Acoustics, Inc., and Sumon Corporation *and* Carpenters District Council of Denver and Vicinity and its affiliate Local 1391. Case 27-CA-8297

31 May 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

Upon a charge filed by the Union 9 March 1983 the General Counsel of the National Labor Relations Board issued a complaint 22 April 1983 against the Respondent, alleging that it has violated Section 8(a)(1) and (5) and Section 2(6) and (7) of the National Labor Relations Act. Although properly served copies of the charge and complaint, the Respondent has failed to file an answer.

On 10 June 1983 the General Counsel filed a Motion for Summary Judgment. On 21 June 1983 the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed no response. The allegations in the motion are therefore undisputed.

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

Upon the entire record in this proceeding, the Board makes the following

Ruling on Motion for Summary Judgment

The complaint alleges, inter alia, that the Respondent Acoustics at all material times herein has been a corporation duly organized under the laws of the State of Utah, that the Respondent Sumon has been a corporation duly organized under and existing by virtue of the laws of the State of Colorado, that each maintains an office and place of business in Denver, Colorado, where it has been engaged in the construction industry and that each in the course of its business operations provided services valued in excess of $50,000 for other enterprises within the State of Colorado, each directly engaged in interstate commerce. The complaint alleges that the Respondent Acoustics and Sumon have at all times material been affiliated business enterprises and by virtue of their operations have constituted a single integrated business enterprise and a single employer within the meaning of the Act. The complaint also alleges that at all times material the Respondents Acoustics and Sumon have existed as a dual or "double-breasted" operation, wherein the Respondent Acoustics has functioned as a union contractor and the Respondent Sumon has functioned as a nonunion contractor, utilizing two separate units of employees.

As set forth in the complaint, the following employees of the Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> [T]he employees described in the 1981-1984 Master Agreement covering dry wall, acoustical, lather, insulation and interior systems work in the State of Colorado between the United Brotherhood of Carpenters and Joiners of America, Local Union 1391, the Carpenters District Council of Denver and Vicinity, the Carpenters District Council of Southern Colorado, the Colorado State Council of Carpenters and the Rocky Mountain Association of Gypsum Drywall Contractors, to which Respondent is signatory.

The complaint further alleges that at all times material "a majority of the employees of Acoustics in the unit described above . . . designated or selected the Union as their Representative for the purposes of collective bargaining with Acoustics," and that the Union by virtue of Section 9(a) of the Act has been the exclusive representative of the employees in said unit for the purposes of collective bargaining.

Finally, paragraph 10 of the complaint alleges that commencing on or about 8 February 1983, and at all times thereafter, the Respondent has failed and refused to meet and bargain with the Union, refused to recognize the Union as the exclusive bargaining representative of the employees described above (as the appropriate unit); that the Respondent has failed and refused to honor the collective-bargaining agreement with respect to employees of Sumon and refused to bargain by refusing to make fringe benefit payments to the Union on behalf of the employees of Sumon. Paragraph 5 alleges that, about 28 February 1983, the Respondent interfered with, restrained, and coerced its employees by a threatened refusal to bargain at the expiration of the current collective-bargaining agreement in 1984, if the Union pursued the issue of single-employer status of Acoustics and Sumon.

With respect to the allegations in paragraph 10 of the complaint, that the Respondent refused to bargain in violation of Section 8(a)(5) of the Act, we shall deny the General Counsel's Motion for Summary Judgment for the following reasons.

For the purposes of this decision, we find, as alleged in the complaint, that the Respondent Acoustics and Sumon constitutes a single integrated enterprise and a single employer.[1] But that conclu-

[1] Our finding in this regard, of course, applies only to Acoustics and Sumon's construction operations within Colorado. The record does not

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sion is not dispositive herein. For, as noted by the Supreme Court in *South Prairie Construction Co.*,[2] a single-employer finding does not necessarily establish that the employerwide unit is the appropriate bargaining unit. Indeed, the criteria for finding a single employer are not the same as those used in determining the scope of the unit.[3] Thus, for the General Counsel to prevail in contending that the Respondent violated Section 8(a)(5) of the Act by not applying contract terms to employees of Sumon, it must be shown (or alleged without contest) that the Union was the exclusive collective-bargaining representative of those Sumon employees covered by contract; or that, by virtue of other factors, the employerwide unit of the Respondent Acoustics and Sumon is the appropriate bargaining unit. That is not the case here.[4]

First, the complaint plainly sets forth that at all times material Acoustics has functioned as a union contractor while Sumon has functioned as a nonunion contractor, and that they have utilized two separate units of employees. The complaint does not assert that such units are not appropriate; nor do the factual allegations in the complaint give rise to such an inference. Further, the complaint asserts that at all times material a majority of the employees of Acoustics designated or selected the Union as their representative. Again, the complaint does not allege that the employees of Acoustics constitute an inappropriate unit. The clear implication of the complaint language is that a majority of the employees of Sumon have not designated the Union as their representative.[5] Thus, in order to find that the Respondent has violated Section 8(a)(5) of the Act as alleged, we would at least in part have to either ignore or contravene the plain language of the complaint. Additionally, we find the allegations pertaining to the Respondent's refusal to meet and bargain or to recognize the Union as the exclusive bargaining representative to be ambiguous, inasmuch as it is unclear whether such allegations are intended to apply with respect to employees of Acoustics only, or to employees of both Acoustics and Sumon. Hence, we are unable to find those violations as alleged in the complaint without engaging in speculation.

For the reasons set forth above we conclude that substantial portions of the complaint raise substantial and material issues which are not susceptible to conclusive findings in this proceeding, but which may best be resolved at a hearing before a judge.[6]

Accordingly, we shall deny the General Counsel's Motion for Summary Judgment.

ORDER

The General Counsel's Motion for Summary Judgment is denied.

IT IS FURTHER ORDERED that this proceeding is remanded to the Regional Director for Region 27 for further appropriate action.

MEMBER ZIMMERMAN, dissenting.

Contrary to my colleagues, I would grant the General Counsel's Motion for Summary Judgment. This is an uncontested case: The Respondent has not filed an answer to the complaint which issued 22 April 1983, despite the clear warning that if it failed to do so, all allegations in the complaint would be deemed admitted to be true. The majority's refusal to grant summary judgment, therefore, is based solely on the adequacy of the complaint allegations. I find those allegations sufficient to support the finding of a violation of Section 8(a)(5) of the Act.

As the complaint makes clear at paragraph II(i), this case involves a dual or double-breasted operation, where the Respondent is using two groups of employees to perform construction work: one union (Acoustics) and one nonunion (Sumon). The Supreme Court set forth the law in this area in *South Prairie Construction Co. v. Operating Engineers Local 627*, 425 U.S. 800 (1976). There, the Court stated that an 8(a)(5) violation was established in a double-breasted operation if the employers in the union and nonunion companies constituted a single employer and if the employer unit (i.e., the unit of both union and nonunion employees) constituted an appropriate unit for the purposes of collective bargaining.

My colleagues agree that the complaint allegations sustain a finding that Acoustics and Sumon are a single employer. They find, however, that the complaint does not establish that the unit of Acoustics and Sumon employees is appropriate because it does not allege that the unit of Acoustics employees and the unit of Sumon employees are inappro-

reflect the two corporations' operations in States other than Colorado. See *Peter Kiewit Sons' Co.*, 231 NLRB 76 fn. 5 (1977).

[2] *South Prairie Construction Co. v. Operating Engineers Local 627*, 425 U.S. 800 (1976), cited (on remand) in *Peter Kiewit Sons' Co.*, above, 231 NLRB 76 (1977).

[3] *Peter Kiewit Sons' Co.*, above at 77.

[4] Our dissenting colleague misperceives the thrust as well as the language of *South Prairie*. After establishing a single employer, "the existence of a violation under Sec. 8(a)(5)" then turns on "whether under Section 9 the 'employer unit' [is] *the* appropriate one for collective-bargaining purposes." (425 U.S. at fn. 1, emphasis added.) As noted above, that is not the case here.

[5] Nor can the complaint support a reasonable inference that a majority of the employees of both Acoustics and Sumon in an appropriate employerwide unit have designated the Union as their representative for the purposes of collective bargaining.

[6] Inasmuch as the remaining complaint allegation is intimately intertwined with the unit question, we decline to reach the issue at this time, but rather include it in our remand herein.

priate; it does not allege that a majority of the Sumon employees have selected the Union as their exclusive bargaining representative; and finally, it is ambiguous because it is unclear whether the refusal-to-bargain allegations apply to Acoustics employees only or to employees of both Acoustics and Sumon.

The majority's quarrel with the complaint displays a misunderstanding of *South Prairie*. The complaint need not assert that any unit is *inappropriate*. Instead, it must assert that the employerwide unit is *appropriate*. My colleagues' argument against this interpretation of *South Prairie* stresses the Court's use of the word "the" when it asserts "the existence of a violation under Section 8(a)(5) . . . then turn[s] on whether under Section 9 the 'employer unit' [is] *the* appropriate one for collective-bargaining purposes." (425 U.S. at fn. 1, emphasis added.) However, by this phrase, the Court simply means that the finding of a single employer is not determinative of the unit question, and that there must be a separate affirmative finding that the employerwide unit is appropriate.[1] The complaint here meets this requirement.

First, it should be noted that, after the complaint makes the allegations that Acoustics and Sumon are a single employer and exist as a double-breasted operation, it refers only to the Respondent (i.e., the single employer Acoustics-Sumon). There is no ambiguity anywhere in the complaint in this regard. After paragraph II(i), the complaint makes references only to Acoustics or Sumon in reference to employees. It states that the Acoustics employees selected the Union as representative, that the Respondent has failed to honor the collective-bargaining agreement with respect to Sumon employees and that the Respondent has refused to pay fringe benefits to the employees of Sumon. In all other sections, Acoustics and Sumon are simply referred to as the Respondent.

The complaint then asserts that the Respondent's employees (i.e., employees of the single employer, Acoustics/Sumon) as described in the collective-bargaining agreement constitute an appropriate unit. Because this allegation is not answered, we must deem that the Respondent admits the truth of it.

While the Respondent might have raised factual matters supporting a finding that the unit comprised of employees of Acoustics and Sumon was not appropriate, it failed to do so. Accordingly, the assertion that the unit is appropriate must be accepted. As discussed earlier, the assertion that the employerwide unit is appropriate constitutes the affirmative unit finding required by *South Prairie Construction Co.*, above.

Next, the complaint alleges that a majority of Acoustics employees have selected the Union as representative. This assertion is necessary because an 8(a)(5) finding of failure to honor a contract requires a representative with 9(a) status. Of course the complaint does not allege that the majority of Sumon employees have separately selected the Union: Sumon was operated as a nonunion company which is the whole point of the charge in this case.

Finally, the complaint asserts that the Respondent has failed to bargain with the Union, failed to recognize the Union as the exclusive bargaining representative of the employees of the Respondent, and has failed to honor the collective-bargaining agreement with respect to Sumon employees, including refusing to pay these employees fringe benefits.

While the General Counsel might have eased the reading of such a complex complaint by adding "Acoustics/Sumon" in parentheses at each reference to "Respondent," a careful reading of the complaint shows no ambiguity on this point and establishes that the employees of Acoustics/Sumon constitute an appropriate unit.

On these grounds, I would grant the General Counsel's motion in this uncontested case.

[1] This is evident from the Court's discussion of whether the Board had in fact passed on the unit question when it *disagreed* with the judge's finding of a single employer. "The Administrative Law Judge's decision in favor of the Union included a conclusion that the pertinent employees of Kiewit and South Prairie constituted *an* appropriate unit under Section 9(b). But that conclusion was, of course, preceded by the the determination that the two firms were a single employer. In disagreeing on the 'employer' issue, the Board was not compelled to reach the Section 9(b) question in order to dismiss the complaint." (425 U.S. at fn. 6, emphasis added.) Further, in disapproving of the court of appeals' deciding the unit issue rather than remanding the case to the Board to make the initial unit determination, the Court stated, "Since the selection of *an* appropriate bargaining unit lies largely within the discretion of the Board . . . we think the function of the Court of Appeals ended when the Board's error on the 'employer' issue was 'laid bare.'" (Emphasis added; citations omitted.)