

**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,

Charging Party.

REPLY BRIEF IN SUPPORT OF CHARGING PARTY'S EXCEPTIONS

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REPLY BRIEF IN SUPPORT OF CHARGING PARTY'S EXCEPTIONS

Pursuant to Rule 102.46(h) of the Board's Rules and Regulations, the charging party, International Brotherhood of Electrical Workers Local 380, submits this reply brief in support of its exceptions.¹

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 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 discriminatees terminated in violation of the Act. Although he found that LEI and MRP "had common management and common ownership and financial control;" that there was "evidence of an inter-relationship of operations;" and that "the relationship between [LEI and MRP] was not arm's-length" (ALJD at 3), the ALJ concluded that the answer was no. He based that conclusion on the fact that "LE[I] and MRP operated in completely different businesses" (ALJD at 5) and his mistaken belief that "entities constituting a single employer must have a common business purpose" (ALJD at 4 n.5).

In its initial brief, ("Chg.P. Br."), the charging party explained that the Board

¹ In an order issued on June 27, 2014, the Board, citing the Supreme Court's decision in *NLRB v. Noel Canning*, __ U.S. __, 82 U.S.L.W. 4599 (June 26, 2014), set aside the supplemental decision, 359 NLRB No. 71, establishing the amount of backpay owed in this case. In that order, the Board also stated that it would retain this case on its docket and take further action as appropriate.

had previously addressed the question whether two entities – one of which conducted a business and the other of which owned the building in which that business was conducted – constituted a single employer. In several cases, the Board has answered that question in the affirmative by applying its well-established single employer criteria. (Chg.P. Br. at 1-2, 8-10) The ALJ’s conclusion that single employer status requires a common business purpose is thus simply incorrect.

Respondent LEI/MRP has submitted a response to the charging party’s exceptions (“Resp. Br.”), but that response is hardly a ringing endorsement of the ALJ’s analysis. Even LEI/MRP acknowledges that, under some circumstances “single employer liability can be found between companies in separate lines of business.” (Resp. Br. at 10) Rather than defend the ALJ’s statement of the applicable law, LEI/MRP attempts to dismiss its importance – describing it an “off the cuff remark” and an “extraneous statement” (ALJD at 9) that should be struck, “[i]f the Board is looking for a case to make a refined opinion about single employer liability.” (Resp. Br. at 2)

Review of the ALJ’s decision, however, belies LEI/MRP’s glib characterization. The ALJ plainly held that “entities constituting a single employer must have a common business purpose.” (ALJD at 4 n.5, emphasis added) And, he found that, although LEI/MRP satisfied the Board’s other criteria for single employer status, “what is missing in this case from situations in which employers are found to constitute a single employer is the fact that LE[I] and MRP were never in the same business.” (ALJD at 4). The absence of a common business purpose

was plainly the lynchpin of the ALJ's decision.

Rather than defend the ALJ's rationale, LEI/MRP offers a substitute: According to LEI/MRP, entities in separate lines of business can constitute a single employer, but only when there is "extensive evidence of interrelatedness." (Resp. Br. at 10, 15, 19, 30, 31) LEI/MRP contends that, if two business entities lack a common business purpose, they must meet a higher standard of interrelatedness to satisfy the Board's single employer standard. LEI/MRP discovers this heretofore unstated "truth" (Resp. Br. at 10) by reviewing the cases cited by the charging party and arguing that in each the business entities deemed a single employer were more highly interrelated than were LEI and MRP. (Resp. Br. at 10-20)

This argument suffers from several obvious flaws. First and foremost, there is not a single word in any case cited by LEI/MRP – or, for that matter, in any case ever decided by the Board – stating that two entities engaged in different businesses must meet a higher standard of interrelatedness to be deemed a single employer. LEI/MRP is arguing that the Board somehow secretly adopted this higher standard, applied it in several cases, but never articulated it.

In each of the cases cited by the charging party, and discussed in LEI/MRP's response, the Board described the well-established single employer criteria, without any suggestion that those criteria applied differently where two business entities lacked a common business purpose. And, in each case, the Board also stated that no single criterion is controlling. *Carnival Carting, Inc.*, 355 NLRB 297, 355 NLRB No. 51, slip op. at 4 (2010), *enfd.*, 455 Fed. Appx. 20, 192 LRRM (BNA) 2599 (2nd Cir.

2012) (“no single aspect is controlling”); *Three Sisters Sportswear Co.*, 312 NLRB 853, 861 (1993), *enfd.*, 55 F.3d 684 (D.C. Cir. 1995) (“no one factor is controlling”); *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 at *16 (April 2, 2010). Thus nothing that the Board stated in those cases supports the proposition that the results somehow turned on a single, additional and unstated criterion, such as a higher degree of interrelatedness.

LEI/MRP attempts to demonstrate that the results did turn on that unstated criterion by pointing out that each case presented facts not present here. (Resp. Br. at 11-18) But, every single employer case presents a multitude of facts, many of which are unique to that case. The Board has never suggested that the facts of those cases somehow established a minimum level of interrelatedness required for single employer status when two related business entities are engaged in separate businesses. The question addressed in *Carnival Carting*, *Three Sisters Sportswear*, *G. Zaffino & Sons* and every other single employer case decided by the Board is whether nominally separate business entities satisfy the Board’s traditional, Supreme Court approved, *Radio & Television Technicians v. Broadcast Service of Mobile, Inc.*, 380 U.S. 255, 256 (1965), criteria for single employer status. That is the question, and the only question, that the ALJ should have answered here.²

² Rather than address the charging party’s argument that this case should have been decided under the Board’s traditional single employer criteria, LEI/MRP responds to a “straw man” argument “that landlord companies are always single employers with tenant companies” (Resp. Br. at 15, 19), an argument not advanced by either charging party or the General Counsel.

LEI/MRP commits a similar mistake in arguing that MRP's lack of employees shows that LEI and MRP do not constitute a single employer. (Resp. Br. at 27-29) In *Hydrolines, Inc.*, 305 NLRB 416 (1991), and *Three Sisters Sportswear, supra*, the Board held that centralized control of labor relations "becomes less important where some of the companies have no employees." 312 NLRB at 863; 305 NLRB at 418. LEI/MRP contends that these cases are inapplicable because in those cases, "the entity without employees was running a substantially similar business using employees from the other entity." (Resp. Br. at 27) But, that explanation does not appear in either of those cases. Rather, in those cases, and others, *see Imco*, 304 NLRB 738, 740 (1991), *enfd*, 978 F.2d 334 (7th Cir. 1992), the Board merely concluded that, where one entity had no employees and therefore no labor relations that could be centrally controlled, the Board would look to other factors to determine whether those entities had an arm's length relationship among themselves. *See NLRB v. Resisteflame Acquisition Co*, 2012 U.S. Dist. Lexis 128809 at *14 (S.D. Ohio Sept. 11, 2012) (holding that a real estate company and a related operating company constituted a single employer and that "[w]here, as here, there are no employees to 'centrally control,' it is inappropriate to accord this factor substantial importance").

LEI/MRP also contends that a common business purpose – even if not the *sina qua non* of single employer status – should still be a relevant criteria in single employer cases. (Resp. Br. at 20-25) That argument presents an obvious problem: There is no Board decision holding that common business purpose is relevant in

determining single employer status. LEI/MRP attempts to overcome this insurmountable obstacle by making a series of arguments, none of which has merit.

LEI/MRP argues first that, since many single employer cases involve companies with a common business purpose, the existence of that common purpose is “somewhat assumed” or “almost presume[d].” (Resp. Br. at 21) But, business entities deemed to be single employers even more typically share other attributes: interrelation of operations, common management, centralized control of labor relations and common ownership – attributes that the Board has explicitly articulated as relevant criteria, despite their typicality. And, in alter ego cases, where a common business purpose is a relevant criterion, the Board has clearly articulated the relevance of that attribute. *See, e.g. Advance Electric, Inc.*, 268 NLRB 1001, 1002 (1984). Thus, nothing in the Board’s decisions supports the proposition that a common business purpose is an unstated “somewhat assumed” criterion for establishing single employer status. In single employer cases, the relevant criteria are those stated by the Board, rather than any that might be “somewhat presume[d].” And, although the point seems self-evident, attempting to ascertain what the Board may have assumed or presumed – as opposed to what it has said and held – does not provide a reliable guide to applicable law.

LEI/MRP next argues that whether the Board has listed a common business purpose as a relevant criterion should not matter, because the Board has stated that single employer status depends on all the circumstances of a case. (Resp. Br. at 23) But that argument proves too much. That all circumstances can be

considered does not mean that every conceivable circumstance is relevant. Relevant circumstances are those demonstrating the existence or non-existence of an arm's length relationship between two nominally separate business entities. *See Three Sisters Sportswear*, 312 NLRB at 861 ("Single employer status depends on all the circumstances of a particular case, and is characterized by an absence of an arm's-length relationship found among unintegrated companies.") In this case, the ALJ found that, despite the fact that they did not share a common business purpose, the relationship between LEI and MRP was not at arm's length. (ALJD at 3) So, as this case demonstrates, the fact that two business entities do not share a common business purpose does not necessarily shed light on the question whether they lack an arm's length relationship, and therefore is not relevant to a single employer inquiry.

Finally, LEI/MRP argues that, in determining single employer status, the Board should be free to consider the criteria for establishing alter ego status, one of which is a common business purpose, because single employer and alter ego concepts are related. (Resp. Br. at 23-25) In *Johnstown Corp.*, 322 NLRB 818 (1997), the Board explained "that 'alter ego' and 'single employer' are related, but separate concepts." *Id.* at 818. LEI/MRP's argument, if accepted, would obliterate the distinction between the two. If alter ego criteria could be used to determine single employer status and single employer criteria could be used to determine alter ego status, then every alter ego would also be a single employer and every single employer would also be an alter ego.

The fundamental problem here is that the ALJ applied a criterion – common business purpose – applicable in alter ego but not single employer cases. Indeed, the ALJ made that criterion the *sine qua non* of single employer status. Try as it might, LEI/MRP cannot gloss over that glaring analytical flaw.

In its initial brief, charging party pointed out that, had he applied the traditional criteria for determining single employer status, and only those criteria, the ALJ undoubtedly would have found that LEI and MRP constituted a single employer. (Chg.P. Br. at 13-14) LEI/MRP disputes that contention, but LEI/MRP's argument is undermined not only by the ALJ's decision, but also by LEI/MRP's own response to the charging party's exceptions.

The Board has frequently stated that the hallmark of single employer status is the “absence of an arm's-length relationship found among unintegrated companies.” *RBE Electronics of S.D., Inc.*, 320 NLRB 80, 80 (1995). The Board has also stated that, in a single employer case, “the fundamental inquiry is whether there exists overall control of critical matters at the policy level.” *Viking Industrial Security*, 327 NLRB 146 (1998), *enforcement denied*, 225 F.3d 131 (2nd Cir. 2000). In this case, the ALJ specifically found that “the relationship between [LEI and MRP] was not arm's-length.” (ALJD at 3) LEI/MRP did not except to that finding. And, LEI/MRP's own description of the relationship between LEI and MRP – explaining that LEI never paid MRP any rent when those payments would leave LEI unable pay other creditors because LEI knew that MRP would never sue to collect those payments (Resp. Br. at 6-7) – shows that the same individual, James Lederach, had

complete control of critical policy matters, such as whether to pay and whether to sue, for both companies. Thus there can be little doubt the LEI and MRP, lacking an arm's length relationship and having common control of critical policy questions, satisfied the Board's traditional standard for single employer status.

LEI/MRP relies heavily on *NLRB v. Fullerton Transfer & Storage, Ltd.*, 910 F.2d 331 (6th Cir. 1990), which it cites for the proposition that one company's failure to pay rent to a related company while paying other creditors shows that the two companies are not closely related. (Resp. Br. at 17, 19, 20) But, as the district court explained in *NLRB v. Resisteflame, supra*, "*Fullerton* is inapposite to a determination of single employer status." 2012 U.S. Dist. Lexis 128809 at *17 n.3. *Fullerton* is an alter ego case in which the court refused to apply what it described as the Board's "relaxed alter ego standard" and denied enforcement of the Board's order. *Id.* at 336, 342.

As the Board and the courts have explained, the question presented in an alter ego case – whether one company is a disguised continuance of the other – is distinct from the question presented in a single employer case – whether two companies have an arm's length relationship. (See Chg.P. Br. at 10-12) A company's decision to withhold rent from a related company may not show whether one is the disguised continuance of the other but, as the ALJ found here (ALJD at 2-3), does demonstrate the absence of an arm's length relationship.

In its initial brief, charging party explained that, although the ALJ could not discern any public policy rationale for finding single employer status (ALJD at 5),

the public policy of providing make-whole relief and remedying unfair labor practices would be served by that finding. (Chg.P. Br. at 14) LEI/MRP responds that affirming the ALJ's decision, and allowing LEI/MRP to escape liability, would serve public policy by avoiding a reversal and a change in Board law imposed by the United States Court of Appeals for the Third Circuit. (Resp. Br. at 30) As the Supreme Court has explained, "the public policy of the [Act] [is one of] making the employees whole for losses suffered on account of an unfair labor practice." *NLRB v. J.H. Rutter-Rex Mfg.*, 396 U.S. 258, 263 (1969). It is that policy that should guide the Board in this case.

CONCLUSION

For all the foregoing reasons, and for the reasons stated in the charging party's initial brief, 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 22nd day of July, 2014, I served a copy of the foregoing Reply Brief in Support of Charging Party's Exceptions, by electronic mail, upon the following:

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