies on the uncontradicted facts that TLCL did cease marketing MPS and did cease directing new customers to that business as evidence of the power that TLCL exercised over the operations of MPS, and thus as evidence of the single-employer relationship between TLCL and MPS.

B. Single Employer Relationship

Respondent contends that there is insufficient evidence to establish a single-employer relationship between TLCL and MPS under existing Board law. This is incorrect. There is substantial evidence within the record to show that MPS and TLCL are a single employer under Board law. The Board finds single integrated employer status where there is an interrelation of operations, common management, centralized control of labor relations, and common ownership or financial control. Radio Union Local 1264 v. Broadcast Service, 380 U.S. 255 (1965); Wisconsin Education Assn., 292 NLRB 702, 711 (1992). The Board has also noted that:

In finding that a single-employer relationship exists, not one of these factors is controlling, and the presence of all four factors is not necessary. The single-employer relationship has also been characterized as an absence of an “arm's length relationship found among unintegrated companies.”Operating Engineers Local 627 v. NLRB, 518 F.2d 1040, 1045-1046 (D.C. Cir. 1975), affd. on this issue sub nom. South Prairie Construction Co. v. Operating Engineers Local 267, 425 U.S. 800 (1976). Ultimately, in finding that a single-employer relationship exists, all the circumstances present in each case must be considered.

Northern District of Connecticut Iron Workers Local 15, 306 NLRB 309, 310-311

(1992). In this case there is strong evidence of all the elements of a single integrated enterprise, but most striking is the lack of arms length transactions between MPS and TLCL.

1. Common Ownership

There is common ownership between the two entities as Respondent admits in its brief. As set forth above, TLCL purchased ACI from Sam Ware on February 18, 1998. At that time MPS was a subsidiary of ACI. Since that date TLCL has been the sole owner of MPS, first through TLCL's ownership of ACI and then following TLCL's decision to dissolve ACI in January 2000, as a direct subsidiary of TLCL. While Respondent is correct that common

ownership alone is not sufficient to establish a single-employer relationship, the record clearly reflects the other factors used to determine single-employer status are present in the instant case.

2. Common Management and Centralized Control of Labor Relations

Respondent contends that there was a lack of common management between TLCL and MPS. Of course, TLCL and MPS did share common management. It is true that following the purchase of ACI by TLCL, Sam Ware continued to operate as President of MPS, and Ware was never an officer or director of TLCL. However, once Ware resigned his position on March 14, 2000, the TLCL board appointed Richard Dyer as the new Director of MPS. Dyer at the time was the President of Payroll Plus Corporation, another subsidiary of TLCL, and was based in Allentown, Pennsylvania. Dyer had no previous connection with MPS before being appointed to head that entity by the TLCL board. At that time Timothy Coughlin, TLCL's Chief Operating Officer, was also appointed Treasurer of MPS. Coughlin remained in that position until he was appointed President of MPS towards the end of 2002 upon the resignation of Dyer. At the time Coughlin was appointed, MPS still had customers. The last ones did not leave until sometime in 2003. Respondent argues that Coughlin did not exercise any control over MPS's operations. That begs the question as to who did exercise control then. MPS had no other employees or officers. The control therefore must have come from Coughlin, whether directly or indirectly. There was simply no one else.

William Benson, TLCL's Chief Financial Officer and Treasurer, was also appointed at that time to succeed Coughlin as MPS Treasurer. Both men have continued to hold those positions with MPS to the present day. Since 2003 MPS has had no customers, but it continues to exist. Its business has amounted to filing an annual tax return. That tax return is prepared and

filed by TLCL. Since 2000 MPS has had common management with TLCL through Timothy Coughlin and since 2002 through Coughlin and William Benson.

Respondent relies heavily on the lack of centralized control of labor relations between TLCL and MPS and even maintains that this is the most important factor in determining a single-employer relationship.¹ What Respondent fails to point out is that MPS had no labor relations after 2000. It had no internal employees so there was no need for labor relations. All of the services performed for MPS customers were done by employees of other subsidiaries of TLCL. MPS existed only on paper and in tax returns completed by TLCL. In Shane Steel Processing, Inc., 353 NLRB 522 (2008), the Board addressed a situation very similar to the one in the instant case. The matter involved a compliance hearing in which the General Counsel was seeking to establish that two entities were a single employer. One of the entities had no employees. The administrative law judge specifically held that when one of the two entities has no employees, the Board gives less weight to the centralized control of labor relations factor in the single employer test. Id. at 527. The judge then found the entities to be a single employer and was upheld by the Board. The same reasoning can be applied to the instant case. The fact that MPS had no internal employees after 2000 decreases the importance of centralized control of labor relations.

¹ The Acting General Counsel has never contended that common legal representation is sufficient to support a finding of centralized control of labor relations.

3. Significant Interrelation of Operations

a. Interrelationship of MPS and TLCL

As described in the Statement of Facts, TLCL has no operations of its own. It has no customers and generates no revenue. Instead it operates through subsidiaries and directly controls those subsidiaries through actions by the TLCL board. Examples of this control include the decision by TLCL dissolving ACI and making MPS a direct subsidiary of TLCL, the TLCL board decision to move MPS from Olive Grove, Mississippi to Memphis, the appointment of Richard Dyer to head MPS, and the decision to cease marketing MPS to new customers. All of these decisions were made by TLCL and significantly impacted the operations of MPS.

As to MPS's interrelation with other subsidiaries of TLCL, the record shows significant interrelation. As has been set forth on several occasions, beginning in 2000 MPS had no employees. MPS, however, did have customers until sometime in 2003. For those three years those customers still expected to receive the services for which they contracted with MPS. Since MPS had no employees of its own, those services were performed by employees of TLCL's other subsidiaries. It is difficult to imagine a higher level of interrelation than the employees of one entity actually performing the work of another entity.

b. Lack of Arm's Length Transactions Between MPS and TLCL

Nothing so clearly demonstrates the nature of the relationship between TLCL and MPS as the complete lack of arm's length transactions. The Board has found that single-employer status ultimately depends on "all the circumstances of a case" and is characterized by the absence of an "arms-length relationship found among unintegrated companies." Mercy Hospital of Buffalo, 336 NLRB 1282, 1283-1284 (2002). In Shane Steel Processing, Inc., 353 NLRB 522

(2008), the Board found that the absence of an arm's length relationship between the two entities supported the finding that there was an interrelation of operations strongly favoring a single-employer finding.

TLCL and MPS simply did not operate as "unintegrated companies." TLCL's board determined who would head MPS. TLCL's board determined where MPS would be located. TLCL negotiated and executed the lease for the facility where MPS would be located. TLCL decided that MPS would not be marketed to new customers. Since MPS had no employees after 2000, its customers were serviced by employees of other TLCL subsidiaries. There were no contracts between MPS and the other subsidiaries for these services. There was no record keeping as to how much time those employees spent working on MPS business and no method of compensation for that time. All of the revenue generated by MPS was simply swept out of its bank account and into an account controlled by TLCL. Expenses and revenues for MPS were not computed until it was time to compile a tax return, a single tax return that covered both TLCL and MPS. This goes beyond a lack of arm's length transactions. This was simply one entity, TLCL, using another entity, MPS, as a mere instrumentality to do its bidding.

4. Conclusion

TLCL and MPS are a single employer under Board law. An examination of the four factors considered by Board demonstrates this. They shared common ownership. Since 1998 TLCL has been the sole owner of MPS, either indirectly through TLCL's ownership of ACI or directly after TLCL dissolved ACI. They shared common management. Tim Coughlin has been either Treasurer or President of MPS since 2000 during which time he served as TLCL's Chief Operating Officer and then Chief Executive Officer. William Benson has served as MPS's Treasurer since 2002 while also holding that position as well as Chief Financial Officer for

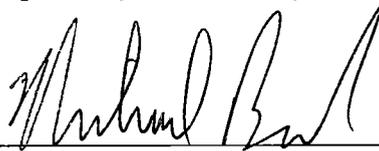
TLCL. Their operations have been interrelated. TLCL has directly controlled the operations of MPS both through actions by the TLCL board and through TLCL's other subsidiaries. Finally, the complete lack of arm's length transactions between TLCL and MPS demonstrates that TLCL used MPS as a mere instrumentality and certainly did not treat MPS as a distinct business entity. This must lead to the conclusion that TLCL and MPS constituted a single employer.

III. CONCLUSION

For the reasons set forth above, the Acting General Counsel respectfully requests that Respondent's exceptions to the decision of the Administrative Law Judge be denied, and the Board find that TLCL and MPS are a single employer and that TLCL and MPS are jointly and severally liable for the amount of backpay and other benefits, plus interest, owed the discriminatees under the Board's Supplemental Order as enforced by the Seventh Circuit of the United States Court of Appeals.

Signed in Indianapolis, Indiana this 6th day of September 2011.

Respectfully submitted by:



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CERTIFICATE OF SERVICE

I hereby certify that copies of Acting General Counsel's Limited Cross-Exceptions to the Decision of the Administrative Law Judge, Brief in Support of Limited Cross-Exceptions to the Decision of the Administrative Law Judge, and Answering Brief to Respondent's Exceptions to the Decision of the Administrative Law Judge were served by electronic filing on the 6th day of September 2011 on the following parties:

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