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June 5, 2014
BY ELECTRONIC FILING

Gary W. Shinners, Executive Secretary
National Labor Relations Board
1099 14th Street N.W. Room 1602
Washington D.C. 20570-0001

Re: Lederach Electric, Inc. and Morris Road Partners, LLC
Case 04-CA-037725

Dear Executive Secretary Shinners:

Counsel for the General Counsel hereby files these exceptions to the Decision of Arthur J. Amchan, Deputy Chief Administrative Law Judge in this matter. These exceptions are being e-filed. Copies have been sent this day to the parties at their e-mail addresses.

Very truly yours,

Daniel E. Halevy

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

LEDERACH ELECTRIC, INC
and MORRIS ROAD PARTNERS
LLC (single employers)

and Case 4-CA-037725

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL 380

COUNSEL FOR THE GENERAL COUNSEL'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

Pursuant to Section 102.46 of the Board's Rules and Regulations, Counsel for the General Counsel submits the following exceptions to the April 30, 2014 Decision of the Honorable Arthur J. Amchan, Administrative Law Judge. [1]

I. INTRODUCTION

The Board uses the following four-factor test to determine whether two or more companies are a single employer: (1) interrelation of operations; (2) common management; (3) centralized control of labor relations; and (4) common ownership or financial control. *Carnival Carting, Inc.*, 355 NLRB No. 51, JD slip op. at 4 (2010).[2] Common control of labor relations is a significant indicator of

[1] References to Judge Amchan's Decision are designated as "ALJD" and are followed by the page and line number(s) of his Decision. References to the transcript are designated as Tr- followed by the page number(s). References to the Stipulation of Facts are designated as STP followed by item number. References to Lederach Electric and to Morris Road Partners are designated as LEC and MRP respectively.

[2] These four factors are designated herein as Factor 1 through Factor 4.

single employer status, but no single factor is controlling, and all four factors need not be present. Id. With respect to Factor 3, it is inappropriate to attach substantial importance in the single employer analysis where some of the companies have no employees, *Bolivar-Tees, Inc.*, 349 NLRB 720, 722 (2007); see also *Three Sisters Softwear Co.*, 312 NLRB 853, 863 (1993). The hallmark of single employer status is characterized by the absence of an arms-length relationship among seemingly independent companies. Id.; *Carnival Carting*, JD slip op. at 5; *RBE Electronics of S.D., Inc.* 320 NLRB 80, 80 (1995*)* *Hydrolines, Inc.*, 305 NLRB 416, 417-418 (1991).

Judge Amchan found beyond question that Factors 2 and 4 were present here. He further found a lack of an arms-length relationship between LEC and MRP. He found some evidence of Factor 1 (use of the same mailing address and the practice of some MRP tenants to deposit rent at LEC's office), but it was not enough to qualify LEC and MRP to be interrelated. ALJD at 3.

We respectfully take issue with three parts of Judge Amchan's findings and conclusions: (1) In Factor 1, he should have more fully considered the use of cell phones by LEC and James Lederach on behalf of, or involving, MRP, and between LEC's and MRP's vendors. The record evidence concerning phone usage supported a finding that the operations of LEC and MRP were interrelated. Similarly, Judge Amchan did not fully consider how the business decisions made by James Lederach impacted both LEC and MRP; (2) The ALJ found dispositive that LEC and MRP were never in the same business, and he required that LEC and MRP have a common business purpose. Neither of those characteristics is

necessary or probative in analyzing the single employer issue herein; (3) Judge Amchan erred in attempting to distinguish contrary Board law, especially *Carnival Carting*; and (4) he appeared to have been influenced by the speculative inability of either LEC or MRP to pay backpay to the four employees in this case. As discussed more fully below, we respectfully submit that the Board should reverse Judge Amchan's Decision.

II. EXCEPTIONS CONCERNING FACTOR 1 – INTERRELATED OPERATIONS

> **Exception 1**: ALJD, page 2, lines 27 – 29: To the finding that tenants only "generally" communicated with MRP by calling [James Lederach's] personal cell phone. The record shows that MRP used LEC's cell phone and James Lederach's cell phone;
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> **Exception 2**: ALJD, page 3, lines 42-44; ALJD, page 4, lines 16-17; and ALJD page 5, line 15. The ALJ made contradictory findings. After finding Factors 2 and 4 fully satisfied and Factor 1 as partially satisfied, and the lack of arms-length relationship, the ALJ referred to LEC and MRP as completely different businesses;
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> **Exception 3:** ALJD p. 5 at lines 12-14: -- to the finding that General Counsel has not established that LEC and MRP are a single employer using the four factors applied by the Board.
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> **Exception 4**: ALJD at page 2, line 39 through page 3, line 25: -- to the ALJ' failure to address the interrelatedness of operations resulting from James Lederach's decision to pay Univest Bank and vendors before paying MRP

ALJ Amchan identified two aspects of the interrelatedness of LEC and MRP (the two companies used the same mailing address and some tenants of MRP deposited their rent at LEC's office in Lederach Commons. Judge Amchan further found that MRP's tenants ***generally*** communicated with James Lederach using Lederach's personal cell phone. Judge Amchan did cite phone usage in his fact finding, but he did not

identify it as Factor 1 evidence as he had for the common address and rent payment evidence. James Lederach also testified in greater detail how he tried to keep LEC afloat, borrowing against a line of credit he had at Univest Bank, and making personal contributions. As financial manager for both companies, James Lederach decided that MRP would be paid last if there was extra money or profit from its construction work.

The Phones

James Lederach testified that he would use LEC's phone when conducting business for LEC. When asked what phone number he would use when conducting business for MRP, he responded that there was no specific phone number for MRP (TR 12). He testified that he had used the LEC phone (not his personal cell phone) for MRP business, explaining, "[t]here were ***some times***, yes. We never really got phone calls to Morris Road. When my tenants called, they usually called my cell phone." (TR 12) By finding that the tenants ***generally*** communicated with MRP by calling James Lederach's personal cell phone, the ALJ underrated the interrelations between LEC and MRP. In other words, because MRP had no phone number, and used LEC and James Lederach's phones instead, the record shows that the two companies were interrelated. It is hard to imagine two businesses claiming to be independent where only one of them has a phone. Be that as it may, whatever phone communications needed to occur for their operations, James Lederach and LEC handled them. Judge Amchan minimized this evidence and suggested that LEC and MRP used the phones on a limited basis. He should have found that the phone usage was far more extensive than Respondent claimed.

The Vendors, Manager, Bookkeeper

James Lederach managed the rental units and made all financial decisions for MRP (TR-13). He testified that MRP's vendors (e.g. snow plowing, lawn mowing, managing the rental units) would contact him.

Judy Lederach kept the books for both companies, a function that shows further interrelatedness. See *Darlington Mfg. Co.,* 139 NLRB 241, 255-256 (1962); *Dearborn Oil & Gas Co.*, 125 NLRB 645, 647 (1959).

Interrelated financial dealing

James Lederach testified at length concerning the demise of LEC.[1] As the Stipulation of Facts put it, James Lederach exercised complete managerial, financial and operational control of LEC (STP at #7); Judy became a manager with James and the two of them thereafter exercised managerial and operational control over MRP's business on a day-to-day basis. (STP at #7). LEC was able to continue working because James had secured a $400,000 line of credit with Univest Bank, which James Lederach used to get bonding for LEC. LEC had a bonding capacity of approximately $3,000,000 in 2010. (TR-18)

When it came time for LEC to make monthly payments, James Lederach decided that Univest would be paid first (TR 22) and vendors would be paid before MRP. It is not clear whether LEC's employees would be paid before or after the vendors. Without the ability to get bonding, LEC would have become, and later did become, insolvent.[3] LEC "maxed out" on its line of credit with Univest and went out of business in the fall of 2011 or 2012. James Lederach testified that the

[3] During this period, Chief Administrative Law Judge Robert Giannasi presided over a compliance proceeding in late May, 2011, and his decision issued on July 21, 2011). No exceptions were filed. Judge Giannasi found that LEC unlawfully laid off four employees. (ALJD at 1, through p. 2, line 10). Subsequently, there was another hearing, this one before ALJ Earl Shamwell. James Lederach attended that hearing but was not called to testify. 359 NLRB No. 71, P. 17 fn 23. The record does not show who was responsible for handling Respondents' compliance, but a fair inference is that James Lederach made these decisions. James Lederach appeared in the offices of NLRB Region 4 on December 11, 2012) and described his position at that time as a representative of LEC.

decision to stop rent payments came without worry that MRP would sue LEC. Why? Because the Lederachs ***were*** MRP and LEC (TR 23) To the extent that LEC could continue paying its creditors, LEC employees would still be able to work. When LEC lost its line of credit and could not be bonded, it could no longer continue in business.

III. EXCEPTIONS CONCERNING "COMMON BUSINESS PURPOSE," CARNIVAL CARTING AND IMPLICIT SINGLE EMPLOYER FACTOR

Exception 5: ALJD at page 4, lines 5-6: to the ALJ's analysis "...what is missing in this case from situations in which employers are found to constitute a single employer is the fact that LEC and MRP were never in the same business;

Exception 6: ALJD at page 4, lines 23-29: to the ALJ's unawareness of Board cases applying the "same business" criterion in its single employer analysis with one exception (*Carnival Carting*, *supra*, in which the Board has found two entities operating in "completely separate businesses" to be a single employer;

Exception 7: ALJD at p. 4, lines 26-41: to the ALJ's unconvincing attempt to distinguish this case from *Carnival Carting, Inc.*, 355 NLRB No. 51 (2010) ALJD p. 5 at lines 12-14: -- that the General Counsel has not established that LEC and MRP are a single employer using the four factors applied to the Board.

Exception 8: ALJD at page p. 5, lines 15 through 19: To challenge the ALJ's conclusion, "Given the fact that LEC and MRP operated in completely different businesses, I conclude that the General Counsel has also failed to establish the necessary interrelationship of their operations." ALJD, page 4, lines 5-6, page 4, line 16, and fn. 5.

Exception 9: ALJD at page 4, fn. 5: To the ALJ's analysis that "[w]hile the Board has never explicitly stated that the entities constituting a single employer must have a common business purpose, I conclude that this is implicitly the case."

Exception 10: ALJD at page 4, fn. 5: to the ALJ's analysis that "[w]hile the Board has never explicitly stated that the entities constituting a single employer must have a common business purpose, I conclude that this is implicitly the case."

Judge Amchan imposed a requirement that in order to be a single employer, two or more entities needed to be "in the same business" (ALJD at page 4, line 6) in the same market," and have a similar or common business purpose. ALJD p. 5, fn. 5. Board law does not require the involved entities to be in the same business. Thus, in *Carnival Carting*, 355 NLRB 297, 299-301 (2010), two businesses operated out of the same office, one of them (Carnival) garaging two garbage trucks there, while the other (Romar) engaged in ***no business operations*** aside from serving as the owner of the building where Carnival's trucks were kept. As the ALJ characterized it,

> The fact that Romar Sanitation was not actively engaged in refuse removal and that its business was to serve as owner of the garage for Carnival Carting's trucks does not negate a finding of single employer status. The Board has held that, "notwithstanding the different business purposes between real estate companies and other types of businesses, a single employer relationship can be found particularly where there is evidence of a lack of an arm's-length relationship between the entities. 355 NLRB at 300-301.[4]

Judge Amchan professed that he did not understand *Carnival Carting* and found only one fact to distinguish that case from this, that Romar was to pay the sole discriminatee, Similarly, in *Three Sisters Sportswear*, 312 NLRB 853, 863-864 (1993), the ALJ found several companies engaged in the manufacture, sale

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[4] Judge Amchan's resistance to concluding that LEC and MRP are a single employer was perplexing. He started his discussion of *Carnival Carting* with an acknowledgment that he was unaware of any case in which the Board found two entities operating in completely separate businesses to be a single employer. The above-cited cases show that Judge Amchan was wrong in deciding to dismiss the Complaint for want of a finding that LEC and MRP were in the same business or had the same business purpose. As argued above, *Carnival Carting* and this case are very close factually. In that case, as in this one, Romar, the first business rented space to Carnival, the other business. In both cases, the business tenants failed to make timely rent payments. Rents were the sole basis for Romar's income. Rents were the sole basis for MRP's income. The rent Carnival owed to Romar was to be used to pay for the utilities in the building Romar owned. Romar also allowed Roger Carnival, Romar's President, to provide business and personal transportation services to Roger Carnival, less than arm's length behavior. Id. 355 NLRB at 4. The rent LEC was to be used to pay for MRP to maintain Lederach Commons. LEC, the largest unit, essentially paid no rent for months, and MRP took no action. This too, involved less than arm's length transactions or practices.

and distribution of knitwear to be a single employer along with 144 Spencer Street, a company involved in real estate ownership and management. Id at 863-864. The ALJ rejected the argument that he could not find single employer status involving some businesses with different businesses purposes, even where one of the businesses, a real estate company was "totally and completely" removed from the other entities. Id at 863. Notwithstanding the different business purposes between real estate companies and other types of businesses, a single employer relationship can be found, particularly where there is evidence of a lack of an arm's length relationship between them"); accord, *G. Zaffino & Sons*, 289 NLRB 571, 577 1988). *Oaktree Capital et al. d/b/a Turtle Bay Resorts*, 353 NLRB 1242, 1248-1249 (2009). In the instant case, LEC's business purpose was to be an electrical contractor, whereas MRP's business purpose was as a real estate manager and owner.; *Carnival Carting*, supra, 355 NLRB at 297. The cases discussed above do not require this additional test. Nor should the Board require it in this matter.

A second reason for rejecting Judge Amchan's analysis is that, by positing that LEC and MRP were completely separate businesses, he put the proverbial rabbit in the hat. Recall that Judge Amchan found it to be beyond question that LEC and MRP had common management, common ownership and financial control, and some dealings at less than arm's length. ALJD, page 3, lines 39-44. Four paragraphs later, he stated that he was unaware of any case (other than *Carnival Carting*) in which the Board found two entities operating completely separate businesses to be a single employer. It is difficult to fathom how Judge Amchan could find the two businesses herein to be completely separate after having concluded that they satisfied two of the four single employer factors plus a lack of arm's length dealings, the "hallmark" of single employer status. (ALJD at 3, lines 41-42).

A third reason for rejecting Judge Amchan's reasoning is his resort to alter ego cases. It is well-settled that to be alter egos, two businesses must have "substantially identical" management, ***business purpose***, operation, equipment,

customers and supervision. *Crawford Door Sales Co.*, 226 NLRB 1144 (1976). Judge Amchan concluded that a finding of common business purpose was implicitly needed to establish single employer status. ALJD at page 4, fn. 5. In essence, Judge Amchan was adding a fifth factor to the single employer test. Moreover, his conclusion appears to rest on Board law since abandoned. In *Johnstown Corporation*, 322 NLRB 818 (1997), the Board repudiated *Gartner-Harf*, 308 NLRB 531 (1992) and its doctrine that alter egos are a subset of single employers. Instead, the Board held that alter ego and single employer concepts are related but separate. The Board knows how to say "purpose" when that is what it means. Judge Amchan disregarded the difference between the two types of businesses. Even if it was appropriate for him to do so, he ignored that part of single employer law holding that "no single factor is controlling." *Carnival Carting*, 355 NLRB at 300.

IV: MRP'S ABILITY TO PAY BACKPAY – DERIVATIVE LIABILITY AND PUBLIC POLICY RATIONALE

Exception 11: ALJD, page 5, lines 5-7: To the ALJ's wonder about the point of his decision.

Exception 12: ALJD, page 5, lines 9-12: To the ALJ's doubt concerning a public policy rationale for finding MRP and LEC to be a single employer

Exception 13: ALJD p. 5 at lines 12-27: -- to the ALJ's dismissal of the Compliance Specification.

Judge Amchan questioned the efficacy of our continuing efforts to get backpay for the discriminatees, and he expressed a similar sentiment with respect to *Carnival Carting*. But, as the ALJ in *Carnival Carting* observed, "[W]hen an order is issued against an insolvent employer, derivative liability may be imposed on a nominally separate business entity which is nonetheless shown to be so closely related to the guilty employer that a single-employer relationship can be established." Id. 355 NLRB 297, 301; *NLRB v. Deena Artware, Inc.*, 361 U.S.

398 (1960); *Commisary of Great Race Pizza Shoppes*, 277 NLRB 1175, 1176 fn. 3(1985). Upon a finding that a single-integrated enterprise exists, each employer within the enterprise is subject to liability. Id. at 1176, fn. 3. We submit that MRP was closely related to LEC and that a finding of derivative liability is warranted.

IV. CONCLUSION

Based on the foregoing, Counsel for the General Counsel respectfully submits that the Board should reverse the Administrative Law Judge's Decision and should find and conclude that Lederach Electric, Inc. and Morris Road Partners are single employer jointly and severally required to comply with the earlier Orders in this matter.

Dated: June 5, 2014

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