

D & B Contracting Co., Inc. and Domenic D'Egidio and Berniece D'Egidio t/a D'Egidio Contracting Co. and Teamsters Local 470, a/w International Brotherhood of Teamsters, AFL-CIO.¹ Case 4-CA-18472

November 29, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND RAUDABAUGH

On May 8, 1991, Administrative Law Judge Martin J. Linsky issued the attached decision. The General Counsel filed exceptions and a supporting brief. The Respondent filed a brief in answer to the General Counsel's exceptions.

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,² findings, and conclusions and to dismiss the complaint.

The judge found, and we agree for the following reasons, that the results of the Board-conducted election among the drivers of D & B Contracting Co., Inc. (D & B) determine whether D & B has a duty to recognize the Union and apply the collective-bargaining agreement between D'Egidio Contracting Co. (D'Egidio) and the Union. At the time of that representation proceeding, both the Union and the D & B employees were fully aware of evidence that would support a reasonable contention that D & B and D'Egidio constituted a single employer/single unit and or alter ego. This evidence included the fact that D'Egidio was managed and controlled by the same individual who managed D & B. Despite this, the Union petitioned for an election involving only the D & B employees. The employees voted to reject the Union in an election held in March 1989. Where the unit employees in such circumstances have rejected representation in a free and fair election, we would not use single employer and alter ego doctrines to impose representation on the employees by operation of law.

The essential facts are as follows. D'Egidio, a partnership of Domenic and Berniece D'Egidio, was engaged in the business of hauling bulk material. D'Egidio recognized the Union in 1986 and subsequently entered into a collective-bargaining agreement with the Union effective April 30, 1988, to April 30, 1991. D & B is a corporation established by Domenic D'Egidio in 1984. In 1988, D & B began the business

of hauling bulk material. Domenic D'Egidio managed and controlled D & B and D'Egidio. Between June and December 1988, D & B and D'Egidio operated out of the same yard on Merion Avenue Philadelphia, Pennsylvania. The drivers employed by each company sometimes drove for the other company. Each company occasionally used the trucks of the other company. Such interchange of employees and equipment was a common occurrence.

In December 1988, Union Vice President and Business Agent Tipton met with Domenic D'Egidio and discussed the Union's desire to represent the D & B drivers. No agreement on representation was reached.

In January 1989, D & B moved from the Merion Avenue yard to a yard on Oak Avenue in Glenolden, Pennsylvania. On January 17, 1989, the Union filed a petition with the Board seeking an election among the D & B drivers. The parties agreed to hold the election at the Merion Avenue yard even though D & B was located at the Oak Avenue yard.

The Board conducted the election on March 3, 1989. The vote was three for and two against the Union with one challenged ballot. There were no objections to the conduct of the election. The Acting Regional Director's report on the challenged ballot recommended that the challenge be overruled. The challenged ballot was then opened and counted and the revised tally of ballots shows three for and three against the Union. On August 8, 1989, the Region issued a certification of results of election stating that the Union was not selected as the collective-bargaining representative of the D & B drivers. Three of the six employees who voted in the election were former employees of D'Egidio who worked for D'Egidio during part of the time when D'Egidio and D & B operated out of the Merion Avenue yard.

On October 17, 1989, D'Egidio, which had been decreasing in size since June 1988, sold its one remaining truck and went out of business.³ On February 1, 1990, the Union filed the unfair labor practice charge in the instant case alleging that D & B and D'Egidio were a single employer, that D & B was the alter ego of D'Egidio, and that D & B therefore violated Section 8(a)(5) of the Act by refusing to recognize the Union and to apply the collective-bargaining agreement signed by D'Egidio and the Union to the D & B employees.

In this factual context, we find that the results of the Board-conducted election determine the issues of representation and bargaining obligations regardless of whether D & B was the alter ego of and a single employer with D'Egidio. Although the Union and the D & B employees voting in the March 3, 1989 election had no conclusive knowledge of the legal relationship

¹ The name of the Charging Party has been changed to reflect the new official name of the International Union.

² No exceptions were filed to the judge's ruling that the charge in the instant case was not barred by Sec. 10(b).

³ There is insufficient evidence to establish that the D'Egidio operation was transferred to D & B.

between D & B and D'Egidio, it is undisputed that they were aware of the existence of the two companies and of Domenic D'Egidio's managerial role in both companies. This is not a case, therefore, where the existence of a union or nonunion company has been concealed.⁴ Both the D & B employees and the Union participated in the March 3, 1989 election with full awareness of the existence of D'Egidio, the unionized company. Indeed, the election was held at the yard used by D'Egidio even though D & B had already moved to a different location. Half of the employees voting in the election not only knew of the existence of D'Egidio, but recently had worked at D'Egidio under unionized conditions.

Thus, the D & B employees freely decided in a fair election⁵ that they did not want to be represented by the Union. In these circumstances, even if D & B is the alter ego of D'Egidio or would otherwise be required under the Act to recognize the Union and apply the D'Egidio collective-bargaining agreement, we shall not disregard the desires of the employees expressed in the election.⁶ Instead, we give controlling weight to their rejection of representation and we dismiss the complaint.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

⁴ Cf. *Burgess Construction*, 227 NLRB 765 (1977).

⁵ There was no contention at the time, nor is there any present contention, that the election was flawed by objectionable conduct.

⁶ In light of this conclusion, we find it unnecessary to pass on the judge's discussion of the single employer and alter ego issues.

David Faye, Esq., for the General Counsel.
Michael G. Tierce, Esq. (Schnader, Harrison, Segal & Lewis), of Philadelphia, Pennsylvania, for the Respondent.
Mark P. Muller, Esq. (Freedman & Lorry), of Philadelphia, Pennsylvania, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MARTIN J. LINSKY, Administrative Law Judge. On November 27 and December 6, 1989, and February 1, 1990, a charge, a first amended charge, and a second amended charge in Case 4-CA-18472 were filed by Teamsters 470 (the Union). The charge and first amended charge were filed against D'Egidio Contracting, Inc. The second amended charge was filed against D'Egidio Contracting Company and its alter ego D & B Contracting, Inc.

On February 28, 1990, the National Labor Relations Board, by the Acting Regional Director for Region 4, issued a complaint in Case 4-CA-18472. The complaint in Case 4-CA-18472 was consolidated for trial with Case 4-CA-18404. On the eve of the trial Case 4-CA-18404 was settled, the charge withdrawn, and that portion of the consolidated complaint dismissed.

It is alleged in Case 4-CA-18472 that D & B Contracting Co., Inc. (Respondent D&B), and Domenic D'Egidio and Berniece D'Egidio t/a D'Egidio Contracting Co. (Respondent D'Egidio Contracting) were a single employer with each other and that D&B is an alter ego of D'Egidio Contracting, and that D&B violated Section 8(a)(1) and (5) and Section 8(d) of the National Labor Relations Act (the Act), by refusing to recognize the Union as the collective-bargaining representative of its employees and abide by the collective-bargaining agreement effective April 30, 1988, to April 30, 1991, entered into by the Union and D'Egidio Contracting. Respondents D'Egidio Contracting and D&B deny that the Act was violated in any way. More specifically it is denied that D&B and D'Egidio Contracting are either a single employer or that D&B is the alter ego of D'Egidio Contracting. Respondent also raises a 10(b) defense and claims further that the results of an election among the employees of D&B, which the Union lost, should control the issue of whether the Union represents the D&B employees.

Trial was held before me in Philadelphia, Pennsylvania, on December 12, 1990.

On the entire record in this case, to include posthearing briefs filed by the General Counsel¹ and Respondent, and on my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

D & B Contracting Co., Inc. is a Pennsylvania corporation. D'Egidio Contracting Co. is a partnership comprised of Domenic D'Egidio and Berniece D'Egidio, doing business as and trading under the name of D'Egidio Contracting Co.

Both D&B and D'Egidio Contracting were engaged in the transportation of bulk materials.

During the past year prior to the issuance of the complaint both Respondents provided services in excess of \$50,000 to other enterprises, including Glasgow, Inc., located within the Commonwealth of Pennsylvania, each of which enterprise purchased and received goods and service valued in excess of \$50,000 directly from points located outside the Commonwealth of Pennsylvania.

Respondents admit, and I find, that they are and have been at all times material employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Respondents admit, and I find, that Teamsters 470 is now and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Factual Overview

D'Egidio Contracting, the partnership, operated out of a yard on Merion Avenue in Philadelphia, Pennsylvania. D'Egidio Contracting was in the business of hauling bulk material, i.e., its drivers drove dump trucks which hauled sand, gravel, asphalt, and dirt.

¹ The Charging Party joins in the brief filed by the General Counsel.

In 1986 D'Egidio Contracting, which had been in business since 1967, recognized the Union as the collective-bargaining representative of its drivers. Later, D'Egidio Contracting and the Union entered into a 3-year contract effective April 30, 1988, to April 30, 1991.

Back in 1984, 2 years before D'Egidio Contracting recognized the Union, on the advice of his accountant, Domenic D'Egidio set up a corporation named D'Egidio Contracting Co. In 1988 the name was changed to D & B Contracting Co., Inc. because the original corporate name was too similar to the partnership name. The corporation was dormant until June 1988, when it began operating out of the same Merion Avenue yard in Philadelphia out of which the partnership, D'Egidio Contracting, operated. Between June 1988 and December 1988 both D'Egidio Contracting and D&B operated out of the same facility. Both entities did the same kind of work, i.e., the hauling in dump trucks of bulk material. The drivers employed by D'Egidio Contracting sometimes drove for D&B and vice versa. On occasions D&B trucks were used by D'Egidio Contracting and vice versa.

Domenic D'Egidio ran both D'Egidio Contracting and D&B. Donald D'Egidio, the son of Domenic and Berniece D'Egidio, did the books for both D'Egidio Contracting and D&B.

In the fall of 1988, William Hammer, who was a driver for D'Egidio Contracting and Chief Steward, told Union Vice President and Business Agent Delmont "Tex" Tipton that D'Egidio was starting up a new business. Tipton spoke with D'Egidio about representing the drivers in the new business. At a meeting in December 1988 Domenic D'Egidio and Tipton met. Domenic D'Egidio wanted a contract for D&B which was less costly laborwise than the D'Egidio Contracting contract with the Union. There is some difference between Tipton and Domenic D'Egidio as to what was said at this meeting. The bottom line, however, is that no agreement was reached that the Union would represent the D&B drivers.

Also in December 1988 Domenic D'Egidio spoke with John DiLuzio, who was president of Teamsters Local 312. D'Egidio spoke with DiLuzio about D&B signing a contract with Teamsters Local 312 and that D&B was moving from the city of Philadelphia to Darby Township. Domenic D'Egidio was thinking of going with Teamsters Local 312 for his D&B drivers because D&B would be located in Teamsters Local 312's jurisdiction and because D&B's biggest custom, Glasgow, Inc., had suggested D&B go with Teamsters 312 because Glasgow, Inc. was in Teamsters Local 312's jurisdiction as well. DiLuzio told D'Egidio he wanted to check with Teamsters Local 470 and he would get back to D'Egidio. DiLuzio learned from Tipton that Teamsters Local 470 was trying to organize D&B and DiLuzio told Tipton that in light of that he had no interest in Teamsters Local 312 representing the D&B drivers. DiLuzio never got back to Domenic D'Egidio on this.

In January 1989 two significant events took place. D&B moved from the Merion Avenue yard in Philadelphia to a yard on Oak Avenue in Glenolden, Pennsylvania (Darby Township). As result the D&B trucks were kept separate and apart from the D'Egidio Contracting trucks except when D&B trucks went to the Merion Avenue yard for repairs. I note that other trucking concerns also used the Merion Avenue yard, which yard was owned by Domenic D'Egidio and

two of his brothers, who have no personal connection to either D'Egidio Contracting or D&B. The second significant event was the filing of an election petition by Teamsters Local 470 with the Board on January 17, 1989, for an election among the D&B truckdrivers.

A hearing was held at the Board Office in Philadelphia regarding that election in February 1989, and the parties agreed that the Board would conduct an election among the D&B drivers at the Merion Avenue yard in Philadelphia on March 3, 1989. The election was held at the Merion Avenue yard even though D&B had relocated to the Oak Avenue yard.

The Board-conducted election was held on March 3, 1989, among the D&B truckdrivers. A list of eligible votes had been furnished to the Union prior to the election. The vote was 3 to 2 in favor of representation by the Union with one challenged ballot. The report on the challenged ballot issued by the Acting Regional Director recommended that the challenged ballot be opened and counted. It was and the revised tally of ballots reflected a vote of three votes for representation and three votes against representation. A tie vote, of course, is a vote against representation. The Region on August 8, 1989, issued a Certification of Results of Election reflecting that the Union was not selected as the collective-bargaining representative of the D&B truckdrivers.

When D&B started operations in June 1988 it had three trucks and D'Egidio Contracting had five trucks. In January 1989, when D&B moved to the Oak Avenue yard and D'Egidio Contracting remained at the Merion Avenue yard, D&B had five trucks (it owned three and leased two from Domenic D'Egidio) and D'Egidio Contracting had three trucks. Two of the D'Egidio Contracting trucks were sold in May 1989 and D'Egidio Contracting was down to one truck. On October 17, 1989, D'Egidio Contracting sold its one remaining truck and went out of business. At this time D&B was up to eight trucks (it owned five and leased three from Domenic D'Egidio). The D'Egidio Contracting trucks sold in May and August 1989 were not sold to D&B.

It is the contention of the General Counsel and the Union that D&B and D'Egidio Contracting were a single employer and that D&B was the alter ego of D'Egidio Contracting. Therefore, the Union represents the drivers of D&B (even though the Union lost a representation election, 3 to 3, among those very same drivers). Further, D&B must recognize the Union and abide by the April 1988 to April 1991 contract signed by D'Egidio Contracting and the Union.

The attorney for D&B and D'Egidio Contracting maintains that the entities were not a single employer, that D&B is not an alter ego of D'Egidio Contracting, and the fact that there was an election clearly demonstrates that a question of representation existed and the results of that election establish that the Union does not represent the D&B drivers. Respondents also assert that the Union had reason to believe that D&B and D'Egidio Contracting were a single employer in January 1989 but did not file a charge that raised this issue until February 1, 1990, and, therefore, the complaint is time-barred under Section 10(b) of the Act.

B. *Analysis of the Law*

The Board's traditional test in determining whether two or more entities are a single employer involves the evaluation of four factors: (1) interrelation of operations; (2) common

management; (3) centralized control of labor relations; and (4) common ownership or financial control.

Single employer status does not require the presence of all four criteria, but depends on all the circumstances of the particular case. See *Weldment Corp.*, 275 NLRB 1432 (1985). However, certain factors carry more weight than others. Common control of labor relations has been described as a critical factor, while common ownership is least important. See *Watt Electric Co.*, 273 NLRB 655, 657 fn. 13 (1984); *Shellmaker, Inc.*, 265 NLRB 749, 754 (1982).

In the instant case there was an interrelation of operations between D&B and D'Egidio Contracting because for many months (June 1988 to December 1988) they shared a common facility and for the entire period that they both were in operation (June to October 1989) there was an exchange of drivers and equipment² and both entities serviced many of the same customers, principally a corporation named Glasgow, Inc. On the other hand, separate Federal and state tax returns were filed for both entities and separate books and records were maintained, albeit, by the same people. Each entity had a different Federal identification number and separate bank accounts.

Domenic D'Egidio was the dispatcher for both D&B and D'Egidio Contracting and, for all practical purposes, was the one person running both entities throughout the period they were both in operation.

D&B and D'Egidio Contracting had common ownership or financial control because Domenic and Berniece D'Egidio were the owner and shareholders of D&B and Domenic and Berniece D'Egidio were the two parties in the partnership that did business as D'Egidio Contracting.

With respect to whether or not there was centralized control of labor relations, it is noted that Domenic D'Egidio was management as for as employees of both D&B and D'Egidio Contracting was concerned. Obviously the terms and conditions of employment for D'Egidio Contracting employees were governed by the contract with Teamsters Local 470 and they were not governed by the contract with respect to the employees of D&B. In other words, there was centralized control of labor relations. Basically, pay was the only real distinction. Drivers for neither entity wore uniforms. The trucks were only numbered and did not have the name of either entity on them.

The criteria applicable to an alter ego/disguised continuance issue are set forth in *Fugazy Continental Corp.*, 265 NLRB 1301 (1982), enfd. 725 F.2d 1416 (D.C. Cir. 1984), as follows:

In determining whether [one employer] is the alter ego of [another], we must consider a number of factors, no one of which, taken alone, is the sine qua non of alter ego status. Among these factors are: common management and ownership; common business purpose, nature of operations, and supervision; common premises and equipment; common customers, i.e., whether the employers constitute "the same business in the same

market"; as well as the nature and extent of the negotiations and formalities surrounding the transaction. We must also consider whether the purpose behind the creation of the alleged alter ego was legitimate or whether, instead, its purpose was to evade responsibilities under the Act.

It would certainly appear that D&B is the alter ego of D'Egidio Contracting because there is common management (Domenic D'Egidio) and ownership (Domenic and Berniece D'Egidio), common business purpose (the hauling of bulk material in dump trucks), nature of operations (dump trucks that pick up and deliver bulk material), supervision (Domenic D'Egidio), common premises and equipment (from June 1988 to January 1989 D&B and D'Egidio Contracting shared the same yard and D&B trucks continue to use that yard for repairs and D&B and D'Egidio Contracting drivers on many occasions used trucks from the other entity); common customers (D&B and D'Egidio Contracting during the period of June 1988 to October 1989 both serviced many of the same customers, i.e., they had approximately eight customers in common and apparently Glasgow, Inc., was the biggest customer for both entities).

Why was D&B created? Was it to evade responsibilities under the Act or for some other reason? As noted above D'Egidio Contracting was a partnership. The liabilities of the partnership were the *personal* liability of the principals of the partnership, i.e., Domenic D'Egidio and his wife, Berniece D'Egidio. Domenic D'Egidio's accountant, Daniel Irwin, credibly testified that he urged Domenic D'Egidio to let him set up a corporation and let Domenic D'Egidio thereby lessen the *personal* liability of himself and his wife because the liabilities of a corporation generally do not render the principals of a corporation *personally* liable for corporate debt. Irwin also suggested to Domenic D'Egidio that he relocate his business outside of Philadelphia because the partnership was disputing a debt which the city of Philadelphia claimed it was owed by D'Egidio Contracting. The debt was approximately \$104,000 and Irwin was fearful that at some point the city of Philadelphia might terminate certain licenses D'Egidio Contracting needed to stay in business.

Based on the above it does not appear that D&B was created to evade D'Egidio Contracting's responsibilities under the National Labor Relations Act³ but it is nevertheless clear taking all the evidence into account and the law applicable to deciding whether or not two entities are a single employer and whether one is the alter ego of the other, that D&B and D'Egidio Contracting were a single employer and that D&B is the alter ego of D'Egidio Contracting.

C. Effect of the Election

The only troubling aspect is that there was an election in March 1989 among the drivers of D&B which vote was three for representation by the Union and three against representation, i.e., the Union lost. The legal consequence of a finding of single employer and alter ego status is that D&B must

²Documentary evidence at the hearing establishes that throughout the period when D&B and D'Egidio Contracting were both in operation (June 1988 to October 1989) D&B drivers drove D'Egidio Contracting vehicles and vice versa and D&B drivers driving D&B trucks did work for D'Egidio Contracting and vice versa. And, further, this was a common occurrence and not isolated.

³On the other hand, the fact that within 16 months after D&B went operational D'Egidio Contracting went out of business might persuade someone that one of the purposes of creating D&B might have been to avoid responsibility under the Act.

recognize the Union and comply with the contract D'Egidio Contracting had with the Union.

The six employees of D&B who voted in the March 1989 election were:

Brian Durkee
Leonard Leary
William Long
Paul Robertson AKA Dennis Griffen
Claxton Wright
Edward McLaughlin

Three of the six D&B employees, i.e., William Long, Claxton Wright, and Edward McLaughlin, had been D'Egidio Contracting employees prior to the election and during part of the time when both D&B and D'Egidio Contracting were in operation. The only objection to the election was the Union's challenge to the ballot of Brian Durkee.

After the election Domenic D'Egidio, the moving force in both D&B and D'Egidio Contracting, built up D&B from five to eight trucks and downsized D'Egidio Contracting from three trucks to zero trucks. And, in October 1989 D'Egidio Contracting went out of the business. When D'Egidio Contracting went out of business it laid off William Hammer, its last driver, who had been chief steward for the Union. Charges were filed with the Board over Hammer's permanent lay off and alleging that he should have been transferred to D&B and a complaint issued (Case 4-CA-18404), which case was settled by the parties prior to the hearing before me.

Prior to the election in March 1989 the General Counsel and Union could have known through investigation that there was reason to believe that D&B and D'Egidio Contracting were a single employer. Rather than file a charge alleging single-employer status if D&B refused to recognize the Union, the Union went for a Board-conducted election among the D&B drivers. Of course, the attorney for D&B did not advise the Union or the Board that D&B and D'Egidio Contracting were a single employer.

Some 5 months after the election results were certified by the Board the Union for the first time on February 1, 1990, alleged that D&B was the alter ego of D'Egidio Contracting. I believe the Union waited too long. The Union waived the single-employer and alter ego issues by going the election route. The will of the employees expressed in the 3 to 3 vote should control whether the Union represents the D&B drivers or not. I find the election results more persuasive than the evidence on single-employer and alter ego status on the question of D&B's duty to recognize the Union, bargain in good faith with the Union, and abide by the April 1988 to April 1991 contract which the Union signed with D'Egidio Contracting. Accordingly, I will recommend that the complaint be dismissed.

Since close to 2 years have gone by since the election results were certified by the Board on August 8, 1989, the Union will be free to undertake another organizing campaign among the D&B drivers and the majority of those drivers could well decide for themselves that they want to be represented by the Union even though in March 1989 a majority of those D&B drivers did not vote for such representation.⁴

CONCLUSIONS OF LAW

1. D&B Contracting Co., Inc., and Domenic D'Egidio and Berniece D'Egidio doing business as D'Egidio Contracting Co. were employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Teamsters Local 470 is a labor organization within the meaning of Section 2(5) of the Act.

3. D&B Contracting Co., Inc., and D'Egidio Contracting Co. were a single employer during the time they were both operating, i.e., June 1988 to October 1989.

4. D&B Contracting Co., Inc. is an alter ego of D'Egidio Contracting Co.

5. A Board-conducted election was held among the employee drivers of D&B Contracting Co., Inc. on March 3, 1989. The Union lost that election and the Board so certified on August 8, 1989.

6. The results of the election control whether or not D&B Contracting Co., Inc. has a duty to recognize the Union as the representative of its employee drivers. Because the majority of employee drivers of D&B Contracting Co., Inc. did not vote to be represented by the Union and the Board has certified that result D&B Contracting Co., Inc., did not violate Sections 8(a)(1) and (5) and 8(d) of the Act when it refused to recognize the Union as the collective-bargaining representative of its employee drivers.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁵

ORDER

The complaint is dismissed in its entirety.

⁴Pursuant to Sec. 10(b) of the Act a charge must be filed within 6 months of the aggrieved party (in this case the Union) being put on notice of the unfair labor practice. *Truck & Dock Services*, 272 NLRB 592 (1984). The burden is on the party raising the 10(b) defense (in this case D&B and D'Egidio Contracting) to show notice and such notice must be clear and unequivocal. *Strick Corp.*, 241 NLRB 210 (1979). It would seem that the 10(b) 6-month period in this case should run from the certification of election results on August 8, 1989. Hence the charge was timely filed.

⁵If 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.