

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

**DEER CREEK ELECTRIC, INC. and
BLACK HILLS ELECTRIC, INC., alter
egos**

and

Case 19-CA-097260

**INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL 76,
AFL-CIO, CLC**

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

Ann Marie Skov, Counsel for General Counsel ("General Counsel") files these exceptions to the Decision of Administrative Law Judge ("ALJ") Mary Miller Cracraft (the "ALJD") [JD(SF)-18-14], issued on May 1, 2014, in the above-captioned case:

1. The ALJ's failure to find that Deer Creek Electric, Inc. ("Respondent DCE") and Black Hills Electric, Inc. ("Respondent BHE") (collectively, "Respondents") have substantially common ownership. (ALJD 9:15-39; 10:1-12).¹ In support of this exception, General Counsel relies upon the testimony of Rick Moloney ("Moloney") (18:25; 19:1-10, 17-22; 20:2; 21:58; 51:10-19; 52:6-8; 56: 12-22; 61:8-23; 62:5-7, 15-25; 63:1-5; 79:12-24; 80:11-13; 114:2-4; 135:2-9; 187:24-25; 188:1-2; 194:23; 196:1-8; 199:9-25; 200: 9-12, 16-19, 23-25; 201:6-8; 207:19-23; 232:2-3; 267:17-21); Sandra Moloney (118:11-19); Cheri Jackson (123:4-8, 12-25; 124:7-9; 294:14-15; 125:17-25; 126:1-12; 127:2-4; 129:9-11; 130:10-17, 24-25; 131); Clint Bryson ("175:15-24"); and the

documentary evidence contained in GC Exhs. 1, 15, 16, 17, 18, 20, 21, 22, 23, 24, 30, 31, 36, 40, 41, 47, 50, 58, 59.

2. The ALJ's failure to find a lack of arm's length transacting in the passing of assets from Respondent DCE to Respondent BHE supporting a finding of common ownership and shared equipment and vehicles. (ALJD 12: 10-29). In support of this exception, General Counsel relies upon the testimony of Moloney (51:10-19; 52:6-8; 56: 12-22; 79:12-24; 80:11-13; 114:2-4; 135:2-9; 267:17-21); Jackson (125:17-25; 126:1-12; 127:2-4; 129:9-11; 130:10-17, 24-25; 131); and documentary evidence contained in GC Exhs. 1, 16, 17, 18, 20, 21, 22, 30, 31, 40, 41, 47, 58.

3. The ALJ's failure to find that Moloney's financial guarantees on behalf of Respondent BHE supported a finding of common ownership. (ALJD 10: 5-12, 33-38). In support of this exception, General Counsel relies upon the testimony of Moloney (61:8-23; 62:5-7, 15-25; 63:1-5; 232:2-3) and documentary evidence contained in GC Exhs. 23, 24, 36.

4. The ALJ's failure to find common management and supervision. (ALJD 3:38-42; 11:1-23). In support of this exception, General Counsel relies upon the testimony of Moloney (21:9-14, 22-5; 22:1, 5-8; 23:18-25; 24:1-6, 8-10; 25:9, 13-15; 26:3-10; 29: 1-12; 114:11-12, 15-24; 115:1-17, 21-25; 193: 2-9; 198:4-6, 11-16; 199:12-17; 216:5-18; 258:11-20; 288:20-25; 289:1-4;); Cheri Jackson (123:15-25; 295:4-7); Wes Hillman (319:3-11); and documentary evidence contained in GC Exhs. 1, 30, 32, 47, 48, 56, 57, 59, 60, 65.

¹ References to the Decision appear as (ALJD __:__). References to the transcript appear as (--:--). The first number refers to the pages; the second to the lines. References to General Counsel Exhibits appear as (GC Exh. --). References to Respondent Exhibits appear as (R Exh. --).

5. The ALJ's finding that Jackson demonstrated that she was a manager by hiring Moloney, Wes Hillman, Jesse Birdsall, and Paul Roulet. (ALJD 5:29-30). Moloney, Hillman, and Birdsall were all employees and/or subcontractors with Respondent DCE so they were not new hires to disguised continuance Respondent BHE. As for Roulet, he worked for Respondent BHE for a total of 18 hours. In support of this exception, General Counsel relies upon the testimony of Moloney (225:23-25; 226:1-13); Cheri Jackson (295:4-7) and documentary evidence contained in GC Exhs. 12, 13, 47, 48, 59, 65.

6. The ALJ's failure to find that Moloney was a manager for Respondent BHE. (ALJD 11:14-15). In support of this exception, General Counsel relies upon the testimony of Moloney (21:9-14, 22-5; 22:1, 5-8; 23:18-25; 24:1-6, 8-10; 25:9, 13-15; 26:3-10; 29: 1-12; 114:11-12, 15-24; 115:1-17, 21-25; 193: 2-9; 198:4-6, 11-16; 199:12-17; 216:5-18; 258:11-20; 288:20-25; 289:1-4;); Cheri Jackson (123:15-25; 295:4-7); documentary evidence contained in GC Exhs. 1, 30, 32, 47, 48, 56, 57, 59, 60, 65, and the ALJD (5:39-47; 6:1-10).

7. The ALJ's failure to find that Respondents had common employees. Moloney, Hillman, and Birdsall were all employees and/or subcontractors with Respondent DCE so they were not new hires to disguised continuance Respondent BHE. As for Roulet, he worked for Respondent BHE for a total of 18 hours. In support of this exception, General Counsel relies upon the testimony of Moloney (225:23-25; 226:1-13); Cheri Jackson (295:4-7) and documentary evidence contained in GC Exhs. 1, 12, 13, 47, 48, 59, 65.

8. The ALJ's finding that Respondent BHE's sales to customers in common with Respondent DCE was around \$365,000 out of \$1,235,000 in total sales when the record evidence showed that Respondent BHE sales to customers in common with Respondent DCE was close to \$730,000 out of \$1,235,000. (ALJD 6:26-38). In support of this exception, General Counsel relies upon the documentary evidence contained in GC Exhs. 61, 62, 63, 64, 66 and R. Exhs. 5, 6.

9. The ALJ's failure to find a substantial number of customers in common. (ALJD 12:31-38). In support of this exception, General Counsel relies upon the testimony of Moloney (109:1-9; 110:6-19; 111:1-21; 230:6-15); Cheri Jackson (136:16-25); and documentary evidence contained in GC Exhs. 36, 43, 61, 62, 63, 64, 66; and R. Exhs. 2, 3, 5, 6.

10. The ALJ's failure to find substantially identical equipment. (ALJD 12:8-30). In support of this exception, General Counsel relies upon the testimony of Moloney (51:10-19; 52:6-8; 56: 12-22; 79:12-24; 80:11-13; 114:2-4; 135:2-9; 267:17-21); Cheri Jackson (125:17-25; 126:1-12; 127:2-4; 129:9-11; 130:10-17, 24-25; 131); and documentary evidence contained in GC Exhs. 1, 16, 17, 18, 20, 21, 22, 30, 31, 40, 41, 47, 58 and R. Exhs. 7, 8, 9.

11. The ALJ's finding that equipment that was purchased more than six months after Respondent BHE began operations and after the filing of the instant unfair labor practice charge supported the finding that Respondents did not have shared equipment. (ALJD 7:5-13; 12:8-30). In support of this exception, General Counsel relies upon the testimony of Jackson (291:15-25; 292: 1-18) and documentary evidence contained in GC Exh. 1 and R. Exhs. 7, 8, 9.

12. The ALJ's failure to find that Respondents used common services. In support of this exception, General Counsel relies upon the testimony of Moloney (70:9-14; 71:9-21; 72:1-9); Cheri Jackson (140:1-13; 141:8-13) and documentary evidence contained in GC Exhs. 1, 27, 28, 45, 46.

13. The ALJ's failure to find that Respondent BHE was created for the purpose of evading the responsibilities under the Act. (ALJD 10: 14-26, 40-45). In support of this exception, General Counsel relies upon the testimony of Moloney (38: 16-25; 39:1-2, 17-25; 40:1-2, 11-17); Dennis Callies (163:16-25; 164:1-11); and documentary evidence contained in GC Exhs. 4-6.

14. The ALJ's failure to find that only after the instant unfair labor practice charge was filed, did Respondent BHE clean up its vehicle titles to show they were purchased and not gifted, bring Hillman on to work full-time, and buy equipment and vehicles from third parties. In support of this exception, General Counsel relies upon the testimony of Moloney (51:10-19; 52:6-8; 56: 12-22; 79:12-24; 80:11-13; 114:2-4; 135:2-9; 267:17-21); Jackson (125:17-25; 126:1-12; 127:2-4; 129:9-11; 130:10-17, 24-25; 131; 291:15-25; 292: 1-18); and documentary evidence contained in GC Exhs. 1, 16, 17, 18, 20, 21, 22, 30, 31, 40, 41, 47, 58, 60 and R. Exhs. 7, 8, 9.

15. The ALJ's failure to find that Respondent DCE and Respondent BHE are alter egos and that Respondents violated §§ 8(a)(5) and (1) of the Act by failing to apply the terms of the July 1, 2012-August 31, 2015 IBEW/NECA Area Agreement ("Area Agreement") to the bargaining unit employees of Respondent BHE. (ALJD 12:40-45; 13:1-20).

16. The ALJ's failure to order that Respondents recognize and bargain with the Union; apply and/or continue in effect, all the terms and conditions for the bargaining unit set forth in the collective bargaining agreement; make bargaining unit employees whole for wages and benefits owed pursuant to the terms of the collective bargaining agreement, reimburse bargaining unit employees for amounts equal to the difference in taxes owed upon receipt of a lump-sum payment and taxes owed had there been no failure to apply the terms of the collective bargaining agreement, and submit the appropriate documentation to the Social Security Administration so that when backpay is paid, it will be allocated to the appropriate periods. (ALJD 12:40-45; 13:1-20).

17. The ALJ's findings and conclusions that the allegations set forth in paragraphs 3, 10, 11, and 12 of the Complaint should be dismissed. (ALJD 12: 39-44; 13: 1-2, 15-20).

Signed at Seattle, Washington on June 19, 2014.



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