

***National Labor Relations Board***  
**OFFICE OF THE GENERAL COUNSEL**  
**Advice Memorandum**

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Hollerbach Equipment Co., Inc.; Pumpall, Inc. and Pumpall Industrial Operations, Inc., Case 5-CA-19107

177-1642-0100, 518-4040-4300, 530-4825-5000, 530-4850-7500, 530-6083-1000

This case was submitted for advice as to (1) whether three ostensibly separate companies are a single employer; (2) whether the employees of any of the individual entities comprise a single appropriate bargaining unit with the employees of any of the others; if so, (3) whether the failure to apply either of two expired Section 8(f) agreements or a retroactive successor 8(f) agreement to the employees of two of the three entities within the 10(b) period violated Section 8(a)(5); and, finally, (4) whether, following the termination of the original Section 8(f) agreements with the Union but before the formation of the retroactive successor agreement, any of the companies violated Section 8(a)(2) by signing a Section 8(f) agreement with another union covering the employees of only one of the employers.

**FACTS**

In April 1984, Hollerbach Equipment Co., Inc. (HECO) signed collective-bargaining agreements with the International Union of Operating Engineers, Local 37 (the "Union").<sup>[1]</sup> HECO was founded by Tom Hollerbach to provide mobile concrete pumping services for various contractors in the Washington, D.C.-Baltimore, Maryland metropolitan area. In January 1985, Hollerbach founded another company, Pumpall, Inc. (PI) to perform the same mobile concrete pumping services for unionized construction jobs in the same geographic area. In October 1985, PI also signed the Section 8(f) Union-Association agreements as an individual employer.

By their terms, the Union-Association contracts signed by HECO and PI were effective through March 31, 1987, <sup>[2]</sup> and from year to year thereafter unless appropriate notice of termination was tendered to the Association. In addition, the agreements provided that notice by any party would be deemed to be an individual notice of termination to all parties, including individual employer signatories. On December 8, 1986, the Union sent such a notice of termination to the Association. Accordingly, the 1983-1987 Union-Association contracts signed by HECO and PI expired on March 31, even though neither company received notice of the Union's intentions. Thereafter, in July or August, the Union and the Association executed successor Union-Association 8(f) agreements, which the parties agreed would be effective retroactively from April 1, 1987 to March 31, 1990.

In mid-May, the Union learned that HECO and/or PI might be awarded a cement pumping contract at the Bethlehem Steel shipyard in Baltimore for the fabrication of highway tunnel components. Union business agent Ron DeJuliis contacted Hollerbach to inquire about jobs at the shipyard. Hollerbach confirmed the Union's information and told DeJuliis that, pursuant to his subcontract with Parametrics, the general contractor at the shipyard, the job would have to be staffed with members of the Laborers' International Union (the "Laborers"). Thereafter, DeJuliis contacted the Laborers and worked out an agreement whereby Union members would be referred to the shipyard job through the Laborers hiring hall. While Hollerbach initially indicated that he approved of the Union-Laborers' agreement, he failed to attend a July 27 meeting with both unions to confirm the arrangements. Then, around the first of August, Hollerbach advised DeJuliis that such an arrangement could not be effected and that he had decided to form a new company, Pumpall Industrial Operations, Inc. (PIO), to perform work at the shipyard. PIO signed a Section 8(f) collective-bargaining agreement with the Laborers on July 30, to be effective until the end of the shipyard project and to be limited to work performed at the shipyard. Hollerbach thereafter offered jobs at PIO to 2 HECO employees, who accepted the positions and became members of the Laborers at Hollerbach's direction.

After October 1985, when PI began complying with the benefit fund contribution and reporting requirements of the Union-

Association contracts, the Union made no effort to enforce the Union-Association contracts with HECO. Thus, the Union assumed that HECO had either become defunct or was performing a business function unrelated to unit work. Moreover, the Union claims that it was unaware until sometime in the spring or summer of 1987 that HECO continued to perform pumping work on a nonunionized basis. During the same period, the Union realized that Hollerbach had not signed the new Union-Association agreements for either HECO or PI, and contacted him to arrange a meeting. The Union met with Hollerbach on August 19 and September 23, and Hollerbach signed the successor 1987-1990 Union-Association contracts on behalf of PI. However, Hollerbach refused to sign the agreements on HECO's behalf, asserting that HECO was a non-Union company.

Although HECO, PI, and PIO are separately incorporated, numerous other factors suggest that the companies are not wholly separate. Thus, Hollerbach holds the controlling interest in all three companies and is the president of all three. The minority share in each of the companies is owned by Dennis Andrews, who is the only other corporate officer in the three companies. Hollerbach personally has, and exercises, ultimate control over all management, supervision and labor relations matters for the three companies. Hollerbach negotiated and signed all of the collective-bargaining agreements herein on behalf of HECO, PI and PIO. Moreover, Hollerbach set the same discipline and discharge policies for all three companies, and makes hiring, firing and disciplinary decisions for HECO and PI. Further, Hollerbach has admitted that he also has or will, when necessary, make such decisions for PIO. And, while HECO and PI employees are generally supervised on a daily basis by Michael Beagan, and PIO employees by Andrews, Hollerbach also handles employee complaints and other daily labor relations matters for the three companies. Additionally, Hollerbach personally approves the leave or vacation requests and medical, dental and life insurance policies are the same for all three companies. Premiums for this coverage apparently are all paid by HECO.

HECO, PI and PIO also share many common business and operational characteristics. All three companies are in the concrete pumping business, and while Hollerbach claims that PIO's work is less skilled, it appears that the PIO employees' job functions do not vary substantially from the other companies. HECO holds the lease on the facility in Jessup, Maryland which is used by all three companies, but only HECO's name is displayed on the building. The three companies share the same telephone number, which is answered "Hollerbach & Andrews," [3] Although separate bookkeeping, accounting, payroll and other records are kept for each of the three companies, these records are kept by the same office staff at the Jessup facility. There is no evidence as to how the costs of these services or the rent on the facility are apportioned among the companies. HECO owns the pumps used by the three companies, and apparently leases them on an hourly basis to PI and PIO. However, the only evidence of such payments indicates that HECO is reimbursed by PI for the use of the pumps on a lump sum basis, which payments the Region has concluded do not correspond to the amounts listed on HECO's invoices. HECO further appears to maintain the pumps without additional charge to PI or PIO. While Hollerbach claims that a maintenance charge is included in the pump rental fees, there is no evidence to support this claim. Also, employees of all three companies are provided with identical uniforms bearing the "Hollerbach & Andrews" name.

In addition to the common working conditions, management, facilities, skills and equipment, there is substantial interchange between the HECO and PI employees. Thus, Hollerbach assigns PI employees to HECO when Union business is slack, and pays them non-Union wages through HECO. At other times, HECO employees have been dispatched on PI jobs, but have continued to receive their regular HECO wages. Hollerbach explained that HECO employees are sent out on PI jobs as "trainees," an apparent employment category not covered by the Union-Association contracts, to work side-by-side with PI employees or, if there is excess PI work, with other operators from the Union hiring hall. Hollerbach explained that such HECO "trainees" are sent with the non-PI operators to ensure that the HECO pumps are properly operated and maintained. There is some evidence, however, that PI employees have been sent on HECO jobs even though PI work was available and assigned to HECO "trainees." In addition, the PIO employees, who, as noted above, previously worked at HECO, continue to do so when Parametrics does not require PIO's services at the shipyard. They are not dispatched on PI jobs during slack time at PIO. At all times relevant to the instant case, HECO has employed 15 to 20 employees, and PIO has employed the two former HECO employees. Prior to March 31, PI employed between 3 and 7 employees, however, by the summer of 1987, there was only one employee on PI's payroll.

The Union filed the instant charge on September 14, alleging that HECO, PI, and PIO comprise a single employer that has violated Section 8(a)(1),(2) and (5) of the Act by failing to apply the collective-bargaining agreements with the Union to the employees of all three entities and by signing a collective-bargaining agreement with the Laborers.

ACTION

We conclude that a Section 8(a)(5) complaint should issue, absent settlement, alleging that HECO, PI and PIO are a single employer whose employees comprise two separate bargaining units, a HECO and PI unit and a PIO unit, and that the single employer has violated the Act by failing to apply the original and successor Union-Association contracts to the HECO-PI unit within the 10(b) period. The Section 8(a)(2) allegations of the instant charge should be dismissed, absent withdrawal, since the single employer was free to enter into the collective-bargaining agreement with the Laborers covering the separate PIO unit.

## 1. Single Employer Status

In determining whether ostensibly separate entities in fact comprise a single employer, the Board and courts consider whether the entities share the following factors: (1) common ownership; (2) common management; (3) centralized control of labor relations and; (4) interrelation of operations. [4] While no single factor is controlling, [5] the Board stresses the latter three factors, and places particular emphasis upon centralized control of labor relations. [6] In general, single employer status will be based upon the determination that in all the circumstances the relationship among the nominally separate entities lacks "the arm's length relationship found among unintegrated companies." [7]

Applying these principles to the instant case, we conclude that the evidence is sufficient to establish that HECO, PI and PIO constitute a single employer. The first two indicia of single employer status, common ownership and common management, clearly are present. Hollerbach and Andrews are the sole owners and officers of the three companies and together manage the operations and business affairs of all three. In this regard, Hollerbach negotiated and Andrews signed the Parametrics subcontract on behalf of PIO. The third single employer factor, common control of labor relations, also is present. Thus, even though the HECO and PI employees are supervised by Beagan and the PIO employees by Andrews, Hollerbach's role in the labor relations of all three companies is substantial. [8] Hollerbach personally negotiated and signed all of the Union-Association contracts on behalf of HECO and PI, as well as the agreement between the Laborers and PIO; [9] has set the same discharge, discipline and vacation/leave policies for all three companies. [10] Moreover, Hollerbach has hired, fired and/or disciplined HECO and PI employees and granted their leave and vacation requests pursuant to these policies, and has or will exercise the same authority vis-a-vis the PIO employees when necessary. [11] In addition, employees of all three companies are covered by the same medical, dental, and life insurance policies. [12]

We also believe there is evidence that HECO, PI and PIO's operations are sufficiently interrelated to satisfy the fourth single employer factor. While all three share office space, clerical staff and a single telephone number at the Jessup facility, only HECO's name is listed on the building, and the common telephone number is answered "Hollerbach & Andrews." In addition, employees of each company are furnished with uniforms bearing the "Hollerbach & Andrews" name. There is no evidence of any contractual arrangement or lease agreements for the provision of these services. Nor is there evidence that any of the entities reimburse the others or Hollerbach & Andrews for their costs. And, while the three companies use equipment that is owned and maintained by HECO, there is no evidence to substantiate Hollerbach's claims that PI and PIO lease their equipment from HECO and that a maintenance fee is included in the rental charge. Thus, there is no evidence of a lease or other agreement for the equipment or maintenance services. Hollerbach did provide invoices from HECO to PI for equipment rentals and copies of checks representing PI's monthly payments on those invoices, but the payments do not correspond to the amounts invoiced. In our view, the instant facts satisfy the fourth single employer criterion, and amply demonstrate the absence of an arm's length relationship among the three companies. We also note that there is additional evidence indicating an even higher degree of operational integration between HECO and PI. Thus, HECO and PI employees are dispatched interchangeably to HECO or PI jobs. Indeed, HECO employees have been sent out on PI jobs at the same time available PI employees have been sent out on HECO jobs. Moreover, HECO employees are paid by HECO at HECO's non-Union rates even when they work on PI jobs, and PI employees are paid by HECO at HECO rates when they work on HECO jobs. PIO employees are assigned to HECO jobs, and apparently are paid by HECO, during slack periods on the Parametrics job, but are not assigned to PI jobs, and no PI or HECO employees work at the shipyard. In addition, Beagan prepares production schedules for PI and HECO, whereas Parametrics contacts the PIO employees directly regarding their work schedules. HECO and PI also use HECO's pumps interchangeably, while the PIO employees use two pumps that are located at the shipyard for the duration of the Parametrics project.

Based upon all of these factors, we conclude that HECO, PI and PIO are a single employer.

## 2. Single Appropriate Bargaining Unit

The foregoing conclusion that the three companies are a single employer is not dispositive of the question whether the failure to apply any or all of the Union-Association contracts to the HECO, PI or PIO employees within the 10(b) period violated Section 8(a)(5) of the Act. Thus, in a single employer context, the collective-bargaining obligations of one coemployer are binding on nonsignatory members of the employing enterprise only to the extent the employees of the signatory and nonsignatory entities comprise a single appropriate bargaining unit.[13] In making this determination, the Board is primarily concerned with the degree of common interests among the employees,[14] based upon the following criteria: (1) the bargaining history; (2) the functional integration of operations among the companies; (3) the extent of centralization of management and supervision, especially with regard to labor relations, hiring, discipline and day-to-day operations; and (4) the degree of interchange and contact among the groups of employees.[15]

In the instant case, we conclude that the HECO and PI employees constitute an appropriate bargaining unit based upon all of the evidence relied upon to establish single employer status, but that the PIO employees' working conditions are sufficiently different to make their inclusion in the HECO-PI unit inappropriate. Thus, with the exception of their separate bargaining histories,[16] the HECO and PI employees share all of the single unit criteria set forth above. They work interchangeably for the two companies, under common supervision, work rules, personnel policies and management. In addition, they use the same equipment, and are often dispatched on the same jobs. By contrast, although Hollerbach's role in the management and labor relations of the three companies is sufficient for single employer purposes, the PIO employees' day-to-day working conditions differ from those at HECO and PI. Thus, the PIO employees work at a separate, discrete location from the PI and HECO employees and under different day-to-day supervision. Moreover, in contrast to the complete interchange among the PI and HECO employees, which interchange is determined by either Beagan or Hollerbach, PIO employees work with HECO employees only when Parametrics does not schedule pumping work at the shipyard. In these circumstances, and considering the agreement between Hollerbach and the Laborers that the Laborers-PIO contract would be site and project specific, we conclude that the PIO employees appropriately constitute a bargaining unit separate from the HECO-PI unit.

### 3. Section 8(a)(5) Liability

Having concluded that the HECO and PI employees comprise one bargaining unit and the PIO employees another, we also conclude that the single employer did not violate Section 8(a)(5) by failing to apply any of HECO or PI's Union-Association contracts to the PIO employees.[17] Accordingly, this allegation of the instant charge should be dismissed, absent withdrawal.

However, because the HECO and PI employees constitute a single appropriate unit, we conclude that the single employer violated Section 8(a)(5) by failing, within the 10(b) period, [18] to apply the 1983-1987 and the retroactive 1987-1990 Union-Association contracts to the HECO and PI employees.[19] Thus, the single employer was obliged to apply the initial HECO and PI Union-Association agreements to all employees in the HECO-PI unit whether they worked on HECO or PI jobs from March 14 until March 31, 1987, when the 1983-1987 contracts expired by their terms. [20] Further, the single employer is bound by the successor 1987-1990 Union-Association agreements signed by Hollerbach for PI.[21] Thus, even though, under *John Deklewa & Sons*, 282 NLRB No. 184 (1987), a Section 8(f) employer's Section 8(a)(5) obligations end with the expiration of the prehire agreement, by signing the 1987-1990 Union-Association contract, PI entered into a new 8(f) agreement with the Union, which it agreed would be retroactive to April 1, 1987. Inasmuch as the single employer is obliged to apply this agreement to all employees in the HECO-PI unit under Peter Kiewit, *supra*, and since the single employer agreed, through PI, that the agreement would be retroactive to April 1, the agreement is enforceable against the single employer for that entire duration under Deklewa. Accordingly, we conclude that the single employer continued to violate Section 8(a)(5) after March 31 by failing to apply the terms of the 1987-1990 agreement to the HECO-PI unit.[22]

### 4. The Section 8(a)(2) Allegations

We further conclude that the instant Section 8(a)(2) allegation that the single employer violated the Act by signing the agreement with the Laborers in July 1987 should be dismissed, absent withdrawal. Thus, the PIO-Laborers contract was signed after the 1983-1987 Union-Association contracts expired and before PI reestablished its 8(f) relationship with the Union, a time when the single employer was free to enter into an agreement with any union, including the Laborers. Accordingly, PIO's agreement with the Laborers did not violate Section 8(a)(2) of the Act. Nor does PIO's recognition of the Laborers affect the lawfulness of the single employer's subsequent execution of the 1987-1990 Union-Association contracts, since the single employer extended Section 8(f) recognition to the two unions in different bargaining units. Moreover, Hollerbach and the

Laborers voluntarily agreed to limit their bargaining to PIO employees working on the Parametrics subcontract at the shipyard, and the Board is reluctant to disrupt voluntary agreements as to the scope of bargaining units.[23]

## 5. Conclusion

Based upon all of the foregoing, a Section 8(a)(1) and (5) complaint should issue, absent settlement, alleging that HECO, PI, and PIO are a single employer, that the employees of HECO and PI comprise an appropriate bargaining unit, and that the single employer accordingly violated the Act by failing within the 10(b) period to apply the 1983-1987 Union-Association contracts and the 1987-1990 successor agreements to all of the employees in the HECO-PI bargaining unit. The allegations that the single employer violated Section 8(a)(5) by failing to apply the Union-Association contracts to the PIO employees and the Section 8(a)(2) allegation that it unlawfully extended Section 8(f) recognition to the Laborers should be dismissed, absent withdrawal, because the PIO employees are not appropriately part of the single employer unit. We rely upon the Region's apparent conclusion that all three companies are engaged in the construction industry, notwithstanding Hollerbach's claim that PIO operates outside the construction industry. Cf. *Forest City/ Dillion-Tecon Pacific*, 209 NLRB 867 (1974). In light of the foregoing conclusions that none of the Union-Association contracts apply to the separate PIO bargaining unit, the case need not be resubmitted should the Region reconsider PIO's status and conclude that it is not in the construction industry. In that event, the Region may, however, resubmit the case for consideration of the lawfulness of the PIO-Laborers agreement/recognition.

H.J.D.

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[1] Thus, HECO signed Section 8(f) agreements between the Union and the Maryland Heavy Contractors Association, Inc. (the "Association") covering "highway" and "building" work. HECO signed the Union-Association contracts as an individual employer and has never been an Association member.

[2] All dates hereafter are in 1987 unless otherwise indicated.

[3] "Hollerbach & Andrews" appears to be a separately incorporated business that procures equipment and supplies for HECO, PI and PIO as well as other companies. It does not appear to have any employees.

[4] See, e.g., *Radio Union v. Broadcast Service of Mobile, Inc.*, 380 U.S. 255, 256 (1965); *Emsing's Supermarket, Inc.*, 284 NLRB No. 41, slip op. at 3 (1987).

[5] See, e.g., *Central Mack Sales*, 273 NLRB 1268, 1271-1272 (1984); *Air-Vac Industries, Inc.*, 259 NLRB 336 (1981); *Blumenfeld Theatres*, 240 NLRB 206 (1979), *enfd.* 626 F.2d 865 (9th Cir. 1980).

[6] See, e.g., *Geo. V. Hamilton Inc.*, 289 NLRB No. 165, slip op. at 7-8 (1988); *Fedco Freight Lines, Inc.*, 273 NLRB 399, n. 1 (1984).

[7] *Blumenfeld Theatres*, 240 NLRB at 215; see also *Emsing's Supermarket, Inc.*, 284 NLRB No.41, slip op. at 3.

[8] Cf. *Neighborhood Roofing*, 276 NLRB 861, 867 (1985)(scope of single individual's role in hiring, firing, disciplinary and other matters of nominally separate entities supports single employer finding).

[9] See *Soule Glass Co. v. NLRB*, 652 F.2d 1055, 1075 (1st Cir. 1981).

[10] Cf. *Malcom Boring Co.*, 259 NLRB 597, 600 (1981); *Neighborhood Roofing*, 276 NLRB at 867.

[11] See, e.g., *Neighborhood Roofing*, *supra*.

[12] See, e.g., *Cardio Data Systems*, 264 NLRB 37 (1982); *Glover Bottled Gas Corp.*, 275 NLRB 658 (1985); *Royal*

Typewriter Co., 209 NLRB 1006 (1974).

[13] South Prairie Construction Co. v. Operating Engineers (Peter Kiewit Sons' Co.), 425 U.S. 800, 805 (1976).

[14] See, e.g., Land Equipment, Inc., 248 NLRB 685, 688 (1980).

[15] Peter Kiewit Sons' Co., 231 NLRB 76, 77 (1977); Neighborhood Roofing, 276 NLRB at 868.

[16] I.e., Hollerbach signed the initial Union-Association contracts on behalf of HECO and PI at separate times. Indeed, the Union was under the impression that HECO had ceased performing bargaining unit work at the time PI signed its initial agreement.

[17] South Prairie Construction Co. v. Operating Engineers (Peter Kiewit Sons' Co.), supra.

[18] The 10(b) period began on March 14, 1987, six months prior to the filing of the instant charge.

[19] South Prairie Construction Co. v. Operating Engineers (Peter Kiewit Sons' Co.), supra.

[20] As noted above, the automatic renewal provisions of the 1983-1987 Union-Association contracts were rendered inoperative when the Union sent appropriate notices of termination to the Association, the FMCS and the Maryland Department of Labor and Industry on December 8, 1986.

[21] See part 3 supra and South Prairie Construction Co. v. Operating Engineers (Peter Kiewit Sons' Co.), supra.

[22] This conclusion is unaffected by the Union's failure to enforce the 1983-1987 Union-Association contracts. Thus, consistent with Deklewa, supra, the single employer was bound by the contracts for their duration absent the employees' rejection of the Union in a Board election. Cf. Colson Equipment, Inc., 257 NLRB 78, 79 (1981)(union nonenforcement does not privilege employer abrogation of collective-bargaining agreements absent showing that union lost majority support or abandoned its responsibilities to such an extent that it "was neither willing nor able to represent employees at the time its status was called into question"). There is no evidence or contention herein that the Union was unwilling nor unable to represent the HECO employees. Nor is there any evidence that HECO employees ever sought or were denied assistance from the Union.

[23] See, e.g., A-1 Fire Protection, Inc., 250 NLRB 217, 220 (1980).