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UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MORRIS ROAD PARTNERS, LLC	:	
Petitioner	:	Case No. _____ #31076
v.	:	
NATIONAL LABOR RELATIONS BOARD	:	Petition for Review
Respondent	:	

Morris Road Partners, LLC, hereby petitions the Court for review of the Second Supplemental Decision and Order of the National Labor Relations Board in Case No. 04-CA-037725, entered on February 3, 2015.

Respectfully submitted,

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By: _____
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DATE: 2/19/15

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Lederach Electric, Inc. and Morris Road Partners, LLC *and* International Brotherhood of Electrical Workers, Local 380. Case 04–CA–037725

February 3, 2015

SECOND SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA AND JOHNSON

On April 30, 2014, Administrative Law Judge Arthur J. Amchan issued the attached decision. The General Counsel and Charging Party each filed exceptions and supporting briefs, the Respondent filed answering briefs, and the Charging Party filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs, and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Second Supplemental Decision and Order.

The sole issue in this compliance proceeding is whether Lederach Electric, Inc. (LEI) and Morris Road Partners, LLC (MRP) constitute a single employer, rendering them jointly and severally liable for remedying the unfair labor practices in the underlying case.[1] The judge found that LEI and MRP do not constitute a single employer, and therefore recommended that the instant compliance specification be dismissed. For the reasons discussed below, we find, contrary to the judge, that LEI and MRP constitute a single employer.

LEI operated as an electrical contractor in the construction industry from about 1985 to 2012. From 1986 until its closure in late 2012, LEI leased an office in the Lederach Commons Building, which is owned and managed by MRP.

James and Judy Lederach jointly owned 100 percent of LEI's shares until January 1, 2010, when Judy transferred her LEI shares to James, and they jointly own 100 percent of MRP's shares. Judy served as LEI's Secretary and Treasurer until its closure and currently keeps the financial records for MRP. Judy also signed all checks issued by LEI and MRP. James managed the day-to-day operations of LEI and currently manages the operations of MRP. On occasion, James would use LEI's phones to conduct MRP business, and MRP's tenants would drop off their rent payments at LEI's office in Lederach Commons. LEI and MRP also shared a post office box.

The most recent lease between LEI and MRP requires LEI to pay MRP $3000 each month for rent. However, after LEI's financial situation started to deteriorate in 2008, James decided not to enforce the terms of the companies' lease when doing so would render LEI unable to pay its employees and other creditors. Thus, for approximately 20 months between January 1, 2009, and March 2012, LEI paid no rent at all to MRP, and on a few occasions it paid less than the $3000 it owed. James testified that he operated the companies in this manner so that LEI could avoid the litigation that could have resulted if LEI failed to pay its creditors.

James decided to wind down LEI's operations in about September or October 2011. LEI did not submit bids for new work after November 2011, and it had no employees after February or April 2012. MRP has never had employees. When LEI vacated the office it rented from MRP in March or April 2012, it owed MRP $62,000. MRP has not attempted to recover the rent that LEI failed to pay.

In finding that LEI and MRP do not constitute a single employer, the judge stated, correctly, that the absence of an arm's-length relationship between the companies is a hallmark of single-employer status, and that the Board looks to the following factors in determining whether nominally separate entities constitute a single employer: (1) interrelation of operations, (2) common management, (3) centralized control of labor relations, and (4) common ownership or financial control. See *Denart Coal Co.*, 315 NLRB 850, 851 (1994), enfd. 71 F.3d 486 (4th Cir. 1995). No single factor is controlling and all factors need not be present. See *Three Sisters Sportswear*, 312 NLRB 853, 861 (1993), and cases cited there, enfd. mem. 55 F.3d 684 (D.C. Cir. 1995), cert. denied 516 U.S. 1093 (1996).

Applying this standard, the judge acknowledged that the relationship between LEI and MRP was not at arm's length, but he nevertheless found that the evidence failed to establish single-employer status. With respect to the first factor, interrelation of operations, the judge found that this factor did not weigh in favor of single-employer status because LEI and MRP did not share a common

[1] On July 21, 2011, Administrative Law Judge Robert A. Giannasi issued a decision in which he found, among other things, that LEI violated Sec. 8(a)(3) and (1) of the Act when it laid off employees Jeffrey Wallace, Christopher Rocus, Cameron Troxel, and Christopher Breen, in retaliation for their union activity or protected concerted activity. On September 2, 2011, in the absence of exceptions, the Board issued an unpublished Order adopting Judge Giannasi's findings and conclusions. As a result, LEI was ordered to make Wallace, Rocus, Troxel, and Breen whole for any loss of earnings and other benefits suffered as a result of the discrimination against them. The Board subsequently ordered LEI to pay the discriminatees $122,229.06 in backpay. *Lederach Electric, Inc.*, 361 NLRB No. 21 (2014) (incorporating by reference 359 NLRB No. 71 (2013)).

business purpose. The judge also found that the absence of centralized control of labor relations (the third factor) weighed against single-employer status. The judge found that the remaining two factors weighed in favor of single-employer status, because the record showed that LEI and MRP had common management, ownership, and financial control. Nevertheless, based on his finding of insufficient evidence of interrelation of operations and an absence of evidence of centralized control of labor relations, the judge concluded that LEI and MRP do not constitute a single employer.

Contrary to the judge, and in agreement with the General Counsel's and Charging Party's contentions on exception, we find that the record establishes single-employer status.

Most significantly, we find that the judge erred in finding that the interrelation of operations weighs against a single-employer finding. In addition to the facts that the two companies shared a post office box, LEI received the rent payments from MRP's tenants, and that James used LEI's phones to conduct MRP's business, the record shows that MRP allowed LEI to forego many rent payments required under the terms of LEI's lease with MRP. Indeed, James admitted that he did not require LEI to pay MRP rent when doing so would leave LEI unable to pay its creditors and its employees, and he did not attempt to recover the $62,000 in rent that LEI failed to pay MRP. Viewed in their entirety, these business arrangements demonstrate that LEI and MRP lacked an arm's-length relationship during the period relevant to this proceeding, and that their operations were substantially interrelated.[2]

We further find no merit in the judge's finding that the absence of a common business purpose is fatal to finding an interrelationship of operations and single-employer status. The Board has found that, notwithstanding the different business purposes between two nominally separate entities, "a single employer relationship can be found particularly where there is evidence of a lack of an arm's-length relationship between the entities." *Three Sisters Sportswear Co.*, supra at 863 (single-employer status found between real estate company and companies associated with the garment industry); accord: *Carnival Carting, Inc.*, 355 NLRB 297, 297, 300–301 (2010) (single-employer status found between trash removal company and building management company), enfd. 455 Fed. Appx. 20 (2d Cir. 2012). As the evidence shows that LEI and MRP did not operate at arm's length, the absence of a common business purpose does not preclude a finding of single-employer status.

With respect to the remaining factors, we agree with the judge, for the reasons he states, that the second factor, common management, and the fourth factor, common ownership and financial control, were clearly established by the evidence. See *RBE Electronics of S.D.*, 320 NLRB 80, 80 (1995) (common management established where one individual controlled day-to-day operations of both companies; common ownership established where both entities owned by an individual and his spouse). We also agree with the judge that the record contains no evidence of centralized control of labor relations (the third factor), but that factor is afforded less significance where, as here, one of the entities (MRP) never had employees. See *Bolivar-Tees, Inc.*, 349 NLRB 720, 722 (2007), enfd. 551 F.3d 722 (8th Cir. 2008) (where one company does not have employees, it is not appropriate to accord substantial importance to the absence of centralized control of labor relations); *Three Sisters Sportswear Co.*, supra at 863 (the absence of common control of labor relations is less significant where one company has no employees).

Considering all the circumstances in this case, we find that evidence of interrelated operations (including the lack of an arm's-length relationship), common management, and common ownership and financial control, establish that LEI and MRP constitute a single employer. Therefore, we shall hold LEI and MRP jointly and severally liable to remedy the unfair labor practices found in the underlying case.

ORDER

The National Labor Relations Board orders that the Respondents, Lederach Electric, Inc. and Morris Road Partners, LLC, Lederach, Pennsylvania, a single employ-

[2] Contrary to our colleague, we find that evidence that the transactions were a "one-way subsidy" is not fatal to an interrelation of operations finding where, as here, the businesses share common ownership and management. See, e.g., *Associated Constructors*, 325 NLRB 998, 999 (1998) (evidence of interrelation of operations included loans by one company to another that were not shown to have been paid back), enfd. 193 F.3d 532 (D.C. Cir. 1999).

Member Johnson agrees that the General Counsel has met his burden to establish that LEI and MRP constitute a single employer under the Act. In particular, he agrees that both the factor of common management and the factor of common ownership and financial control strongly weigh in favor of finding single-employer status. Unlike his colleagues, however, he does not rely on MRP's assistance to LEI, provided in an effort to keep the latter's business afloat, as proof of an interrelationship of operations factor or a lack of an arm's-length relationship. Although evidence that parties have subsidized each other, in a reciprocal fashion, would support a finding of a single-employer relationship, a one-way "rescue" subsidy, such as that between LEI and MRP, should not trigger such a finding. Contrary to precedent cited by the majority, he believes that by giving a one-way subsidy substantial weight in making the single-employer determination, the Board in effect creates a disincentive for businesses to help out their unionized affiliates because any offer to forgive a union affiliate could serve to obligate a business to the entirety of its affiliate's liabilities.

er, their officers, agents, successors, and assigns, shall jointly and severally make whole the individuals named below, by paying them the amounts following their names,[3] with interest to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), minus tax withholdings required by Federal and State law.

Consistent with our decision in *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014), we also order the Respondents to file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each individual named below.

Jeffrey Wallace	$28,645.03
Christopher Rocus	36,844.14
Cameron Troxel	40,059.81
Christopher Breen	16,680.08
Total	$122,229.06

Dated, Washington, D.C. February 3, 2015

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

Harry I. Johnson, III, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Elana Hollo, Esq., for the General Counsel.
Robert J. Krandel, Esq. (Flamm Walton, PC), of Blue Bell, Pennsylvania, for the Respondent.

DECISION

STATEMENT OF THE CASE

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Philadelphia, Pennsylvania, on March 24, 2014. The issue at this stage of the proceedings is whether Lederach Electric, Inc. (LEC) and Morris Road Partners, LLC (MRP) are a single employer.[1] The consequence of finding that LEC and MRP are single employers is that MRP would be jointly and severally liable for the backpay owed to four of LEC's former employees, Chris Breen, Cameron Troxel, Jeffrey Wallace, and Christopher Rocus.

On July 21, 2011, Administrative Law Judge Robert Giannasi issued a decision in which he found that LEC violated Section 8(a)(3) and (1) by permanently laying off these four employees because of their union membership and activities. He also found that LEC violated Section 8(a)(1) in laying off Wallace, Troxel, and Rocus because they engaged in protected concerted activities in connection with complaints about improperly withheld payments.

No exceptions were filed to the decision which then became a final order of the Board pursuant to Section 102.48 of the Board's Rules of Procedure. Thereafter the Regional Director for Region 4 issued a compliance (backpay) specification on January 19, 2012, which he amended on April 26, 2012. Administrative Law Judge Earl Shamwell conducted a hearing on the compliance specification on May 22, 2012. He issued a decision on September 10, 2012, finding that LEC owed the following amounts to the discriminatees: Wallace, $28,645.03; Rocus, $36,844.14; Troxel, $40,059.81; and Breen $16,680.08. The total backpay owed by LEC to the four employees is $122,229.06.

On March 4, 2013, the Board affirmed Judge Shamwell's findings and conclusions, 359 NLRB No. 71. On September 24, 2013, the Regional Director for Region 4 issued the instant compliance specification asserting that LEC and MRP are a single employer, jointly and severally liable for the backpay amount.

The Relationship Between LEC and MRP

The General Counsel's contention that LEC and MRP are a single employer is predicated on the following facts. Between 1986 and 2010, James Lederach, and his wife Judy Lederach, jointly owned 100 percent of LEC. After January 1, 2010, James Lederach owned 100 percent of the shares of LEC. He was LEC's president; Judy Lederach was the secretary and treasurer. LEC operated from 1986 until 2012.

Since 1986, Lederach Electric operated out of an office building, the Lederach Commons Building, owned by Morris Road Properties.[2] James and Judy Lederach are the sole owners of MRP, each owning 50 percent of the shares. MRP has never had employees. The mailing address of both LEC and MRP is the same P.O. Box and tenants generally communicate with MRP by calling James Lederach's personal cell phone. Before LEC closed down, MRP's tenants at times paid their rent at LEC's office in Lederach Commons. Judy Lederach kept the financial records for MRP and possibly for LEC, as well. Both LEC and MRP were managed solely by James Lederach.

There are 10 units in the Lederach Commons Building; 7 on the first floor; 3 on the second floor. The two units at the ends

[3] The amount following each individual's name was determined in the previous compliance proceeding. *Lederach Electric, Inc.*, supra 361 NLRB No. 21. We accordingly restate those amounts here.

[1] I have used LEC for Lederach Electric Company as the caption on the transcript reads, rather than LEI for Lederach Electric, Inc.

[2] MRP also owns two plots of undeveloped land.

of the first floor, units #1 and 7, are 2000 square feet. The five interior units on the first floor are 800 square feet. The units on the 2d floor are 400, 450, and 475 square feet respectively.

Between 2008 and 2012, Lederach Electric's financial situation deteriorated markedly. It lost its bonding capacity and as a result lost its ability to bid on public projects as a prime contractor. LEC did not bid on work after November 2011, and had no employees after February or April 2012.

Pursuant to its most recent lease, LEC's rent, owed to MRP for unit 7 in Lederach Commons, was $3000 per month. In 2009, from January to August, LEC did not pay any rent for this unit to MRP. It paid $2000 in September; $3000 in October; zero in November; and $3000 in December. For the calendar year 2009, LEC paid MRP $28,000 less than it owed. The nine other tenants of Lederach Commons paid their monthly rent in full for the entire year, apparently on time.[3]

In 2010, LEC did not pay rent to MRP from January to March; LEC paid $1500 in April and May; it made three payments totaling $8000 in June and then did not pay rent again until December. In December 2010, LEC paid MRP $25,000. At the end of the year LEC had paid all the rent due for the year except for $1000. One other tenant did not pay one months' rent; otherwise all the other tenants paid their rent on time and in full. Unit 1 was empty for 7 months.

In 2011 LEC paid $2000 in rent to MRP in January and then did not pay any rent again until November. In that month LEC paid $10,000, but did not pay rent in December. For calendar year 2011 LEC was $24,000 in arrears. Several other tenants missed a month or two of rent for reasons not reflected in the record. Unit 1 was leased to the Paradise Spa in January 2011. MRP allowed the Paradise Spa to occupy unit 1 rent free from March to July while renovations were done to the unit.

LEC did not pay any rent to MRP for January–March 2012, thus leaving it $9000 in arrears for this period.[4] For the period January 1, 2009, to March 31, 2013, LEC accumulated a debt of $62,000 to MRP. MRP never took any action to enforce the terms of its lease with LEC. LEC apparently was not under any obligation to pay rent to MRP after March 31. Six months later, MRP was able to lease unit 7 to another business.

Analysis

The Board applies four factors in determining whether separate entities constitute a single employer: (1) interrelations of operations, (2) common management, (3) centralized control of labor relations, and (4) common ownership or financial control. No one factor is controlling, nor do all need to be present to support a single employer finding. However, the Board has held that the first three factors are more critical than the last, and further that centralized control of labor relations is of particular importance because it tends to demonstrate "operational integration." Single employer status is characterized by the absence of an arm's length relationship found among unintegrated companies, *RBE Electronics of S.D.*, 320 NLRB 80 (1995). *Hydrolines, Inc.*, 305 NLRB 416, 417–419 (1991).

There is no question that Lederach Electric and Morris Road Properties had common management and common ownership and financial control. It is also true that the relationship between LEC and Morris Road Properties was not arm's-length, a factor sometimes described as the hallmark of single employer status. There is also some evidence of an inter-relationship of operations in that the two companies used the same mailing address and that some tenants of MRP deposited their rent at LEC's offices in the building owned by MRP.

However, what is missing in this case from situations in which employers are found to constitute a single employer is the fact that LEC and MRP were never in the same business. The General Counsel relies heavily on two cases in which the Board found single employer status even though one entity, like MRP, had no employees. In both these cases, however, the entities, unlike LEC and MRP, were in the same business.

In *Bolivar-Tees, Inc.*, 349 NLRB 720 (2007), enfd. 551 F.32d 722 (8th Cir. 2008), Bolivar, which was in the garment industry, ceased production and moved it to the other entities found to be part of the single employer. In *Three Sisters Sportswear Co.*, 312 NLRB 853, 862–863 (1993), enfd. 55 F.3d 684 (D.C. Cir. 1995), all the entities found to be a single employer had also at one time been in the business of producing and selling garments. As Judge Fish noted in his *alter ego* analysis, the various companies were in "the same business in the same market."[5]

In *Lebanite Corp.*, 346 NLRB 748, 757–760 (2006). Lebanite and R. E. Service Company (RES) were found to be a single employer. The two entities, unlike LEC and MRP, were essentially in the same business. Lebanite produced material used in the electronics industry; RES was in a similar business relating to the production of circuit boards.

Although, I am unaware that the Board has applied the "same business" criterion in its single employer analysis, I am also unaware of any case in which the Board had found two entities operating in completely separate businesses, such as electrical contracting and real estate management, to be a single employer—with one exception. In *Carnival Carting, Inc.*, 355 NLRB 297 (2010), the Board found Carnival Carting and Romar Sanitation to be a single employer and thus jointly and

[3] One of the tenants of this building is Pete Retzlaff, a star receiver for the Philadelphia Eagles between 1956 and 1965, who was later general manager of the Eagles.

[4] James Lederach testified that besides MRP, he did not pay the Walton Flamm law firm everything LEC owes it. However, there is no documentation in the record to support this contention and no evidence at all as to how much LEC was billed and did not pay.

[5] *The Developing Labor Law*, citing *San Luis Trucking*, 352 NLRB 211, 228 (2008), and *Cadillac Asphalt Paving Co.*, 349 NLRB 6, 8 (2007), describes the difference between an *alter ego* employer and a *single employer* in the following manner. A single-employer relationship may be found between two ongoing businesses; an *alter ego* relationship may exist where one entity ceases operation and the other begins the same or similar operation. The relationship between LEC and MRP seems to fall in the middle. They both operated at the same time, but the General Counsel seeks a finding of single employer status in part because LEC has ceased operations. One of the criterion for finding an *alter ego* is a substantially similar or common business purpose. While the Board has never explicitly stated that the entities constituting a single employer must have a common business purpose, I conclude that this is implicitly the case.

severally liable for the backpay owed to discriminatee Frank Mendez.

Carnival Carting was in the trash removal business. It housed two garbage trucks at a location owned by Romar. Romar's only business was owning the building where Carnival stored its garbage trucks. Carnival was as lackadaisical in paying rent to Romar as LEC was in paying rent to MRP; the relationship between Carnival and Romar was not "arms-length."

However, there are distinctions between the Carnival case and the instant one. Mendez was paid by Romar. It appears that Carnival was out of business and was not able to pay the judgment outstanding against it. At some point assets were transferred from Carnival to Romar Sanitation, but Romar also was dissolved. The Board's Order found that Carnival Carting, Inc. and Romar Sanitation, Inc. constituted a single employer and were jointly and severally liable for the backpay. Frankly, I fail to understand the decision. Had Carnival paid rent to Romar as it would have in an arms-length relationship, it would have fewer, not greater assets to satisfy its backpay obligation. Also, by the time of the Board decision, neither entity could satisfy the backpay obligation leaving me to wonder what the point of this decision may be.

I also do not see any public policy rationale for finding MRP and Lederach to be a single employer. This is not a case in which LEC depleted its assets by transferring them to MRP. The lack of an arm's-length relationship between the two companies, if anything, caused LEC to be left with more assets to pay creditors other than MRP. In sum, I conclude that the General Counsel has not established that LEC and MRP are a single employer applying the four factors generally applied by the Board. See, e.g., *Bryar Construction Co.*, 240 NLRB 102, 103–104 (1979). There no evidence of a centralized control of labor relations. Given the fact that LEC and MRP operated in completely different businesses, I conclude that the General Counsel has also failed to establish the necessary interrelationship of their operations. The General Counsel did not allege that James Lederach was individually liable for the backpay. I have no opinion as to whether it could have done so.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[6]

ORDER

The complaint is dismissed.[7]

Dated, Washington, D.C. April 30, 2014

[6] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[7] Of course, Lederach Electric, Inc. still owes the amounts set forth in the Board's Order of March 4, 2013, to the discriminatees.

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MORRIS ROAD PARTNERS, LLC	:	
Petitioner	:	Case No. _____
v.	:	
NATIONAL LABOR RELATIONS BOARD	:	Certification of Service
Respondent	:	

I hereby certify that a true and correct copy of the foregoing Petition for Review was sent via first class mail, postage prepaid, to the following:

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