

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

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

and

19-CA-097260

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

**GENERAL COUNSEL'S REPLY TO RESPONDENTS' OPPOSITION
TO GENERAL COUNSEL'S BRIEF IN SUPPORT OF EXCEPTIONS
TO THE ADMINISTRATIVE LAW JUDGE'S DECISION**

Counsel for General Counsel ("General Counsel"), pursuant to Section 102.46(h), respectfully submits this Reply to Respondents' Opposition to Counsel for the General Counsel's Brief in support of Exceptions to the Administrative Law Judge's Decision ("Opposition Brief").

I. INTRODUCTION

The General Counsel's Exceptions in the instant matter seek to have the National Labor Relations Board ("Board") find that Deer Creek Electric, Inc. ("Respondent DCE") and Black Hills Electric, Inc. ("Respondent BHE") (collectively, "Respondents"), violated the Act by failing to continue in effect the terms and conditions of employment set forth in the collective bargaining agreement between Respondent DCE and IBEW Local 76 ("Union").

Most of the underlying facts and positions set forth in Respondents' Opposition Brief have been fully addressed in previous filings with the Board.¹ The General Counsel files this Reply Brief, however, to respond to the few arguments raised in Respondents' Opposition Brief not previously raised.

II. ARGUMENT

The overwhelming evidence establishes that Respondents are alter egos; they have "substantially identical" ownership, are supervised and managed almost entirely by Rick Moloney ("Moloney"), have the same nature of operations and business purpose operating as licensed general electrical contractors performing mostly commercial work, have many common customers, and have almost identical equipment and vehicles that Respondent BHE purchased from Respondent DCE via an ostensibly delayed payment schedule triggered only by the filing of the instant unfair labor practice. Moreover, the record evidence reveals that Respondent BHE was created to avoid Respondent DCE's union obligations shortly after the Union informed Respondent DCE that it was bound to its successor agreement.

In reviewing this matter, special attention should be paid to Moloney's domination of Respondent BHE and the sequence of events that transpired after the filing of the underlying unfair labor practice charge. The instant charge was filed on January 25, 2013 and served around January 29, 2013 and complaint issued on May 29, 2013. (GC

¹ This Brief does not address the underlying facts in this case at length because the relevant facts have been described in General Counsel's previously filed Brief In Support of Exceptions to the Administrative Law Judge's Decision. Moreover, the General Counsel's Answering Brief to Respondents' Limited Cross Exceptions to the Administrative Law Judge's Decision will cover the facts and arguments raised in Respondents' limited cross exceptions.

Exh. 1(a), 1(b), and 1(c)).² From the moment the unfair labor practice charge was filed going forward, Respondents made strategic decisions so as to appear as two separate entities. Specifically, on February 7, 2013, Respondent BHE's vehicle titles were scrubbed to remove references to being gifted; the first payment for vehicles and equipment to Respondent DCE from Respondent BHE was purportedly dated October 19, 2012 yet cashed on the very same date the vehicle titles were cleansed; and additional vehicles were purchased in April 2013 and December 2013 as well as additional tools purchased in June 2013, all from independent parties. (125:17-25; 126:1-12; 127:2-4; 129:9-11; 130:10-17, 24-25; 131) (GC Exhs. 41, 47, 58) (R. Exhs. 7-9). Manager Wes Hillman finally began working full-time for Respondent BHE during the last week of July 2013, having only worked 21 hours before then. (GC Exh. 60). Indeed, here, as in most matters, it is the cover-up that helps reveal the alter ego violation.

A. Rick Moloney Exercised Significant Control over Respondents' Operations

Rick Moloney ("Moloney") is the common denominator in running both Respondent DCE and Respondent BHE. The Board routinely finds alter ego status when an owner of the first entity dominates and/or controls the second entity while holding no ownership interest in it. *El Vocero de Puerto Rico, Inc.*, 357 NLRB No. 133, slip op. at 1 n.3 (2011); *ADF, Inc.*, 355 NLRB 81, 81 n.3 (2010), adopted in 355 NLRB 351 (2010); *Rogers Cleaning Contractors, Inc.*, 277 NLRB 482, 488 (1985).

² 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. --).

Respondent BHE started up without a hiatus after Respondent DCE went out of business. (200:23-25; 294:14-15). Respondent BHE's purported owner Cheri Jackson ("Jackson") works full-time for the State of Washington and has no experience running an electrical company. (ALJD 5:10-13, 20) (123:12-25; 199:12-24; 200:9-12). Moloney, Jackson's brother-in-law, is the face of Respondent BHE: he finds jobs to bid on, estimates the cost of jobs, puts together job bids, meets with customers, ensures that material is purchased at the correct price, inspects field work, and performs electrical work. (ALJD 5: 10-13, 39-42) (114:11-12; 123:4-8; 198:4-6, 11-16; 199:9-20). Jackson has never changed or disagreed with a bid Moloney has put together. (288:20-25; 289:1-4).

Additionally, Moloney carried over customers from Respondent DCE. These customers are not just any customers for Respondent BHE, but the customers resulting in close to \$730,000 out of \$1,235,000 in sales. (GC Exhs. 62, 66) (R. Exh. 5). Indeed, Moloney's biggest asset for Respondent BHE is the goodwill between Respondent DCE and its customers who have followed Moloney to Respondent BHE, including Respondent BHE's two most lucrative customers in terms of sales – Christiansen and North Thurston School District. (GC Exhs. 62, 66) (R. Exh. 5).

Further, it was Moloney's experience and reputation in the electrical contractor community that allowed Respondent BHE to begin operations on day one. (GC Exhs. 24, 36, 62, 66) (R. Exh. 5). It is Moloney, not Jackson, who holds the electrical administrator's license for Respondent BHE. (ALJD 5: 39, 45-47) (114:15-24; 115:1-

12). As a result of this arrangement, Moloney is personally cited by municipalities or the State of Washington for Respondent BHE failures ranging from working without an electrical permit, working without a license, failing to have an adequate number of journeymen working alongside apprentices, or failing to get an inspection. (115:13-17).

Moreover, Moloney bears financial risk as well by personally guaranteeing to electrical supplier CED that he is jointly responsible for the monthly payment of electrical supplies which allows Respondent BHE to purchase parts and supplies on credit. (62:5-7, 15-25; 63:1-5; 232:2-3) (GC Exh. 24). Moloney also jointly signed a performance guarantee with General Contractor Centennial thereby agreeing to pay for labor, material, and equipment on the project and warranting performance. (GC Exhs. 36, 43). This guarantee led to one of Respondent BHE's first jobs. (109:1-6; 110:6-19; 111:1-21; 230:6-15) (GC Exhs. 36, 43). Specifically, it is Moloney's significant personal and professional risk typically not undertaken by a manager on behalf of his employer. See, e.g., *McAllister Bros.*, 278 NLRB 601, 617 (1986) (principals of alter ego "enjoyed few of the benefits and bore few of the risks" of business relationship); *All-Kind Quilting*, 266 NLRB 1186, 1194 (1983) (old business that created alter ego "alone ha[d] assumed the risks and derived the benefits").

Moreover, even if such control did not exist, common ownership is also established by the close familial relationship between Respondents' owners. See *Walton Mirror Works*, 313 NLRB 1279, 1284 (1994) (common ownership established where the owners of the two companies alleged to be alter egos were brothers-in-law). Moloney, as the brother-in-law to Respondent BHE owner Jackson, is enough to

establish common ownership even without the dominating role that Moloney plays in the day-to-day operations of Respondent BHE. *Id.*

B. Focusing on the Timing of Events Does Not Equate to Arguing Against the ALJ's Credibility Findings

Respondents attempt to paint General Counsel's Exceptions as going to the Administrative Law Judge's ("ALJ") credibility findings. Such attempt fails: the sequence of events and supporting facts are not in dispute and do not involve making credibility determinations. Rather, the General Counsel seeks to have the Board review the sequence of events in relation to the filing of the instant unfair labor practice charge.

On February 7, 2013, just 9 days after the unfair labor practice was served, Respondent BHE re-filed the title for two vehicles to show that they were purchased rather than gifted as initially reflected. (125:17-25; 126:1-12; 127:2-4; 129:9-11; 130:10-17, 24-25; 131) (GC Exhs. 40 and 41). The application to re-register the titles explains that this was on advice of attorney. (GC Exhs. 40 and 41). In addition, the initial payment for equipment and vehicles was cashed on February 7, 2013. (267:17-21) (GC Exhs. 47, 58). See *e.g.*, *Sobeck Corp.*, 321 NLRB 259, 267 (1996) (transaction between old business and alter ego "for all practical purposes" was president of old business dealing with himself); *McAllister Bros.*, 278 NLRB 601, 601 n.2, 607, 617 (1986) (loan transaction by which old business allegedly sold equipment to alter ego was "paper shuffling device" that did not result in change of ownership), *enfd.*, 819 F.2d 439 (4th Cir. 1987).

Further, the other vehicles were purchased from independent parties in April and December 2013 and other equipment purchased in June of 2013, all after the unfair labor practice charge was filed and most after complaint had issued. (R. Exhs. 7-9).

Thus, the timeline alone dictates that limited weight should be given to acquisition of additional vehicles and equipment from independent parties. (R. Exhs. 7-9). In fact, the timing of events makes it clear that any purported arms length transaction/acquisition from third parties occurred in the context of an unfair labor practice investigation and/or hearing and should be given little if any weight to show arms' length transactions occurred.

C. A Majority of Respondent BHE's Jobs Were on Behalf of Common Customers

When looking at the common customer prong in the alter ego analysis, the number of jobs associated with each customer and the related sales must be reviewed. See *Johnstown Corp.*, 313 NLRB 170, 170-171 (1993). To ignore that information would present an entirely different picture of Respondent's operations. All customers are not created equal and the customers that provide numerous jobs and higher volume of sales should be accorded more weight in the alter ego analysis.

Respondents share 21 customers. (GC Exhs. 64, 66) (R Exhs. 5, 6). However, from October 1, 2012, to February 1, 2014, while Respondent BHE performed 161 jobs, 64 of those jobs were for customers in common with Respondent DCE. (GC Exh. 66) (R. Exhs. 5, 6). Moreover, the 64 jobs with common customers yielded the overwhelming percentage of income during this time – close to \$730,000 out of a total of \$1,235,000 in sales.³ (GC Exhs. 62, 66) (R. Exh. 5). These customers are integral to

³ Respondent points out that the General Counsel references several exhibits to establish the correct figure of sales. Unfortunately, it is necessary to review multiple exhibits to get an accurate view of the number of jobs and the sales associated with those jobs. Respondent Exhibit 5 lays out the sales by customers without actually listing the dollar amount of sales. (R. Exh. 5). Thus, it is necessary to look at General Counsel Exhibit 62 to see Respondent BHE invoices issued to customers in chronological order. (GC Exh. 62). A review of General Counsel Exhibit 66 lists the customers in common and indicates the number of jobs performed for each customer. (GC Exh. 66).

Respondent BHE's bottom line and a direct result of Moloney's operational influence and transferred goodwill.

D. Respondent BHE Was Created to Avoid Respondent DCE's Bargaining Obligation

Respondent DCE gave notice that it was closing within 20 days of being informed that it was now covered by an Area Agreement through 2015. (46:18-25; 47: 13-25; 48:3-15; 163:9-15) (GC Exhs. 14, 15, 53). Without hiatus, Respondent BHE sprung to life at the exact time Respondent DCE closed. This shows that Respondent DCE's knee jerk response to improving its financial position was to rid itself of the Union.

However, Respondent DCE also discovered that continuing to operate non-union was not enough, as that would result in crippling pension withdrawal liability. (GC Exhs. 4-6). Moloney knew the only way for him to remove the yoke altogether was to go out of business and create a new non-union company. (GC Exhs. 4-6). Moloney had informed Union Business Manager Dennis Callies on several occasions the year before Respondent DCE closed that the Union was "not a good fit." (ALJD 32-36) (163:16-25; 164:1-11). Moloney, however, never informed the Union of financial problems in the year before DCE closed. (163:16-25; 164:1-11).

III. CONCLUSION

General Counsel respectfully submits that the evidence in the record and relevant case law establish that Respondents are alter egos that violated §§ 8(a)(1) and (5) of the Act as alleged in the Complaint and argued in its Brief In Support of Exceptions to the Administrative Law Judge's Decision. As such, General Counsel requests that the Board amend the ALJ's Decision and Order consistent with General Counsel's Exceptions.

DATED at Seattle, Washington, this 11th day of July, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of General Counsel's Reply to Respondents' Opposition to General Counsel's Brief in Support of Exceptions to the Administrative Law Judge's Decision was served on the 11th day of July, 2014, on the following parties:

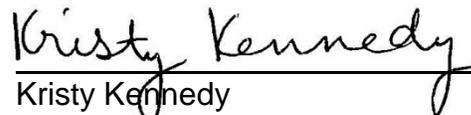
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