

United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: March 20, 2013

TO: Robert W. Chester, Regional Director
Region 6

FROM: Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Alcoa/TRACO,
Case 06-CA-065365

Employer Status Chron
177-1642
378-2847-6800-0000

The Region submitted this case for advice on whether Alcoa Commercial Windows, d/b/a TRACO (“Traco”), a wholly-owned subsidiary of Alcoa, violated the Act by denying offsite Alcoa employees access to its parking lots. We conclude that because the evidence establishes that Traco and Alcoa constitute a single employer, the Region should issue complaint, absent settlement, alleging that Alcoa and Traco violated Section 8(a)(1) of the Act by prohibiting the offsite Alcoa employees from accessing Traco’s parking lots.

FACTS

Alcoa, Inc. (“Alcoa”), produces primary and fabricated aluminum, and also is the world’s largest miner of bauxite and refiner of alumina. It has several wholly-owned subsidiaries and divisions, including Building and Construction Systems (“BCS”). Before Alcoa purchased Traco in August 2010, Traco had been family-owned and operated. After that purchase, Alcoa made Traco a wholly-owned division of Kawneer, which is a division of Reynolds Metal Company, a wholly-owned subsidiary of Alcoa.

Common Management

Reynolds Metal and its subsidiaries, including Traco, are part of Alcoa’s BCS group. Traco has fifteen corporate officers, only two of whom (Traco’s plant manager and general manager) actually work at Traco. Besides the two Traco managers, those officers are also Kawneer and Reynolds Metal officers. After Alcoa acquired Traco, Alcoa placed individuals who previously worked in similar positions at other Alcoa subsidiaries into key Traco management positions, including plant manager, general

manager,¹ environmental health and safety manager, and eventually, human resources director. Both the Traco managers and Alcoa have described those managers as Alcoa employees.² At least 22 other employees working at Traco, in finance, sales engineering, and production, transferred to it from other Alcoa companies within the past two years.³ All Traco officials are subject to removal or discipline by Alcoa officials.⁴

Interrelation of Operations

Evidence of Traco and Alcoa's interrelation includes: (1) Alcoa's statements regarding its purpose for acquiring Traco and its need to integrate Traco employees into Alcoa's culture; (2) Traco's agreements with Alcoa and its subsidiaries for the provision of important, core business services to Traco; and (3) Alcoa's conduct of holding itself out as the employer of Traco employees.

1. Alcoa's statements

Traco's interim general manager stated that Alcoa acquired Traco to enable its BCS division "to offer a more complete product line to its customers. . . . 'Windows were one of the key pieces of the puzzle we didn't have.'"⁵ An Alcoa press release states that it acquired Traco in order to "offer our expanded customer base a comprehensive product portfolio to help them meet increasingly complex commercial construction requirements."⁶ Alcoa and Kawneer have also used advertisements and press statements to market the "bundle" of Kawneer and Traco products in order to

¹ Traco's general manager reports to the General Manager of Kawneer North America and Vice President, Alcoa BCS. *See* Subpoena Exhibits Q & S.

² *See* Subpoena Exhibit R, Traco plant manager described as Alcoa position. *See* also news release quoting Alcoa BCS Vice President's statement that "We are pleased to have" the new general manager of Traco "continue with the organization in this new capacity. . . ."

³ *See* Subpoena Exhibits B, C, and D.

⁴ *See* Alcoa/TRACO, Supplemental Memorandum to Advice dated Nov. 2, 2012, p. 3, and Subpoena Exhibits Q, S, & T.

⁵ Len Boselovic, "Alcoa-owned Traco says strength in its workforce," Pittsburgh Post-Gazette, May 12, 2011, <http://www.postgazette.com/stories/business/news/alcoa-owned-traco-says-strength-in-its-workforce-297324/>.

⁶ "Alcoa Completes Traco Acquisition: Premier Maker of Windows and Doors Joins Alcoa Building and Construction Systems," Aug 2, 2010, http://www.alcoa.com/building/en/news/releases/traco_acquisition.asp.

cross-sell and cross-promote the brands.⁷ Alcoa has publically noted that it has actively integrated Traco employees into Alcoa's culture and way of doing things.⁸

2. Services that Alcoa and its subsidiaries provide to Traco.

Alcoa and its subsidiaries provide several core business services to Traco, and then use internal accounting codes to charge Traco for those services.⁹ Pursuant to a contract covering all Alcoa BCS subsidiaries, Alcoa Global Shared Services provides electronic communications infrastructure services; customer support; and hardware and software operating system support.¹⁰ Alcoa also provides both financial account and human resources services to Traco, including general accounting, property accounting, and tax services; benefits (*e.g.* retirement, pension, 401k); payroll (*e.g.* reconciliations, processing, wage adjustments, and a payroll call center); customer support services (*e.g.* HIPAA management); health and welfare administration; performance management support; and records management.¹¹ Alcoa and/or its

⁷ *See id.*; Kawneer North America Press Release, "Kawneer and Traco Bundle of Products Delivers Compelling Design and Comprehensive Solution to The Moderne," http://www.kawneer.com/kawneer/north_america/en/news/releases/kna_08_14_Moderne.asp (discussing how the range of Kawneer and Traco products and systems were used to help create a luxury high-rise and mixed-use development); "Alcoa Building & Construction Systems Announces New Logo and Identity for its Traco Division," http://www.kawneer.com/kawneer/north_america/en/news/releases/TracoBrandingRelease.pdf (the new Traco logo and brand idea aligns Traco with Kawneer, "communicating to customers, architects and the market-at-large the integration of Traco into the Alcoa BCS unit as a division of Kawneer. . . ."); "Under the Sun" advertisement in NxGen. *See also* Subpoena Exhibit R, p. 2 (listing Kawneer as Traco's primary customer within the Traco plant manager's job description).

⁸ *See* Len Boselovic, "Alcoa-owned Traco says strength in its workforce," Pittsburgh Post-Gazette, May 12, 2011, <http://www.postgazette.com/stories/business/news/alcoa-owned-traco-says-strength-in-its-workforce-297324/> (Traco's interim general manager stated that Alcoa's acquisition of Traco required Traco employees to transition from a family-owned company to a public company; and that it was reorienting Traco's skilled workforce to "Alcoa's way of doing things," which includes "formalized procedures for safety, the flow of production and soliciting employee input on how to improve them.").

⁹ *See* Alcoa's responses to Subpoena question 20.

¹⁰ *See* Subpoena Exhibit X.

¹¹ Alcoa's corporate treasurer signs the Alcoa tax payment checks for Traco, and Alcoa's manager of state taxes submits tax forms to the state entities to whom Traco owes taxes. *See also* Subpoena Exhibits Y & Z.

subsidiaries also provide Traco with environmental health and safety support, specific information technology services for BCS North America,¹² and industrial relations services. Additionally, Kawneer provides research and development support, as well as marketing and product management services, to Traco. There are no formal contracts for the provision of any of these services.

3. Alcoa holds itself out as the employer of Traco employees

In its 2011 Annual Report, Alcoa counts the workers employed at its various subsidiaries in its total number of employees.¹³ Additionally, Alcoa's financial statements and federal income tax returns report all of Traco's financial results; Traco has no separate financial reports or federal tax returns.¹⁴ Alcoa has also represented itself as the employer of Traco employees in the new Traco/Alcoa handbook,¹⁵ on production employees' job applications, on employee paychecks, and in its various communications with employees, including anti-union presentations.¹⁶

¹² See Alcoa's written response to Subpoena item #20.

¹³ See "Alcoa Won't Wait: Taking Decisive Action in a Turbulent World," 2011 Annual Report, http://www.alcoa.com/global/en/investment/pdfs/2011_Annual_Report.pdf.

¹⁴ See Alcoa's response to Subpoena item #5.

¹⁵ See, e.g., p. 9 (Traco employees can make ethics and compliance reports by either calling an Alcoa corporate hotline or writing to the Alcoa, Inc.'s Office of the General Counsel); p. 9, Equal Opportunity Policy ("Alcoa provides equal employment opportunities . . . to all employees. . ."); p. 44, Orientation ("It is important that an employee's transition into Alcoa is a smooth one. Therefore, the company will conduct an orientation program to familiarize all new employees with the Human Resources policies and procedures, safety practices, Alcoa Business systems and Quality."); pp. 13-14, Acceptable Use Policy for Electronic Communications Equipment and Internet ("This policy describes appropriate use of Alcoa's computers systems and computerized information. . ."); pp. 28-32, Benefits (describing the benefits "Alcoa offers" employees).

¹⁶ See September town hall PowerPoint.

Alcoa's Control Over Traco's Labor Relations

1. General evidence

As previously mentioned, numerous Alcoa employees occupy key Traco management positions, including those overseeing Traco's labor relations. Alcoa assigned managers of other Alcoa subsidiaries into key Traco management positions. Both the Traco managers and Alcoa have described those managers as Alcoa employees.¹⁷ At least 22 other employees working at Traco, in finance, sales engineering, and production, transferred from other Alcoa companies within the past two years.¹⁸ Alcoa signs employees' paychecks and provides and administers their benefits, including their 401k savings plan, pension plan, medical, disability, dental, and life insurance.¹⁹ Additionally, Alcoa's Corporate Industrial Relations Department (IRD) offers labor-management relations services to Traco and all other Alcoa subsidiaries, including union avoidance training and support for non-unionized facilities such as Traco.

After acquiring Traco, Alcoa changed Traco employees' work rules through, *inter alia*, issuing a new employee handbook, instituting an orientation policy for employees,²⁰ reissuing and revising several safety policies, presenting health and safety information to employees at town hall meetings; and installing its own HR Director into the position highest in the Traco HR hierarchy rather than having the Traco HR manager, who had worked at Traco for several years prior to the acquisition, serve in that position.

2. Alcoa's involvement in union avoidance at Traco.

Some time after Alcoa acquired Traco, Traco employees began contacting the United Steel Workers ("Union"). In the summer of 2011, some Traco employees distributed authorization cards to coworkers in the plant. After Traco managers found cards and literature in the break areas, they contacted Alcoa's IR director for assistance. Soon thereafter, the IR director conducted union avoidance training for the Traco managers.

In early September 2011, the Union decided to leaflet in the Traco parking lots. On September 7, the Union's regional director called Alcoa's IR director and informed him of the Union's intent to leaflet. The IR director then contacted an attorney in

¹⁷ See *supra* note 2.

¹⁸ See Subpoena Exhibits B, C, and D.

¹⁹ See Traco Employee Handbook, pp. 28-32.

²⁰ See Traco Employee Handbook, p. 44.

Alcoa's corporate legal department, who said he did not think that Board law afforded the offsite Alcoa employees greater access rights than those afforded to non-employees. The IR director then notified the Traco managers that the Union intended to handbill, and gave them Alcoa's position on the Union's right of access. He also called back the Union's regional director to convey Alcoa's position.

On September 8, about 25 Union agents and offsite Alcoa employees arrived at the crosswalk to the employee parking lot. The Union's attorney, accompanied by four to six offsite Alcoa employees, presented Traco managers a letter explaining the Union's position that offsite Alcoa employees had access rights to the property. After some discussion, Traco's general manager called Alcoa's IR director and handed the cell phone to the Union attorney. The IR director explained Alcoa's position that offsite Alcoa employees did not have access rights to Traco property. The Union then leafleted on public property next to Traco.

Later that day, Traco held a meeting at which the plant manager told employees that Traco was nonunion, and that he did not want Alcoa to be union. On September 13-14, Traco held town hall meetings at which it presented a PowerPoint regarding several topics, including Traco's position on the Union's organizing efforts. The slides stated, *inter alia*, that "within Alcoa, 2 of 3 plants in the U.S. are NON-union;" that "business conditions have caused several Alcoa plants to close in recent years;" and pointed to purportedly unwise Union decisions at "another Alcoa plant in Wenatchee, Washington."

ACTION

We conclude that Traco and Alcoa constitute a single employer, and therefore that Traco was obligated to permit the offsite Alcoa employees to leaflet in its parking lots.

1. Traco and Alcoa are a Single Employer.

A single employer exists when two or more employing entities are in reality a single integrated enterprise.²¹ In determining single employer status, the Board and courts consider four factors: (1) common ownership; (2) common management; (3) centralized control of labor relations; and (4) interrelation of operations.²² All of

²¹ See *Mercy Hospital of Buffalo*, 336 NLRB 1282, 1283 (2001).

²² See e.g., *Dow Chemical Co.*, 326 NLRB 288 (1998) (citing *Radio Union v. Broadcast Service of Mobile, Inc.*, 380 U.S. 255, 256 (1965)); *Emsing's Supermarket*, 284 NLRB 302, 302 (1987), *enforced*, 872 F.2d 1279 (7th Cir. 1989).

these criteria need not be present to establish single-employer status,²³ which ultimately depends on all the circumstances of a case and is characterized by the absence of an arm's-length relationship.²⁴ Here, all four factors demonstrate that Traco and Alcoa are a single employer.

a. Common ownership

Common ownership is clearly established because Traco is a wholly-owned division of Kawneer, which is a wholly-owned division of Reynolds Metal Company, and Reynolds is a wholly-owned subsidiary of Alcoa.²⁵

b. Common management

Factors establishing common management include the substantial overlap among the various entities alleged to constitute a single employer,²⁶ the fact that former high-level managers from the parent company serve in high-level management positions for the subsidiary,²⁷ and the parent company's ability to remove or discipline the subsidiary's officials.²⁸ Here, there is a substantial overlap of officers

²³ See, e.g., *Central Mack Sales*, 273 NLRB 1268, 1271-72 (1984); *Blumenfeld Theatres Circuit*, 240 NLRB 206, 215 (1979), *enforced mem.*, 626 F.2d 865 (9th Cir. 1980).

²⁴ *Emsing's Supermarket*, 284 NLRB at 304. See also *Lebanite Corp.*, 346 NLRB 748 (2006).

²⁵ *Dow Chemical Co.*, 326 NLRB at 288 (citing *Masland Industries*, 311 NLRB 184, 186 (1993)); *Flat Dog Productions, Inc.*, 347 NLRB 1180, 1182 (2006).

²⁶ *Pathology Institute*, 320 NLRB 1050, 1062-63 (1996) (substantial overlap between the board of directors of one entity and the board of trustees of the other entity is evidence of common management), *enforced mem. sub nom. Alta Bates Corp. v. NLRB*, 116 F.3d 482 (9th Cir. 1997), *cert. denied* 522 U.S. 1028 (1997).

²⁷ *Royal Typewriter Company*, 209 NLRB 1006 (1974) (where career officials of parent company served as highest officials within subsidiary and thereafter again served in high-level leadership positions within the parent company, their tenure within the subsidiary "was simply another management position" within the parent company, and evidence of common management), *enforced Royal Typewriter Co. v. NLRB*, 533 F.2d 1030 (8th Cir. 1976); *Soule Glass and Glazing Co.*, 246 NLRB 792, 795 (1979) ("flow of common management personnel from one corporation to another" supported single employer finding), *enforced in pertinent part*, 652 F.2d 1055 (1st Cir. 1981).

²⁸ See, e.g., *Royal Typewriter Company*, 209 NLRB at 1009 (the fact that parent company appointed division heads and retained control over their activities, including having frequent discussions with division heads, was evidence of common management). See also *Lebanite Corp.*, 346 NLRB at 759 ("Common management

among Traco, Kawneer, Reynolds, and Alcoa. Further, many of the highest-level management officials at Traco are Alcoa employees or officers who occupied similar roles at other Alcoa facilities and whom Alcoa assigned to manage Traco. By installing managers from other Alcoa subsidiaries into high-level Traco management positions, Alcoa has been able to control day-to-day operations and to implement Alcoa policy at Traco.

c. Interrelation of operations

Factors establishing interrelation of operations include evidence that the alleged single employer has integrated the other entity's product into its product line or utilized the other entity's product;²⁹ that the alleged single employer or another of its subsidiaries has provided core business services to the other entity;³⁰ that the alleged single employer has held itself out to the public or employees as the employer of the employees;³¹ and that the entities have not engaged in arm's-length dealing.³²

may be found where the separate managerial hierarchies take close instruction from a common owner.”).

²⁹ See *Lebanite Corp.*, 346 NLRB at 748, n. 5 (evidence that the alleged single employer used the subsidiary's Lebanite hardboard as a saw and drill board was probative of interrelation of operations); *Boich Mining Co.*, 301 NLRB 872 (1991) (interrelatedness outweighed the independent aspects of the two entities where the two companies combined materials to create product sold to its customers).

³⁰ See *Mammoth Coal Co.*, 358 NLRB No. 159, slip op. at 11 (Sept. 28, 2012) (evidence that one subsidiary provided human resources services to the other operating subsidiaries was probative of interrelated operations); *Spurlino Materials, LLC*, 357 NLRB No. 126, slip op. 7-8 (Dec. 6, 2011) (evidence that one company provided accounting services for the other company, paid for the other company's disability insurance and federal highway tax, and regularly paid the other company's various other bills directly and charged that company for the payment on an internal ledger); *Parma Industries*, 292 NLRB 90, 97 (1988) (evidence that parent company performed clerical accounting, engineering, sales, and marketing functions for its subsidiaries); *Cardio Data Systems Corp.*, 264 NLRB 37, 41 (1982) (evidence that parent corporation provided all of the personnel services, centralized accounting, centralized photocopying, and legal and accounting services to the other two companies), *enforced mem.*, 720 F.2d 660 (3d Cir. 1983).

³¹ See *Royal Typewriter Company*, 209 NLRB at 1010. See also *Spurlino Materials, LLC*, 357 NLRB No. 126, slip op. 7 (evidence that entities held themselves out to employees as their employer in a joint letter); *Masland Industries*, 311 NLRB 184, 187 (1993) (evidence that employees wore uniforms and carried identification cards with the alleged single employer's name and that the employing entity did not have its own business stationary); *Cardio Data Systems*, 264 NLRB at 41 (alleged single

Here, the evidence demonstrates extensive integration of operations between Alcoa and Traco. Specifically, Alcoa has integrated Traco products into its portfolio in order to provide a more comprehensive portfolio of products for its customers. Alcoa has publically stated that it acquired Traco in order to “offer a more complete product line to its customers,” that windows “were one of the key pieces of the puzzle” Alcoa did not have before acquiring Traco, and that Traco’s windows would allow it to offer its “expanded customer base a comprehensive product portfolio to help them meet increasingly complex commercial construction requirements.” Further, Alcoa markets its products with Kawneer products, and provides core business services to Traco. Indeed, Alcoa now cross-sells and cross-promotes Traco products with Kawneer products on the Kawneer website in order to give its customers “everything under the sun.” Moreover, as part of those cross-selling and cross-promotional efforts, Kawneer conducts much of Traco’s advertising, marketing, product management, and research and development.

The lack of an arm’s-length relationship between the two entities further demonstrates their interrelationship of operations. Thus, Alcoa or one of its subsidiaries provides numerous and varied services and supports to Traco. These include electronic communication infrastructure support, tax preparation and payment, accounting, traditional employee benefit administration, employee performance management, records management, EHS support, and industrial relations. The parties do not always execute written contracts for these services,³³ and Traco typically pays for them using internal Alcoa accounting codes rather than through written invoices.³⁴ As to all these services, it is immaterial whether they are

employer held itself out to employees as their employer when it posted a notice to the employees on its official stationery that “*we* do not believe that a majority of *our* employees want to be members of any union”).

³² *Lebanite Corp.*, 346 NLRB at 748, n.5.

³³ See *U.S. Dismantlement Corp.*, 298 NLRB 1068, 1070 (1990) (finding single employer where one entity assertedly paid the other for services provided, but where “the fee arrangements [we]re orally agreed on, an unusual arrangement between corporations purportedly operating at arms length”). See also *Al Bryant, Inc.*, 260 NLRB 128, 141 (1982) (absence of written leases one factor “warrant[ing] the conclusion that the two firms did not deal with each other on an ‘arms length’ basis”), *enforced* 711 F.2d 543 (3d Cir. 1983), *cert. denied* 464 U.S. 1039 (1984).

³⁴ See *Spurlino Materials, LLC*, 357 NLRB No. 126, slip op. 8 (alleged single employer’s failure to issue written invoices to related company for their shared equipment, labor, and other services was evidence that relations were less than arms length, and therefore evidence of interrelated operations).

optional or compulsory because “it is the *existence* of interrelated operations, not a *compulsion* to be interrelated, that is the material consideration.”³⁵

Further, Alcoa has repeatedly held itself out to Traco employees and the public as the employer of Traco employees. Alcoa’s 2011 Annual Report counts the employees at all of its subsidiaries, including Traco, in its total number of employees. Alcoa includes Traco in its federal tax statements and income taxes. Alcoa’s name is on Traco employees’ paychecks and job applications. The new Traco employee handbook primarily refers to Alcoa as the employer. Company presentations to employees, including the September 13-14 PowerPoint presentation, describe Alcoa as the employer. Thus, the evidence demonstrates interrelation of operations between Alcoa and Traco.

d. Centralized control of labor relations

The Board regards centralized control of labor relations as the most important single-employer factor.³⁶ Centralized control of labor relations does not require that common officials directly oversee the work forces of both entities. Rather, the Board has repeatedly emphasized that, particularly when the case involves a large corporation and/or businesses that are separated geographically, it would be impossible or impractical for the same managers to oversee the day-to-day operations of both companies.³⁷ Thus, the “more critical test is whether the controlling company possessed the present and apparent means to exercise its clout in matters of labor negotiations by its divisions or subsidiaries.”³⁸

³⁵ *Pathology Institute*, 320 NLRB at 1059 (emphasis in original).

³⁶ See, e.g., *Geo. V. Hamilton, Inc.*, 289 NLRB 1335, 1337 (1988); *Fedco Freightlines*, 273 NLRB 399, 399 n.1 (1984).

³⁷ See *Sakrete of North Carolina, Inc. v. NLRB*, 332 F.2d 902, 907 (9th Cir. 1964) (“Seldom would it be practicable for two companies situated in different parts of the country to be managed at the local level by one man or management group. If there is overall control of critical matters at the policy level, variances in local management decisions will not defeat the ‘single employer’ principle.”), *cert. denied* 379 U.S. 961 (1965), *enforcing* 137 NLRB 1220 (1962); *Spurlino Materials, LLC*, 357 NLRB No. 126, slip op. 7 (absence of day-to-day managerial control over other entity not significant, particularly where the facilities are geographically separate); *Bolivar Tees, Inc.*, 349 NLRB 720, 722 (2007) (single employer, notwithstanding that related company’s sole shareholder did not control the day-to-day operations of the other entity, where the companies were located in different countries), *enforced* 551 F.3d 722 (8th Cir. 2008).

³⁸ See *Pathology Institute*, 320 NLRB at 1063-64 (“Obviously there has not been an actual exercise of labor relations control here that is so extensive and intrusive as

In the instant case, Alcoa's control over Traco's labor relations is pervasive. First, Alcoa has exercised control over Traco employees' terms and conditions of employment by substantially revising the Traco employee handbook and reissuing and revising other policies, including terms related to benefits, work hours, and safety. For example, Alcoa requires Traco employees to attend an orientation program, which is designed "to familiarize all new employees with the Human Resources policies and procedures, safety practices, [and] Alcoa Business systems and Quality."

Second, Alcoa has installed individuals who previously held high-level management positions within Alcoa into high-level management positions at Traco, including the general manager, plant manager, EHS manager, and HR director. As previously discussed, Alcoa placed these individuals into their positions in order to facilitate Traco employees' transition into Alcoa culture. Moreover, through these managers, Alcoa has control over Traco employees' working conditions because these managers not only report to Alcoa officials and view Alcoa as their employer, but also are subject to removal by Alcoa management.³⁹

Third, Alcoa, and not Traco, provides and administers Traco employees' benefits.⁴⁰ Traco employees are under Alcoa's benefit plans, including 401k, leave accrual, and medical, dental, and disability insurance.⁴¹ And another Alcoa

occurs, for example, when a single proprietor operates two interrelated small companies each of which employs but a handful of employees. . . . In such situations, as here, it is only necessary to conclude that there had been an ability of one entity to exercise 'clout' over labor relations of others."); *Emsling's Supermarket*, 284 NLRB at 302 ("the fundamental inquiry is whether there exists overall control of critical matters at the policy level.").

³⁹ See, e.g., *Soule Glass and Glazing Co.*, 246 NLRB at 795 (fact that the president of parent company installed subsidiary's president into that position was evidence of centralized control of management because subsidiary's president had previously served under his wing and "it was clear where [his] allegiance lies.").

⁴⁰ It is not material that Traco employees' terms and conditions differ from those working at Kawneer or other Alcoa subsidiaries. The single employer analysis focuses on whether Alcoa exercises sufficient control over Traco's labor relations rather than whether all Alcoa employees share similar terms and conditions of employment. Moreover, unionized and non-unionized employees' terms and conditions of employment are likely to differ.

⁴¹ See *Mammoth Coal Co.*, 358 NLRB No. 159, slip op. at 12 (alleged single employer entity, rather than the subsidiary, actually employed the employees, and set the wages and benefits for the subsidiary's employees); *Royal Typewriter Company*, 209

subsidiary performs essentially all of Traco's core human resources functions, including administration of benefits, payroll, customer support services, health and welfare administration, performance management support, and records management.

Fourth, Alcoa had extensive involvement in Traco's union avoidance policy, including the alleged unfair labor practice in this case.⁴² For example, Alcoa's IR director provides union-avoidance training to Alcoa's non-unionized subsidiaries, and conducted such training for Traco's managers after the managers contacted him about finding union literature within the plant. Additionally, the IR Director advised the Traco managers concerning Alcoa's position on the offsite Alcoa employees' rights to access the Traco parking lots; informed the Traco managers of Union's intent to leaflet; and instructed Traco managers to call him if they had any issues.

2. Traco and Alcoa unlawfully denied offsite Alcoa employees access to Traco's parking lots.

The Board has long held that under the rationale of *Tri-County Medical Center*,⁴³ employers may not promulgate or enforce rules denying their off-duty employees access to parking lots, gates, and other outside working areas, except where justified by business reasons.⁴⁴ In *Hillhaven Highland House*⁴⁵ and *ITT Industries*,⁴⁶ the

NLRB at 1010 (alleged single employer entity administered subsidiary employees' pension plan and the pension plan documents referred to the alleged single employer).

⁴² See e.g., *Mammoth Coal Co.*, slip op. at 11-12 (alleged single employer's involvement in the commission of the unfair labor practices was evidence of centralized control of labor relations); *Masland Industries*, 311 NLRB 184, 187 (1993) (same).

⁴³ 222 NLRB 1089, 1089 (1976) (rules limiting the access of off-duty employees are valid only if they: (1) limit access solely to the interior and working areas of the plant; (2) are clearly disseminated to all employees; and (3) apply to off-duty employees seeking access to the plant for any purpose, not just those engaged in union activity).

⁴⁴ *Ibid.* See also *Ryder Student Transportation Services*, 333 NLRB 9, 10-11 (2001) (employer's unwritten no-access policy prohibiting employees from entering the property of a terminal where they do not work or from entering their own work terminal at times they were not scheduled to work invalid on its face because, *inter alia*, it did not limit access solely to interior or working areas of the plant); *Flamingo Hilton-Laughlin*, 330 NLRB 287, 289-290 (1999) (rule invalid under *Tri-County* as it restricted off-duty employee access to employer's entire "property," not just interior or other working areas of the facility); *Donaldson Bros. Ready-Mix, Inc.*, 341 NLRB 958, 959 (2004) (discriminatorily promulgated rule barring employee access to repair shop after hours).

Board determined the applicability of *Tri-County* to offsite employees. In those cases, the Board determined that, although employers have a heightened property interest with regard to offsite as opposed to onsite off-duty employees, the Section 7 rights of offsite employees is a primary, non-derivative right and will generally outweigh those property interests, except where the exclusion of offsite employees is justified by business reasons.⁴⁷ Thus, an employer must specifically demonstrate why these reasons warrant denying access to visiting offsite employees.⁴⁸ Furthermore, employer restrictions on access must be reasonably tailored to avoid unnecessary interference with the offsite employees' Section 7 rights.⁴⁹

Here, Alcoa and Traco violated the Act by prohibiting the offsite Alcoa employees from accessing Traco's parking lots because, although they worked at different Alcoa subsidiaries, the offsite and Traco employees shared a common employer: Alcoa. Further, they have never demonstrated any justification for their complete ban on the offsite employees' access to Traco property. Therefore, the Region should issue a Section 8(a)(1) complaint, absent settlement.

/s/

B.J.K.

ADV.06-CA-065365.Response.AlcoaTRACO. (b) (6), (b) (7)

⁴⁵ 336 NLRB 646, 648 (2001) ("Offsite employees are not only 'employees' within the broad scope of Section 2(3) of the Act, they are 'employees' in the narrow sense: 'employees of a particular employer' (in the Act's words), that is, employees of the employer who would exclude them from its property), *enforced sub. nom, First Health Care Corp. v. NLRB*, 344 F.3d 523 (6th Cir. 2003).

⁴⁶ 341 NLRB 937 (2004), *enforced*, 413 F.3d 64 (D.C. Cir. 2005).

⁴⁷ 336 NLRB at 648. The Board and courts have expressly rejected the claim that the existence of alternative means of access is a relevant consideration in balancing offsite employees' Section 7 right of access against the employer's property interest. *See ITT Industries*, 341 NLRB at 941; *First Healthcare Corp. v. NLRB*, 344 F.3d at 541.

⁴⁸ *Hillhaven Highland House*, 336 NLRB at 648-50 (rejecting employer's asserted business justifications of protecting the tranquility of its nursing home residents, avoiding the burden of identifying offsite employees, and preventing union violence; Board will carefully review employer justifications on a case-by-case basis). *See also ITT Industries*, 341 NLRB at 938, 940-41; *Amptech, Inc.*, 342 NLRB 1131, 1136 (2004), *enforced mem.*, 165 Fed.Appx. 435 (6th Cir. 2006).

⁴⁹ *ITT Industries*, 341 NLRB at 940-41.