

**Green Construction of Indiana, Inc.¹ and Laborers'
International Union of North America, Local
Union No. 1214, AFL-CIO. Case 9-CA-16113**

7 September 1984

DECISION AND ORDER

**BY CHAIRMAN DOTSON AND MEMBERS
ZIMMERMAN AND HUNTER**

On 31 August 1982 Administrative Law Judge James J. O'Meara Jr. issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed a brief in opposition 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, findings, and conclusions and to adopt the recommended Order.

The judge dismissed the complaint in its entirety. In so doing, the judge found no evidence connecting the Respondent with the conduct alleged to be violative in the complaint. Further, the judge denied as untimely the General Counsel's motion to amend the complaint to substitute Robert E. Green as the Respondent and to reopen the record to introduce evidence that Robert E. Green and the Respondent may be a single employer of the employees involved in this case. In this regard, the judge noted that at the opening of the hearing counsel for the Respondent raised the issue of the Respondent's identity. At that time the General Counsel did not seek to amend the complaint. Later in the hearing, the judge questioned Robert E. Green about his relationship to the Respondent and about the Respondent's relationship to the project involved in this case. When Robert E. Green answered that the Respondent had no relationship to the project, the judge turned to the parties and asked, "Any questions prompted by my questions, gentlemen?" The response was negative. Again, the General Counsel did not seek to amend the complaint. The judge also advised the parties that if they sought amendment they should do so prior to the close of the hearing. The General Counsel did not seek amendment at that time. It was not until more than 7 months after the close of the hearing that the General Counsel first sought to amend the complaint. Under the circumstances, the judge found that the issue of the proper identity of the Respondent was brought to the General Counsel's attention at the hearing and that the posthearing motion to amend

the complaint to allege Robert E. Green as the Respondent and to reopen the record to introduce evidence that Robert E. Green and the Respondent may be a single employer of the employees in this case was "so tardy that basic fairness requires that it be denied."

We agree with the judge's reasoning in denying the General Counsel's motion to amend the complaint. In addition, we note that Section 102.17 of the Board's Rules provides that amendment of complaints is permitted "upon such terms as may be deemed just." We conclude that it would not be "just" to allow amendment of the complaint in the circumstances here. The General Counsel was repeatedly apprised of the problem of the proper identity of the Respondent but did nothing for more than 7 months. Further, it is our view that to allow amendment at such a late date would cause Robert E. Green undue prejudice. The interests of Robert E. Green as an individual are not identical with the interests of the corporation, Green Construction of Indiana, Inc. In fact, their interests could be adverse. While the complaint referred to Robert E. Green, it did so only to allege him as an agent of Green Construction of Indiana, Inc., and while Green was on actual notice of certain facts, he was certainly not on actual notice that he might be subject to individual liability in this case. Furthermore, counsel for Green Construction of Indiana, Inc. did not appear at the hearing on behalf of Robert E. Green as an individual. Finally, there might have been witnesses that Robert E. Green would have sought to call on his own behalf that he did not call because he had not been charged and there might have been evidence he would have sought to introduce that he did not introduce because he had not been charged. Accordingly, we believe that to allow amendment at this late date would work substantial injustice against Robert E. Green and conclude that the judge properly denied the General Counsel's motion to amend the complaint.²

² Contrary to our dissenting colleague, we do not find that practice under Fed.R.Civ.P. 15 requires a contrary result. Under Sec. 10(b) of the Act the Federal Rules of Civil Procedure are to be followed "as far as practicable," and the Board has not considered itself bound to apply case law interpreting these rules in Board proceedings. Furthermore, the cases relied on by our colleague are distinguishable in that none involves a posttrial attempt to amend a pleading to substitute a new defendant.

In view of our denial of the General Counsel's motion to amend the complaint, we also deny the General Counsel's motion to reopen the record to introduce evidence that Robert E. Green and the Respondent may be a single employer of the employees in this case. Additionally, in denying the latter motion, we note it is untimely and does not allege that the General Counsel has obtained newly discovered or previously unavailable evidence.

¹ The Respondent's name appears as corrected.

ORDER

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

MEMBER ZIMMERMAN, dissenting.

My colleagues today affirm the administrative law judge's dismissal of a complaint because the General Counsel failed to amend it at the hearing to correctly identify the Respondent. They also affirm the judge's denial of the General Counsel's motion to amend the complaint made after the hearing but prior to the issuance of the decision. By so doing, the majority on a mere technicality, and absent any showing of prejudice, allows the alleged unfair labor practices of the Respondent to escape the Board's scrutiny and go unremedied.

The complaint which issued on 27 March 1981 alleges that Green Construction of Indiana, Inc. refused to bargain with the Union concerning work on a construction site. In its answer, the Respondent admitted that Robert E. Green was the owner and president/treasurer of Green Construction of Indiana, Inc. At the hearing, counsel for the Respondent acknowledged that the contract in issue was signed by Robert E. Green, not Green Construction, but also made the following statement concerning the relationship of the two:

I think it is significant only in terms of the evidence which will be heard. We are not making a claim in the fact we think it would be appropriate that the pleadings should be Robert E. Green as opposed to Green Construction of Indiana, Inc., because of the fact that Robert E. Green was who signed this original contract upon to which we are allegedly bound . . . [W]e are not trying to make any claims other than there is a confusion that it should be pointed out that at various times that the evidence may say at some times, but I think by both sides, Green Construction or it may say Robert E. Green.

At no time did the Respondent contend that the pleadings should be modified. Green himself participated in the proceedings and testified concerning the alleged violations growing out of the contract he had signed. He did so without disavowing his relationship with the Respondent. When the judge asked him what the relationship was between Green Construction of Indiana, Inc. and the work-site governed by the contract, Green said there was no relationship, yet he continued throughout the litigation to address the substantive issues drawing no distinction between the two names. As the General Counsel argues and the Respondent does

not dispute, even in its posthearing brief to the judge, the Respondent did not raise the issue of proper designation.

In his decision, the judge concluded that the General Counsel was on notice of the defect in the pleadings and fairness required that the inaccuracy of the complaint be corrected while litigation was ongoing. He based his conclusion on the muddled testimony cited above and his own colloquy with Green concerning the relationship between Green Construction and the disputed worksite. He ended his examination of Green with a question to counsel, "Any questions, prompted by my inquiry, gentlemen?" The judge identified this cryptic inquiry as evidence that the General Counsel had notice of the complaint's shortcomings.

It is the General Counsel's contention that because the Respondent itself was untroubled by the designation, the General Counsel believed a correction of the complaint to be unnecessary. Both the Respondent and the General Counsel acknowledged in briefs to the Board that, 7 months subsequent to the hearing in July 1982, the judge spoke with the parties by telephone. According to the Respondent, he informed them that there was no evidence that the Respondent, as named, Green Construction of Indiana, Inc., had committed an unfair labor practice. The General Counsel claims only that the judge had a question with respect to the designation of the Respondent. Almost immediately, the General Counsel filed his motion to reopen the record and amend the complaint.¹ The judge denied the motion and dismissed the complaint stating that an amendment at so late a date was "so tardy that basic fairness requires that it be denied."

The Board's Rules and Regulations allow a complaint to be amended subsequent to a hearing. Section 102.17 provides as follows:

Amendment.—Any such complaint may be amended upon such terms as may be deemed just, prior to the hearing, by the regional director issuing the complaint; at the hearing and until the case has been transferred to the Board pursuant to section 102.45, upon motion, by the administrative law judge designated to conduct the hearing; and after the case has been transferred to the Board pursuant to section 102.45, at any time prior to the issuance of an order based thereon, upon motion, by the Board.

¹ The majority relies heavily on the 7-month delay between the close of hearing and filing of the General Counsel's motion. In fact, the General Counsel responded promptly when notified of a possible defect. In any case, the motion was filed a full month before the judge issued his decision.

This rule is consistent with Federal practice where "leave [to amend pleadings] shall be freely given when justice so requires."² As to the failure to name a proper party defendant, the propriety of an amendment turns on the identity of the parties, and the prejudice, if any, to the correct party from the failure to name it originally. Generally, sufficient prejudice to warrant dismissal will not be found if the added defendant has had sufficient notice of the institution of the action, whether formal or informal, within the limitations period or if a sufficient identity of interest exists between the new defendant and the original defendant. *Norton v. International Harvester Co.*, 627 F.2d 18 (7th Cir. 1980). Thus, if the defendant sought to be brought in knew, or should have known, of the action from the beginning, no prejudice will ordinarily result from the amendment. *Bryant Electric Co. v. Joe Rainero Tile Co.*, 84 F.R.D. 120 (W.D. Va 1979).

The Board's judgment in cases where the party is improperly identified is similar. The complaint is not dismissed where the proper respondent has actual notice of allegations proceeding.

Over 30 years ago the Board addressed the problem of misnomer in a complaint. Responding to the respondent's contention of improper service in *Peterson Construction Co.*, 106 NLRB 850, 851 (1953), the Board stated:

Where, as here, the error is one of misnomer and the proper Respondent has actual notice of the charge and of the obvious misnomer, to hold the statutory requirements of service are not met is to project legalism to an unwarranted length.

The Board emphasized in its discussion that the Respondent had not been misled or prejudiced by the proceeding. This position has consistently been expressed in subsequent decisions. *American Geriatric Enterprises*, 235 NLRB 1532 (1978); *Rosco Concrete Pipe Co.*, 219 NLRB 915 (1975); *American Steamship Co.*, 222 NLRB 1226, 1231 (1976).

The principle at issue in these cases applies with equal force here. Green received actual notice of the charge against him. As the owner, president, and treasurer of Green Construction, as well as the representative for purposes of service, he was aware of the allegations raised against him. His participation in the hearing is added proof of that awareness. As to the question of identity of interests, even as the Respondent presented its case it drew no distinction between the interests of Richard E. Green and those of Green Construction of

Indiana, Inc. Given the virtual identity of the two, that is not surprising.

There is yet another reason for finding the General Counsel's motion to be proper. The party opposing the motion to amend the complaint carries the burden of asserting and showing that the amendment will be prejudicial. That is the case in Federal court as well as before the Board.³ The Respondent has failed to show how it will be prejudiced by the amendment. In its brief in support of the judge's decision, the Respondent says permitting the motion violates "all established concepts of fairness and due process." Save for this bald assertion, the brief is bereft of any suggestion of prejudice that would result were the motion to be granted. My colleagues, however, are willing to prove all forms of prejudice through speculation. The majority opinion proclaims a veritable litany of horrors that could befall Green were the General Counsel's motion to be granted. I am unconvinced. There is nothing before us to substantiate a claim of prejudice.

Accordingly, I would grant the General Counsel's motion to amend the complaint and remand the case to the judge to consider the merits of the case in light of the amendment.

³ *Goodman v. Poland*, 395 F.Supp. 660 (D.C.Md. 1975). *Tabacalera Cubana. S.A. v. Fuber, Coe & Gregg, Inc.*, 379 F.Supp. 772 (S.D.N.Y. 1974).

DECISION

STATEMENT OF THE CASE

JAMES J. O'MEARA JR., Administrative Law Judge. The complaint in this case was issued on March 27, 1981, and is based on a charge filed against the Respondent on November 21, 1980, by the Laborers' International Union of North America, Local Union No. 1214, AFL-CIO (the Union). The complaint alleges, in essence, that the Union is the exclusive representative of certain designated employees of the Respondent and the Respondent has refused to bargain collectively with the Union and is, therefore, guilty of engaging in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act. The Respondent denies that it has violated the Act.

The matter was heard in Paducah, Kentucky, on December 17, 1981. At the close of the hearing the parties waived oral argument and were given leave to file briefs which have been received and considered.

In consideration of the entire record in this case, including all competent oral and written evidence, the observed demeanor of the witnesses, and the briefs and arguments of counsel, I make the following

² Fed.R.Civ.P. 15.

FINDINGS AND CONCLUSIONS

I. JURISDICTION

The Respondent, Green Construction Company of Indiana, Inc., is an Indiana corporation with an office and principal place of business in Oaktown, Indiana, and has been engaged as a general contractor in the building and construction industry in the State of Indiana and Kentucky. During the past 12 months, a representative period, Respondent, in the course and conduct of business operations, performed services valued in excess of \$50,000 in States other than the State of Indiana. During this same period, the Respondent, in the course and conduct of such business, purchased and received at its Oaktown, Indiana facility products, goods, and materials valued in excess of \$500,000 directly from points outside the State of Indiana.

The Respondent is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and I find that it will effectuate the policies of the Act to assert jurisdiction in this case.¹

II. THE LABOR ORGANIZATION

Laborers' International Union of North America, Local Union No. 1214, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICE

On November 21, 1980, a charge was filed against the Respondent, Green Construction Company of Indiana, Inc., by Laborers' International Union of North America, Local Union No. 1214, AFL-CIO. The charge alleged that the corporate employer "refused to bargain collectively with the undersigned labor organization . . . on the construction of the Executive Inn and Convention Center in Paducah-McCracken County, Kentucky." A copy of the charge was served on the Respondent by certified mail and a receipt showing delivery was given by one M. Chasteen. Subsequently, and on March 27, 1981, a complaint based on the charge was issued and a copy thereof was served by regular mail upon Green Construction Company of Indiana, Attn: Robert Green Sr. The complaint, as stated above, alleges that the corporate Respondent violated Section 8(a)(5) of the Act by refusing to bargain with the Union for a contract covering employment of laborers. The evidence adduced at the hearing disclosed a contract for "Site Demolition and Clearing—Paducah-McCracken County Convention Center Site," between the owner, Paducah-McCracken County Convention Center Corporation, Paducah, Kentucky and the contractor, Robert E. Green. During the performance of this contract and on April 25, 1980, Robert E. Green entered into a written adoption agree-

ment with the Union which agreement expired on April 30, 1982.²

Subsequent to the demolition phase of the project a construction agreement was entered into with the Convention Center Corporation whereunder the contractor was Robert E. Green, not the Respondent. During the execution of the construction contract exchanges of proposed labor contracts were made between Green and the Union. One of said documents entitled "Project Agreement for Construction" on the construction project in Paducah, Kentucky, recited that the proposed contract was between Robert E. Green and the Western Kentucky Building and Construction Trades Council, AFL-CIO. Another was entitled "Unions Agreement for Construction of the Executive Inn and Convention Center, Paducah, Kentucky" and also was a proposal for a contract between Robert E. Green and the Western Kentucky Building and Construction Trades Council, AFL-CIO.

The business manager for the Union, T. E. Holden, negotiated for a contract with Robert E. Green and his attorney, Arthur R. Donovan. No dealings were conducted by or with the Respondent.

It is uncontradicted from the evidence of record in this case that the Respondent, Green Construction Company of Indiana, Inc., a corporation, was not the employer in the instant matter. On the contrary, the evidence disclosed that Robert Green, an individual, was the entity who performed the acts alleged in the complaint to be violations of Section 8(a)(5) of the Act. Neither the charge which underlies the complaint nor the negotiations between the Union and Green were transactions of the corporate Respondent. Accordingly, there is no evidence in this record which would support any relief demanded by the General Counsel against the Respondent, Green Construction Company of Indiana, Inc.

The General Counsel's Motion to Reopen the Record for Further Hearing

The General Counsel has moved for an order reopening the record for further hearing. The basis for the General Counsel's motion is his contention that "Green Construction Company of Indiana, Inc., Robert E. Green, a sole proprietor," and "Robert E. Green, a contractor," may be a single employer of the employees involved in this proceeding.

The charge and the complaint, based on the charge, were specifically made against Green Construction Company of Indiana, Inc. The evidence clearly establishes activities conducted by Robert E. Green and/or his attorneys.

At the onset of the hearing on the complaint and preliminary to the taking of any evidence, the Respondent's counsel raised the issue of the identity of the Respondent when he advised at the hearing that, "It would be appropriate that the pleading should be Robert E. Green as opposed to Green Construction Company of Indiana,

¹ The Respondent amended its answer to the complaint at the opening of the hearing. The amendments admitted the allegations of the complaint which alleged facts giving rise to the Board's jurisdiction over the Respondent and the subject matter of this case.

² The contract adopted by Green was a contract between the Union and West Kentucky Construction Employers Association, Inc. Neither Green nor the Respondent was a member of the Association.

Inc." The parties were further advised by me in this regard as follows:

I only suggest that in the event at the close of the hearing or sometime prior to the filing of an amendment is necessary that it be made at that time . . . so I reserve my ruling on whatever motion you may make in that regard until we see what the evidence establishes.

Again, near the end of the hearing and after Green had testified, I interrogated Green as follows:

Q. You testified here about yourself, Robert Green; you say you didn't sign and you did sign and so on and so forth in the contract with regard to the demolition project is made out to you personally. What relationship do you have with the Green Construction Company of Indiana, Inc.?

A. I am president of it.

Q. What relationship does it have with the demolition project?

A. Technically, none.

Q. What connection does it have with the Barkley Park project?

A. None.

JUDGE O'MEARA: Any questions prompted by my questions, gentlemen?
(Negative response.)

It is clear from the foregoing that the question of the identity of the Respondent was raised at the hearing. It is further clear that the named Respondent, Green Construction Company of Indiana, Inc., was not the entity which entered into the contracts and engaged in the negotiations which gave rise to the charge and complaint in this case. This fact was brought to the attention of the parties in as affirmative a manner as fairness permits.

The General Counsel's motion to amend the complaint and to reopen the record, coming on the eve of the ren-

dition of this decision, is so tardy that basic fairness requires that it be denied. The problem confronting the General Counsel was clearly brought to his attention at the hearing when all the parties and witnesses were present. To relitigate the matter on such a significant issue would not advance the principles of fairness and justice. Litigation must come to an end and in this case advance toward final conclusion. Accordingly, the motion to amend and reopen the record is denied.³

Accordingly, I find that the General Counsel has not established, by a preponderance of the credible evidence, that the Respondent has violated Section 8(a)(1) and (5) of the Act.

CONCLUSIONS OF LAW

1. The Respondent, Green Construction Company of Indiana, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Respondent has not engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) as alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁴

ORDER

It is ordered that the complaint be dismissed in its entirety.

³ Although the General Counsel is correct that the question of the identity of the entity named as the Respondent was not raised by the parties it is clear from the evidence that no remedy against the named Respondent, Green Construction Company of Indiana, Inc., can be supported by this record.

⁴ 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.