

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

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

Respondent,

Case No. 4-CA-037725

and

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS LOCAL 380, Coo

Charging Party.

BRIEF IN SUPPORT OF CHARGING PARTY'S EXCEPTIONS

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BRIEF IN SUPPORT OF CHARGING PARTY'S EXCEPTIONS

Pursuant to Rule 102.46 of the Board's Rules and Regulations, the charging party, International Brotherhood of Electrical Workers Local 380, submits this brief in support of its exceptions.

INTRODUCTION

This case presents the question whether two nominally separate business entities, Lederach Electric, Inc. ("LEI") and Morris Road Partners, LLC ("MRP"), constitute a single employer and are therefore jointly and severally liable for the backpay owed to the discriminatees in this case.

That question was not novel and should not have been difficult to resolve. LEI was an electrical contractor, and MRP is a real estate management company that owns and manages the office building in which LEI conducted its business. The Board has frequently addressed the question whether two entities – one of which conducts a business and the other of which owns the building in which

business is conducted – constitute a single employer. The Board has heretofore answered that question by applying its well-established criteria for determining whether two nominally separate businesses should be deemed a single employer. *Carnival Carting, Inc.*, 355 NLRB 297, 355 NLRB No. 51 (2010), *enfd*, 455 Fed. Appx. 20, 192 LRRM (BNA) 2599 (2nd Cir. 2012); *Three Sisters Sportswear Co.*, 312 NLRB 853, 863 (1993), *enfd*, 55 F.3d 684 (D.C. Cir. 1995); *G. Zaffino & Sons, Inc.*, 289 NLRB 571, 577 (1988); *Capitol Theater*, 231 NLRB 1370, 1374 (1977); *Copper Craft Plumbing, Inc.*, JD-07-10, 2010 NLRB Lexis 87 (April 2, 2010).

In this case, the ALJ acknowledged the applicability of those criteria, but also imposed one more. Relying on the standard for establishing alter ego status, he held that two entities cannot constitute a single employer unless they also share a common business purpose. (ALJD at 4) He concluded that, because LEI and MRP did not satisfy that additional, newly-imposed criterion, they could not be deemed a single employer. As explained herein, in so holding he ignored established law, misread the Board’s prior decisions and disregarded the well-settled distinction between single employer and alter ego status.

His conclusion that LEI and MRP are not a single employer should be reversed, and an order imposing joint and several liability on LEI and MRP should be issued.

STATEMENT OF THE CASE

In July 2011, ALJ Robert Giannasi issued a decision finding that LEI had violated Sections 8(a)(1) and (3) of the Act, 29 U.S.C. § 158(a)(1), (3), by, *inter alia*,

permanently laying off four employees because of their union membership and activities. *Lederach Electric, Inc.*, 2014 NLRB Lexis 364 (July 21, 2011). No party filed exceptions, and the Board adopted his findings, conclusions and recommended order pursuant to Section 102.48 of the Board's Rules and Regulations. 2011 NLRB Lexis 517 (July 21, 2011).

In September 2012, following a hearing on the Regional Director's backpay specification, ALJ Earl E. Shamwell, Jr. issued a supplemental decision finding that LEI owed the four discriminatees a total of \$122,229.06. 2012 NLRB Lexis 580 (Sept. 10, 2012). The Board subsequently adopted that decision and order. 359 NLRB No. 71 (March 4, 2013).

LEI, which had ceased operation, failed to comply with that order, and in September 2013, the Regional Director issued a compliance specification and notice of hearing alleging that LEI and MRP constituted a single employer and that both were therefore jointly and severally liable for the backpay obligation. ALJ Arthur Amchan conducted a hearing on that specification and issued his decision on April 30, 2014 rejecting the claim that LEI and MRP were a single employer and dismissing the complaint.

ISSUE PRESENTED

Whether Lederach Electric, Inc. and Morris Road Partners, LLC constitute a single employer despite the fact that they did not share a common business purpose.

STATEMENT OF FACTS

The relevant facts are succinctly summarized by the ALJ. LEI was an electrical contractor. It conducted business from 1986 until 2012. LEI was jointly owned by James Lederach and his wife, Judy, until January 1, 2010 and owned solely by James Lederach thereafter. (ALJD at 2; Joint Ex. 1)

From 1986 until its demise in 2012, LEI conducted business in the Lederach Commons Building, which is owned by MRP. MRP is in turn owned solely by James Lederach. (ALJD at 2; Joint Ex. 1) MRP has never had any employees. As the ALJ found, “[b]oth LE[I] and MRP were managed solely by James Lederach.” (ALJD at 2; Tr. at 13) Neither LEI nor MRP have had any officers other than James and Judy Lederach. Both companies had the same mailing address, and James Lederach sometimes used the LEI phone for MRP business. (ALJD at 2; Tr. 12) The Lederach Commons Building had other tenants that occasionally paid their rent to MRP by dropping it off in LEI’s office. (ALJD at 2; Tr. at 11-12)

As the ALJ described, LEI had a lease agreement with MRP obligating LEI to pay rent of \$3,000 per month, but LEI – unlike MRP’s other tenants – more often than not failed to pay the amounts due. From 2009 through 2013, LEI paid MRP less than half the rent due under the lease. (ALJD at 3; Joint Ex. 4) James Lederach testified that he did not pay because he “knew Morris Road would not be suing us for the rent. . . . We were taking – taking advantage” (Tr. at 23) MRP never made any attempt to enforce the lease agreement against LEI.

ARGUMENT

Despite the Fact that they did not Share a Common Business Purpose, Lederach Electric, Inc. and Morris Road Partners, LLC Should be deemed a Single Employer.

The question presented here is whether the Board should accept or reject the ALJ's analysis in which two business entities that otherwise met the criteria for single employer status were deemed separate employers because they did not share a common business purpose. Despite their common ownership, common management and interrelated operations, the ALJ concluded that LEI and MRP were not a single employer because they "were never in the same business." (ALJD at 4) That fact was critical, according to the ALJ because, "[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."

But, as explained herein, that is explicitly not the case.

The question whether two nominally separate business entities should be treated as a single employer first arose in cases presenting the question whether an employer satisfied the Board's discretionary jurisdictional standards. *E.g., Bryar Construction Co.*, 240 NLRB 102, 103-04 (1979); *Harrisburg Building Units Co.*, 116 NLRB 334, 340 n.4 (1956); see Stephen F. Befort, *Labor Law and the Double-Breasted Employer: A Critique of the Single Employer and Alter Ego Doctrines and a Proposed Reformulation*, 1987 WISC. L. REV. 67, 75 (1987) [hereinafter "Befort"]. In *Radio & Television Broadcast Technicians v. Broadcast Service of Mobile, Inc.*, 380 U.S. 255 (1965), the Supreme Court approved the Board's approach of treating

“several nominally separate business entities [as] a single employer where they comprise an integrated enterprise.” *Id.* at 256. As the Court noted, the “controlling criteria, set out and elaborated in Board decisions, are interrelation of operations, common management, centralized control of labor relations and common ownership.” *Id.*¹

The Board subsequently applied the principle that nominally separate business entities that comprise an integrated enterprise should be deemed a single employer in other contexts. The Board, for example, has used the single employer criteria to determine whether a business entity should be deemed a primary or secondary employer for purposes of applying Section 8(b)(4) of the Act, 29 U.S.C. § 158(b)(4), *e.g.*, *Miami Newspaper Printing Pressmen (Knight Newspapers, Inc.)*, 138 NLRB 1346, 1347 (1962), *enfd.*, 322 F.2d 405 (D.C. Cir. 1963); to determine the scope of an employer’s obligation to bargain, *e.g.*, *Gerace Construction, Inc.*, 193 NLRB 645 (1971)²; and, as in this case, to determine whether two related entities should be jointly and severally liable for violations of the Act, *e.g.*, *Viking Industrial Security, Inc.*, 327 NLRB 146, 147 (1998), *enforcement denied*, 225 F.3d 131 (2nd Cir.

¹ In *Radio Technicians*, the Supreme Court held that, because the Board would have asserted jurisdiction over the employer and the labor dispute that was the subject of the employer’s state law claim against the union, that claim was preempted by the Board’s exclusive jurisdiction under *San Diego Building Trades v. Garmon*, 359 U.S. 236 (1959).

² As explained in *South Prairie Construction Co. v. Operating Engineers Local 627*, 425 U.S. 800 (1976), a conclusion that one business entity is bound by the collective bargaining agreement signed by a related business entity requires findings that both entities constitute a single employer and that the employees of both constitute an appropriate bargaining unit.

2000) (“the Board imposes derivative liability on parties that are found to constitute a single employer”); *Emsing’s Supermarket, Inc.*, 284 NLRB 302, 302-03 (1987), *enf’d*, 872 F.2d 1279 (7th Cir. 1989).

The four criteria for establishing single employer status are long-standing and well-established. They are “interrelation of operations, common management, centralized control of labor relations and common ownership.” *Radio & Television Technicians*, 380 U.S. at 256; *Bolivar-Tees, Inc.*, 349 NLRB 720 (2007), *enf’d*, 551 F.3d 722 (8th Cir. 2008). No one factor is controlling, and all need not be present to establish that two companies are a single employer. *Id.*; *RBE Electronics of S.D., Inc.*, 320 NLRB 80 (1995).

The Board has also described the relevant inquiry more broadly, stating in several cases that “the fundamental inquiry is whether there exists overall control of critical matters at the policy level,” *Viking Industrial Security*, 327 NLRB at 146 (1998); *Emsing’s Supermarket*, 284 NLRB at 302, and in others that the hallmark of a single employer status is the “absence of an arm’s-length relationship found among unintegrated companies.” *RBE Electronics*, 320 NLRB at 80; accord *Bolivar-Tees*, 349 NLRB at 720.

Although one of the criteria is centralized control of labor relations, a business entity that, like MRP, has no employees, may still be deemed part of a single employer. In *HydroLines, Inc.*, 305 NLRB 416, 418 (1991), the Board rejected the argument that two business entities could not be classified as a single employer if only one had employees. As explained in *Three Sisters Sportswear, supra*, “this

factor [centralized control of labor relations] becomes less important where some of the companies have no employees.” 312 NLRB at 863.

The Board, as the ALJ acknowledged (ALJD at 4 n.5), has never stated that a common business purpose is a prerequisite, or even a relevant criterion, for single employer status. The ALJ nevertheless, citing the criteria for finding alter ego status, concluded that the existence of that requirement was “implicit.” That conclusion ignores several Board decisions and fails to recognize the distinction between single employer and alter ego status.

In *Carnival Carting, Inc., supra*, the Board considered the status of two nominally separate companies – one a trash removal company and the other, Romar Sanitation, a corporation that owned the garage in which the trash company housed its trucks. The ALJ, whose decision the Board adopted, held that

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 arm’s-length relationship between the entities.” *Three Sisters Sportswear Co.*, 312 NLRB 853, 863 (1963), *enfd.*, 55 F.3d 684 (D.C. Cir. 1995).

355 NLRB No. 51, slip op. at 5 (emphasis added).

Carnival Carting was the most recent but not the only case to hold that two businesses comprising a single employer need not share a common business purpose. The Board based its decision in *Carnival Carting* on its earlier decision in *Three Sisters Sportswear* in which the Board found that several companies –

including a real estate company that owned and managed the building in which the other companies conducted business – constituted a single employer. 312 NLRB at 863-64. In so holding, the Board specifically rejected the argument, accepted by the ALJ in this case, that the real estate company could not be deemed part of a single employer because it was engaged in “a business ‘totally and completely’ removed from that of the other companies.” *Id.* at 863.

As the *Three Sister* ALJ noted, the Board had previously found single employer relationships between two companies, one of which conducted a business and the other of which owned the property in which that business was conducted. In *G. Zaffino & Sons, Inc., supra*, for example, the Board held that a company engaged in the business of making and installing iron and steel products and the realty company that owned the building in which those products were made and sold were part of a single employer. 289 NLRB at 577. *See also Capitol Theatre*, 231 NLRB 1370 (1977) (companies in the business of showing films and company that owned theater in which films were shown constituted a single employer).

The decision of the ALJ in this case should be contrasted with that of ALJ Margaret Brakebusch in *Copper Craft Plumbing, Inc.*, JD(ATL)-07-10, 2010 NLRB Lexis 87 (April 2, 2010). In that case, the ALJ, citing *Three Sisters* and *G. Zaffino & Sons*, concluded that several plumbing companies and Studio 36, a real estate investment company that owned the building occupied by the plumbing companies and their owners, constituted a single employer. As the ALJ observed there, “The fact that Studio 36 was not actively engaged in in the business of plumbing and

served primarily as the building owner where the operation of the other three entities merged does not negate a finding of single employer status.” 2010 NLRB Lexis 87 at [*18].

Whether single employer status requires a common business purpose is a question that the Board’s decisions answer, not implicitly, but explicitly. *Carnival Carting, Three Sisters* and *G. Zaffino & Sons* show that the Board’s explicit answer has been that single employer status does not require a common business or a common business purpose. Those cases establish that a common business purpose is not a prerequisite, or even a relevant criterion, for establishing single employer status.

To be sure, whether two companies share a common business purpose is a relevant criterion for determining whether one company is the alter ego of the other. According to one commentator, the alter ego doctrine evolved from the Supreme Court’s decision in *Southport Petroleum Co. v. NLRB*, 315 U.S. 100 (1942). *Befort*, 1987 WISC. L. REV. at 89. The question presented there was whether the Board’s order requiring the reinstatement of discharged employees could be enforced against a newly-formed company created when the respondent was liquidated and its assets transferred to the new company. The relevant inquiry, according to the Supreme Court, was “[w]hether there was a bona fide discontinuance and a true change in ownership . . . or merely a disguised continuance of the old employer.” 315 U.S. at 106.

Under the alter ego doctrine, “in certain situations, one employer entity will

be regarded as a continuation of a predecessor, and the two will be treated interchangeably for purposes of applying labor laws.” *NLRB v. Hospital San Rafael, Inc.*, 42 F.3d 45, 50 (1st Cir. 1994). The alter ego doctrine focuses “on the existence of a disguised continuance of a former business entity or on the attempt to avoid the obligations of a collective bargaining agreement, such as through a sham transfer of assets” *Penntech Papers, Inc. v. NLRB*, 706 F.2d 18, 24 (1st Cir. 1983); Befort, 1987 WISC. L. REV. at 90.

The criteria used to determine whether two employers are alter egos are well-settled. “Although each case must turn on its own facts, we generally have found alter ego status where the two employers have ‘substantially identical’ management, business purpose, operation, equipment, customers, and supervision, as well as ownership.” *Advance Electric, Inc.*, 268 NLRB 1001, 1002 (1984).

The Board and the courts have clearly stated that whether two employers are alter egos and whether two businesses constitute a single employer are different questions. At one time the Board viewed one as a subset of the other, *see Garner-Harf Co.*, 308 NLRB 531 (1992), but in *Johnstown Corp.*, 322 NLRB 818 (1997), the Board concluded “that ‘alter ego’ and ‘single employer’ are related, but separate concepts.” *Id.* at 818; *accord NYP Acquisition Corp.*, 332 NLRB 1041, 1041 n.1 (2000), *aff’d sub nom. Newspaper Guild Local 3 v. NLRB*, 261 F.3d 291 (2nd Cir. 2001). And, as the court explained in *Penntech Papers, supra*, whether two business entities constitute alter egos or a single employer “are not only different questions, but they may have different answers.” 706 F.2d at 24.

That point is illustrated perfectly by *Copper Craft Plumbing, supra*, in which the ALJ concluded that a real estate company and a group of plumbing contractors were not alter egos, because they did not share a common business purpose, but did constitute a single employer. 2010 NLRB Lexis 87 at [*14-*22]. As *Copper Craft Plumbing* shows, whether two businesses share a common business purpose is relevant in determining whether one is a disguised continuance of the other, but not relevant in determining whether they lack an arm's-length relationship and are therefore a single employer under the Act.

The ALJ's decision in this case contains the following statement: "A single employer relationship may be found between two ongoing businesses; an *alter ego* relationship may exist where one entity ceases operations and the other begins the same or similar operation. The relationship between LE[I] and MRP seems to fall in the middle." (ALJD at 4 n.5) The ALJ thus appears to have concluded that the cessation of LEI's business operations somehow made an alter ego analysis appropriate.

But it didn't.

The circumstances of this case are hardly unique. There are several cases like this in which, after one of two related business entities has ceased operation, the General Counsel alleges that the surviving business entity is jointly and severally liable for the backpay owed because, at the time the violation, those entities constituted a single employer. *E.g., Carnival Carting*, slip op. at 4 ("Carnival Carting is out of business and is unable to pay the judgment outstanding

against it.”); *Lebanite Corp.*, 346 NLRB 748, 749 (2006) (“the operation became uneconomic and, in August 2003, the plant closed”); *Viking Industrial Security*, 327 NLRB at 147 (“Viking New York went out of business”); *Emsing’s Supermarket*, 284 NLRB at 303 (“Emsing’s closed”).

Indeed, if both entities remained open and profitable, there would be no need even to address the single employer question. It is the non-existence of one entity, or the inability of that entity to satisfy the backpay obligation, that requires the General Counsel to raise the issue and the Board to address it. So, the fact that LEI no longer exists does not distinguish this case from other single employer cases and does not logically require application of an alter ego analysis.

As these cases show, the question presented when one of two related, but nominally separate business entities ceases to exist, is not whether they are now alter egos, but whether they were a single employer at the time of the violation. *See Viking Industrial Security*, 327 NLRB at 147 (“we agree with the judge that Viking New York and Viking New Jersey constituted a single integrated enterprise as of the time of Marrero’s discharge, and thus that Viking New Jersey is derivatively liable for the unfair labor practices previously found”) (emphasis added). That is the question that the ALJ should have addressed.

His decision leaves little doubt that, had he applied the traditional criteria for determining single employer status, and only those criteria, he would have found that LEI and MRP constituted a single employer at the time the unfair labor practices were committed. He concluded that “[t]here [was] no question that

Lederach Electric and Morris Road Properties [sic] had common management and common ownership and financial control.” (ALJD at 3) He also found that there was “evidence of an inter-relationship of operations” and that “the relationship between LE[I] and Morris Road Properties [sic] was not arm’s-length.” (ALJD at 3) Because MRP had no employees, he did not find centralized control of labor relations, but, as noted, all four factors need not be present and, when one entity has no employees, the importance of centralized labor relations diminishes. *Three Sisters Sportswear*, 305 NLRB at 863; *Hydrolines*, 305 NLRB at 418.

The ALJ also stated that he did “not see any public policy rationale for finding MRP and Lederach to be a single employer.” (ALJD at 5) He noted that LEI did not transfer assets to MRP and that the absence of an arm’s length relationship between LEI and MRP “if anything, caused LE[I] to be left with more assets to pay creditors other than MRP.” (ALJD at 5) Those comments misperceive the public policy issue presented by this case.

The public policy question presented here is whether the assets of an employer that commits an unfair labor should be immune from liability merely because the employer conducts business through interrelated entities that are separate in name but not in substance. More fundamentally, the question is who should bear the loss attributable to an employer’s unfair labor practice – the employer, including its interrelated business entities, or the victims of the employer’s wrongdoing. The answer to that question is obvious and should have been apparent to the ALJ.

The ALJ should have concluded that LEI and MRP constituted a single employer and that both were therefore jointly and severally liable for the backpay owed to the employees terminated in violation of the Act

CONCLUSION

For all the foregoing reasons, the Board should reverse the decision of the ALJ and should issue an order providing that Lederach Electric, Inc. and Morris Road Partners, LLC are jointly and severally liable for the backpay owed in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on this 5th day of June, 2014, I served a copy of the foregoing Charging Party's Exceptions and Brief in Support of Charging Party's Exceptions, by electronic mail, upon the following:

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