

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19**

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

Respondents.

and

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

Charging Party.

Case 19-CA-097260

**RESPONDENTS' BRIEF IN SUPPORT OF ITS LIMITED CROSS-EXCEPTIONS
TO THE ADMINISTRATIVE LAW JUDGE'S DECISION**

Dated July 3, 2014

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Deer Creek Electric, Inc. (“Deer Creek”) and Black Hills Electric, Inc. (“Black Hills”), (collectively referred to as “Respondents”) respectfully submit this Brief in Support of Its Limited Cross Exceptions to Administrative Law Judge Mary Miller Cracraft’s (“ALJ”) Decision of May 1, 2014.

I. INTRODUCTION

The only issue in this case is whether is Black Hills Electric is an alter ego of Deer Creek Electric. The Board has long held that the test for finding alter ego status is that the two entities must have “**substantially identical** management, business purposes, operations, equipment, customers, supervision, and ownership.” *Cadillac Asphalt Paving*, 349 NLRB 6, 8 (2007)(emphasis added). In the present case, Administrative Law Judge Mary Miller Cracraft correctly found that Deer Creek and Black Hills did NOT have substantially identical management, equipment, customers, supervision or ownership and correctly concluded that the two companies are not alter egos. ALJD 9:13-40, 10:1-9, 11:1-23, 12:8-29, 12:31-37, 12:40-44, 13:1-2.¹ The ALJ erred, however, in failing to find that the two entities also lacked substantially identical business purposes and operations. ALJD 11:25-48 – 12:2-6.

The determination of alter ego status is a question of fact based on all attendant circumstances. *U.S. Reinforcing, Inc.*, 350 NLRB 404, 404 (2007). General Counsel bears the burden of establishing that status. *Id.* Here, the ALJ has done a thorough job in laying out the facts of the case. Respondents refer the Board to her decision for a summary of the facts. ALJD p. 2-8. Additional details with references to the evidence will be provided within the specific argument sections where relevant.

¹ References to the ALJ’s Decision are indicated as “ALJD ____.” References to the hearing transcript are cited as “Tr. ”, indicating page and line numbers. References to Exhibits are cited as “GC Ex. ” or “Resp. Ex. ”, indicating General Counsel or Respondent.

As will be shown, the ALJ's factual findings support Respondents' limited cross-exceptions. The ALJ correctly found that the two entities operated out of different locations, using different phone number. ALJ 3:35-38; 5:34-36; 12:11. She correctly found that Deer Creek's business purpose was commercial electrical work, primarily public works projects. It was certified as a service-disabled, veteran-owned company which allowed it to perform work projects set aside for disabled veterans. ALJD 3: 27-33. Black Hills, on the other hand, cannot perform disabled veteran set aside work. ALJD 6:9-11. Moreover, Black Hills business purpose focused on design build, data networking and residential electrical work. ALJD 5:24-26. This work is distinctly different from Deer Creek's. Despite her correct factual findings, the ALJ erred in concluding that Deer Creek and Black Hills did not lack substantially identical business purpose and operations.

II. ARGUMENT

A. The ALJ erred in not finding a lack of substantially identical business purpose.

There were a number of substantial differences in business purpose. The factual finding of the ALJ and the overall record support this conclusion. Deer Creek qualified as a disabled veteran-owned company bidding on disabled veteran set aside projects. ALJD 3:27-28. Black Hills was not qualified to perform this work because Jackson was not a disabled veteran. ALJD 6:10-11. A much higher percentage of DCE's work was public works projects. ALJD 3:28-30. Tr. 191: 7-17. Black Hills focused on residential service work, low voltage cabling, data networking and general contracting. ALJD 5:24-26. Deer Creek did no data networking jobs and very few residential jobs. ALJD 3:30-32; Tr. 191:12-14. Deer Creek primarily focused its operations on prevailing wage work and some private commercial work. ALJD 4:1-3. It also operated as a disabled veteran-owned company bidding on disabled veteran set-aside projects.

ALJD 3:27-28. Black Hills is not veteran-owned and cannot bid on set-asides for veteran subcontractors. ALJD 6:10-11. Forty-five percent of Deer Creek's projects were public works projects. Only 21% of Black Hills' projects have been public works. Resp. Ex. 10. Black Hills does design and build private work. It has performed \$400,000 to \$450,000 in design build projects since its inception. Tr. 14-24. Deer Creek did not self-perform any design and build projects. ALJD 3:30-32. Black Hills is focused on residential service work, low voltage cabling, data networking and some general contracting. ALJD 6:13-14, Tr. 296:10-12. Black Hills has performed over \$300,000 in data networking jobs for customers. Tr. 225:3-4. Deer Creek did not self-perform any data networking jobs. ALJD 3:30-32. Black Hills has performed nearly eight times more residential jobs than Deer Creek. In its final two years of operation, Deer Creek had four residential jobs. In its first 15 months of operation, Black Hills had 31 residential jobs. Tr. 193:24-25, 194:1-2, 213:19-25.

The Board has long held that companies that have significant differences in business operations are not alter egos. See, *Friederich Truck Services*, 259 NLRB 1294 (1982), where the Board found that differences in business purposes was a significant factor in finding the lack of an alter-ego relationship. See, also, *Victor Valley Heating*, 267 NLRB 1292 (1983), where the Board found no interrelationship of business where one business focused on installations in residential and commercial areas, while the prior company focused on industrial installations. In *Victor Valley*, the two companies were owned by different members of the same family and the second company was formed in order to profit from residential construction jobs the first company had abandoned. In *United Brotherhood of Carpenters and Joiners of America*, 312 NLRB 903 (1993), the Board found that no alter ego relationship existed between two companies that were owned by the same family, relying on the fact they served basically

different customer markets. In *Marino Electric, Inc.*, 285 NLRB 344 (1987), no alter ego was found where there was no similar business purpose between two electric contracting companies. One company was created to operate in the competitive market where price is the primary consideration. The other was formed to “enter the design/build, negotiated bid, high quality, new construction market where price is a secondary consideration.” *Id.* at 354. “Based on the different business purpose of the firms ([one] as a design/build contractor, and [the other] as a competitive bid contractor),” the ALJ found the different business purposes indicated a finding of separate companies. The ALJ also considered the local *versus* national market in considering the different business purpose. The Board affirmed, but without relying on the national/local market portion of the ALJ’s analysis.

In the instant situation, Black Hills chose to pursue specific areas that Deer Creek was not operating in, namely residential construction, data networking and design-build. Thus, the business purposes of the two companies are substantially different. The ALJ’s factual findings show that Deer Creek operated in the public works, prevailing wage, and disabled veterans projects, while Black Hills was formed to enter the design/build, data networking and residential markets. Based on these factual findings and supported by the record, the ALJ erred in finding the business purpose of the two entities to be substantially identical. They are not. Respondent respectfully requests that this limited exception be granted and it be found that there was no substantially identical business purpose.

B. The ALJ erred in not finding a lack of substantially identical operations.

Deer Creek also had different operations. Deer Creek operated its business out of Moloney's home. ALJD 3:35. Deer Creek utilized a nearby shop and storage container to perform its operations. ALJD 3:36-38. Black Hills operates out of a business park at a different location and does not utilize the Deer Creek location and facilities. ALJD 5:34-35; Resp. Ex. 1.

The companies utilize different phone numbers. ALJD 12:11. Only one former Deer Creek employee works for Black Hills. The other three hourly workers are new employees.

ALJD 6:21-23. Black Hills has performed 161 jobs, of which only 29 were public works jobs. Resp. Ex. 2. During its last two years of operation, Deer Creek had 118 jobs, 63 of which were public works projects. Black Hills has done a substantial amount of data networking and design and build work. Deer Creek did none of that work. Black Hills has performed nearly eight times more residential jobs than Deer Creek. At Deer Creek, Moloney did all estimating; at Black Hills, Moloney and Hillman both perform estimating. Tr. 21:13-14, 216: 9-12, 217: 2-3. The operations of Deer Creek and Black Hills are not substantially identical. Respondent respectfully requests that this limited exception be granted and it be found that there were no substantially identical operations.

III. CONCLUSION

For all of the above-stated reasons, Respondents respectfully request that the ALJ's decision be corrected to reflect Respondents' Cross-Exceptions, and that the Unfair Labor Practice charge dismissed.

DATED at Seattle, Washington this 3rd day of July, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of July, 2014 I caused to be filed with the Executive Secretary of the National Labor Relations Board via the NLRB E-Filing system the above and foregoing “*Respondents’ Brief in Support of Its Limited Cross-Exceptions to the ALJ’s Decision.*”

E-FILE:

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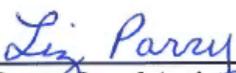
I further certify that on July 3, 2014, true and correct copies of the same were served via electronic mail upon the following individuals at the email address specified for them as shown below:

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