

**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 ANSWERING BRIEF TO RESPONDENTS' LIMITED
CROSS-EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION**

Counsel for the General Counsel (“General Counsel”) respectfully submits this Answering Brief to Respondents’ Limited Cross-Exceptions to the May 1, 2014, Decision (the “Decision” or “ALJD”) of Administrative Law Judge Mary Miller Cracraft (“ALJ”) dismissing the complaint in its entirety. On June 19, 2014, the General Counsel filed Exceptions and a supporting brief asserting that the ALJ erred in not finding that Deer Creek Electric, Inc. (“Respondent DCE”), and Black Hills Electric, Inc. (“Respondent BHE”) (collectively, “Respondents”), are alter egos whose failure 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”) violated the Act.

Despite erroneously finding that Respondents were not alter egos, the ALJ correctly found that Respondents had substantially identical general business purpose and operations. As such, Respondents’ Limited Cross Exceptions are wholly without

merit, and the General Counsel requests that the Board affirm the ALJ's findings that Respondents had substantially identical general business purpose and operations while overruling her other findings as requested in the General Counsel's Exceptions.

I. THE ALJ'S FINING THAT RESPONDENTS HAVE SUBSTANTIALLY IDENTICAL GENERAL BUSINESS PURPOSE AND OPERATIONS IS AMPLY SUPPORTED BY RECORD EVIDENCE

A. Respondent DCE

Respondent DCE is an electrical contractor owned by Rick Moloney ("Moloney") and Sandra Moloney. (ALJD 3:22-23; 11:27) (18:25; 19:1-10, 17-22; 20:2; 118:11-19).¹ During Respondent DCE's final year in business, it marketed itself on its website as an electrical contractor capable of performing a wide range of electrical services including residential and commercial wiring, replacement and upgrades of power meters and electrical panels, bathroom wiring and hot tub installations, lighting fixture installation, installation of exterior lighting and power supply, computer and data wiring, telephone and television wiring, generator installation, service upgrades, office remodeling, and industrial wiring. (ALJD 4:18-24) (26:11-25; 27:1, 5-7; 197:3-20) (GC Exh. 3).

From January 1, 2011, through December 31, 2012, Respondent DCE performed work for: industrial parks, retail spaces, warehouses, schools (public work jobs), libraries, restaurants, federal contractors at Joint Base Lewis McCord, medical offices, an RV park, residences, a dealership, and the Olympia Farmers Market. (R Exh. 6). According to Respondent DCE, it performed a substantial amount of city, state, and federal public works jobs as well as private commercial (aka prevailing wage) work. (ALJD 4:1-3; 29:13-22). Respondent DCE also operated as a service disabled owned

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. --).

veteran company, which allowed it to bid on federal government projects set aside just for disabled veterans. (ALJD 3:27-30) (29:24-25; 30:1-4; 31:1-4, 9-15; 189:8-25; 190:1-14; 191:7-11).

Respondent DCE subcontracted out work totaling \$59,512.98 in 2011 and \$21,340.00 in 2012. (GC Exhs. 25-26). Respondent DCE subcontracted data networking work to Communication Technologies, Inc. ("CTI"), a company owned by Respondent BHE supervisor/manager Wes Hillman. (ALJD 3: 32-33) (81:12-21) (GC Exh. 32). Data networking jobs involve installing mobile cabling for voice, phone, and computers. (ALJD 3:31-32). Respondent DCE contends that it did not perform "design build work," which involves designing and building electrical systems. (ALJD 3:30-31).

Respondent DCE's employee Pete Buck spent 78% of his time on prevailing wage rate jobs. (R Exh. 10). Conversely, Jesse Birdsall, while working for Respondent DCE, spent 32% of his working time on prevailing wage jobs. (R Exh. 10). Troyep Aly spent 9% of his working time for Respondent DCE on prevailing wage jobs. (R Exh. 10).

B. Respondent BHE

Respondent BHE commenced operations at a different facility with a different phone number on October 1, 2012, on the heels of Respondent DCE's closure at the end of September 2012. (ALJD 5: 9, 20-21; 12: 10-12) (123:4-8; 124:7-9; 200:16-19, 23-25; 294:14-15). However, Respondent BHE began its operations with gifted vehicles and equipment that were converted to purchases only after the unfair labor practice charge was filed. (ALJD 6:39-41) (51:10-19) (GC Exhs. 1, 16-17). Moloney was the primary manager and the face of Respondent BHE operations because Manager Cheri

Jackson worked full-time for the State of Washington and had no electrical experience and Manager Wes Hillman worked a total of only 21 hours from February 2013 through July 29, 2013. (ALJD 6: 16-17) (123:15-25) (GC Exhs. 59, 60).

Respondent BHE focuses on electrical commercial and residential work including data networking and design build work. (ALJD 5:9, 24-26) (207:18-20). Respondent BHE contends that it performs more residential jobs than Respondent DCE did. (R Exhs. 2-3). However, from October 1, 2012 to February 1, 2014, Respondent BHE, like Respondent DCE, performed work for: retail spaces, schools (public work jobs), libraries, restaurants, federal contractors at Joint Base Lewis McCord, medical offices, residences, a dealership, and the Olympia Farmers Market. (R Exh. 5).

Moloney testified that one difference between Respondent DCE and Respondent BHE is that Respondent BHE cannot bid on veteran set aside work because Jackson is not a veteran. (189: 12-25; 190:1-14; 321:16-25). It is worth noting, however, that veteran set aside work simply refers to federal contractors *preferences* for hiring veteran contractors. (189:17-25; 190:1-11). Respondent BHE has still performed work for some of the same federal contractors that awarded Respondent DCE veteran set aside work. (GC Exh. 36, 43).

The payroll records provided by Respondent BHE show that Jesse Birdsall, Respondent's senior most employee (who worked previously for Respondent DCE), spent 26.7% of his time working on prevailing wage jobs. (GC Exhs. 48, 65). As for other employees working for Respondent BHE, Derrick Lancaster spent 14.3% of his time on prevailing wage work; Brian Connelly spent 13.4% of time on prevailing wage work; Josh Duncan spent 32.4% of his time on prevailing wage work; Jordan Beers

worked for approximately 3 months and appears to have not performed any prevailing wage work; and Wes Hillman spent 19% of his time on prevailing wage work. (GC Exhs. 48, 65).

Instead of subcontracting out data networking work to Wes Hillman's company, CTI, Hillman now works in-house for Respondent BHE. (GC Exhs. 32, 48, 65). Moloney testified that Hillman bids on the work himself and he and another employee perform the work. (216:9-13; 319:3-11). Respondent BHE does, however, occasionally subcontract out data networking jobs, as evidenced by the fairly large job it subcontracted out to CTS. (244:1-5; 248:15-20; 290:11-15) (GC Exh. 56) (R Exh. 2). Of note is the fact that Moloney signed the subcontract with CTS and not Hillman, the purported Manager of the data networking side of Respondent BHE. (GC Exh. 56). Additionally, Wes Hillman did not start working full-time for Respondent BHE until July 29, 2013. (GC Exh. 60).

C. Respondents Have Substantially Identical General Business Purpose and Operations

As laid out above, both Respondents have performed a wide variety of electrical work for different types of customers, including schools, libraries, medical facilities, restaurants, and commercial entities. Both Respondents primarily perform commercial electrical contracting work. Indeed, Respondent DCE marketed itself as available to perform residential and data networking work.

It is also important to note that prevailing wage work is not a different kind of work; rather, it is commercial work for a public entity paid at the designated standard wage rate for the particular area where the job is performed. WASH. REV. CODE §

39.12.010 (2013). Thus, analyzing the work as either being prevailing wage work or not creates a false impression that the work is different. It is not.

Although Respondent BHE attempts to characterize its contracting business as performing jobs that were not handled by Respondent DCE (e.g., residential jobs, data networking jobs, and design build jobs), the evidence demonstrated that Respondent DCE marketed itself as available to perform these types of jobs. Moreover, Respondent DCE often had jobs that involved data networking and it would subcontract that portion of the job out to companies such as Hillman's company. Now, rather than subcontracting jobs out to Hillman, Respondent BHE has hired Hillman to work in-house. In addition, like Respondent DCE, Respondent BHE subcontracts out portions of data networking jobs.

Further, where the evidence does show that Respondent BHE performs more residential jobs than Respondent DCE, all of the electrical work performed by Respondent BHE is bargaining unit work like Respondent DCE had performed under the 2004 "residential" agreement with the Union. Despite whatever increase there has been in residential work, it is clear that Respondent BHE has continued to perform significant amounts of commercial and prevailing wage work as well, which are alleged to be the bulk of the work previously performed by Respondent DCE. Further, employee Jesse Birdsall has worked a consistent number of prevailing wage hours for both Respondents averaging 32% prevailing wage work with Respondent DCE and 26.7% prevailing wage work with Respondent BHE.

Even if the work performed by Respondents were different, the Board has found an alter ego when an employer expands into new areas not covered by the prior

employer. *Continental Radiation Corp.*, 283 NLRB 234, 236 (1987). In fact, in *Continental Radiation Corp.*, the Board used expanded operations by the new entity into more lucrative, but related areas, as evidence of suspicious motive. *Id.* Here, Respondent BHE attempts to emphasize projects where it has done data networking or design build work. Again, this creates the false distinction that this is new or different kind of work than performed by Respondent DCE. Indeed, data networking has always been a part of some jobs and Respondent DCE chose to subcontract the data networking work to the very person (Hillman) who now performs it for Respondent BHE. Respondent BHE will still, on occasion, subcontract out data networking jobs.

In *Kodiak Electric*, 336 NLRB 1038 (2001), two electrical companies were found to be alter egos where they shared some customers in common, but where the first company performed “inside work” (meaning work within the inside of a customer’s property line), and the new company was created for the purpose of doing “outside work” for the gas and electric company, from which it derived most of its income. This case is instructive, as it eviscerates the argument made by Respondents that they cannot be alter egos because some of the electrical work performed by Respondent BHE is of a different type of electrical work than that performed by Respondent DCE.

Instead, Respondents rely on *Victor Valley Heating*, 267 NLRB 1292 (1983), where one company which performed residential/commercial work and the other industrial installations were not found to be alter egos. Respondents’ reliance on this case is misplaced because the Board’s decision turned almost exclusively on the lack of connection between the two companies including no common management with almost no discussion of the differences in scope of work. *Id.* Respondents also continue to

argue that the Board found no alter ego relationship existed in *Carpenters Local 745 (SC Pacific)* between two companies that were owned by the same family, relying on the fact that they served different customer markets that only marginally overlapped. 312 NLRB 903 (1993). The ALJ, however, found that *Carpenters Local 745* was inapposite because Respondents' markets significantly overlap. *Id.*

Despite the ALJ finding that Respondents have substantially identical operations, the Respondents attempt to argue that because Respondents had different phone numbers and operated out of a different locations, it had different operations. This ignores the fact that Respondent BHE started with only Respondent DCE's vehicles and equipment and with Moloney as the only Manager at the helm since the inexperienced Jackson worked full-time for the State of Washington and Manager Hillman had only worked a total of 21 hours from February 2013 through July 29, 2013. Based on all of the above, the ALJ correctly found that Respondents perform electrical work in the construction industry and that their markets significantly overlap. (ALJD 12:2-6). Accordingly, the ALJ properly determined that Respondents have a substantially identical general business purpose and operations. (ALJD 12:2-6).

II. CONCLUSION

Based on the foregoing, Respondents' Limited Cross Exceptions have no merit. The ALJ's findings and conclusions that Respondents have substantially identical general business purpose and operations were based on a correct analysis of the facts and reasonable interpretation/application of the law. As a result, the Board should adopt these findings and conclusions along with those set forth in the General

Counsel's Exceptions, and find that Respondents violated Sections 8(a)(1) and (5) of the Act as alleged in the Complaint.

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 Answering Brief to Respondents' Limited Cross-Exceptions to the Administrative Law Judge's Decision was served on the 11th day of July, 2014, on the following parties:

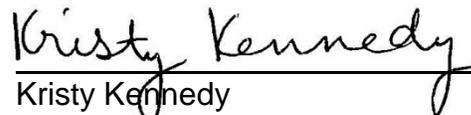
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