

Local 3, International Brotherhood of Electrical Workers, AFL-CIO and Eastern Electrical Wholesalers Association, Inc. Case 2-CB-13287

January 29, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND RAUDABAUGH

On October 25, 1991, Administrative Law Judge Steven Davis issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a cross-exception and an answering brief to the Respondent's exceptions and brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified.¹

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Local 3, International Brotherhood of Electrical Workers, AFL-CIO, its officers, agents, and representatives, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(a).

“(a) Refusing, on request, to execute the collective-bargaining agreement it agreed on during negotiations with the Association from February 1990 to May 1990, and which the Association requested the Respondent to execute on about May 15, 1990; refusing to execute such contract bearing the name of the Association on its cover as follows: ‘Metro N.Y. Council Division of the Eastern Electrical Wholesalers Association, Inc.’ in the following appropriate unit:

All persons employed by the establishments covered by the collective-bargaining agreement reached between Respondent and the Association, excluding officers, partners, supervisors, managers and confidential employees as defined in the agreement.”

2. Substitute the following for paragraph 2(a).

“(a) On request of the Association, execute the collective-bargaining agreement with the Association

¹ Both the Respondent and the General Counsel have excepted to the judge's use of the name, “Eastern Electrical Wholesalers Association, Inc.” for the employer in his recommended Order. As the judge correctly concluded in his decision, the name to be used for the employer is “Metro N.Y. Council Division of the Eastern Electrical Wholesalers Association, Inc.” We have modified the Order and notice to correct the judge's inadvertent error.

agreed to on about April 27, 1990, said agreement to include the name of the Association on its cover as follows: ‘Metro N.Y. Council Division of the Eastern Electrical Wholesalers Association, Inc.’”

3. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse on request, to execute the collective-bargaining agreement we agreed on during negotiations with the Eastern Electrical Wholesalers Association, Inc., from February 1990 to May 1990, and which the Association requested us to execute on about May 15, 1990; refuse to execute such contract bearing the name of the Association on its cover as follows: Metro N.Y. Council Division of the Eastern Electrical Wholesalers Association, Inc., in the following appropriate unit:

All persons employed by the establishments covered by the collective-bargaining agreement reached between Local 3, International Brotherhood of Electrical Workers, AFL-CIO, and the Association, excluding officers, partners, supervisors, managers and confidential employees as defined in the agreement.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, on request of the Association, execute the collective-bargaining agreement with the Association agreed to on about April 27, 1990, said agreement to include the name of the Association upon its cover as follows: Metro N.Y. Council Division of the Eastern Electrical Wholesalers Association, Inc.

LOCAL 3, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO

Nancy Reibstein and *David E. Leach III, Esqs.*, for the General Counsel.

Norman Rothfeld Esq., New York, New York, for the Respondent.

Steven S. Goodman Esq. (Jackson, Lewis, Schnitzler & Krupman), New York, New York, for the Charging Party.

DECISION

STATEMENT OF THE CASE

STEVEN DAVIS, Administrative Law Judge. Pursuant to a charge filed by Eastern Electrical Wholesalers Association, Inc. (Association or Employer), on June 4, 1990, a complaint was issued against Local 3, International Brotherhood of Electrical Workers, AFL-CIO (Respondent), on August 29, 1990.

The complaint alleges essentially that, in violation of Section 8(b)(3) and 8(d) of the Act, Respondent has failed and refused to execute a written collective-bargaining agreement between it and Respondent, notwithstanding that full and complete agreement had been reached. Respondent's answer denied the material allegations of the complaint, and on May 30, 1991, a hearing was held before me in New York City.

On the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Association, a nonprofit New York corporation, having its principal office and place of business in Stamford, Connecticut, is an organization composed of various employer-members which are involved in electrical wholesale work, some of whom are located in New York State.

The Association exists for the purpose of representing its employer-members in negotiating and administering collective-bargaining agreements with labor organizations, including Respondent.

Annually, in the course of their business operations, the employer-members of the Association collectively purchase and receive at their facilities in New York State goods and materials valued in excess of \$50,000 directly from points located outside New York State.

Respondent admits, and I find, that the employer-members of the Association are at all times material employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

I also find that Respondent is a labor organization within the meaning of Section 2(5) of the Act.

II. THE UNFAIR LABOR PRACTICES

This case involves a dispute concerning the name to be placed on the cover of a newly negotiated collective-bargaining agreement.

Background

The Association's regular members consist of electrical suppliers located in the greater New York metropolitan area. There are about 45 such members. Another category of membership is the manufacturers, consisting of about five in number. As "allied members" they are not regular members, and have a nonvoting capacity. Employers who do not have collective-bargaining agreements with any labor union are also members of the Association.

In August 1988, the Association established separate councils for its members, based upon geographical location. Thus,

its Westchester, New York, members were placed in the northern counties council of the Association, and its Long Island members were placed in the Long Island counties council of the Association. However, the metropolitan New York council was comprised of its members who had collective-bargaining agreements with Respondent, including those which were located on Long Island or in Westchester counties.

The creation of these councils did not cause a change in the structure of the organization of the Association.

Collective-Bargaining History and Current Negotiations

The Association has had collective-bargaining agreements with Respondent for more than 50 years.

The three collective-bargaining agreements between the parties which ran from 1977-1980; 1980-1982, and 1982-1984, all identify the employer on the cover of the agreements as "Electrical Wholesaler." The body of the agreement states that the agreement is made "by and between the Electrical Wholesalers & Independent Wholesale Firms acting for the individual members, signatory hereto." In addition, there are references within each contract to the Eastern Electrical Wholesalers Association, Inc.

In contrast, the two most recent agreements, for the period 1984 to 1987, and from 1987 to March 31, 1990, refer to the employer on their covers as "Eastern Electrical Wholesalers Association" and state that the contract is the agreement made "by and between Eastern Electrical Wholesalers Association."

The admitted unit appropriate for the purposes of collective-bargaining is as follows.

All persons employed by the establishments covered by the collective-bargaining agreement reached between Respondent and the Association, excluding officers, partners, supervisors, managers and confidential employees as defined in the agreement

On January 22, 1990, prior to the expiration of the most recent agreement, Kenneth Lewis, president of the Association, sent a letter to Sam Cannistraci, the Respondent's business representative, which stated that the "Metro N.Y. Council of the E.E.W.A. will be the collective-bargaining agent for the negotiation of a new agreement and working rules between Eastern Electrical Wholesalers Association and Local Union 3. The Association has been designated bargaining agent for the electrical wholesale companies listed below."

A first collective-bargaining session was held in mid-February 1990. Present for the Association were Paul Hillstrom, treasurer of the Association, and Harvey Lifton, chairman of the Metro New York Council, division of the Association.

At that meeting, each side presented its demands. One of Respondent's demands was as follows.

The term used, Eastern Electrical Wholesalers Association in previous contracts, to be changed back to "Electrical Wholesalers."

According to Hillstrom, a dispute arose at that session concerning the identity of the negotiating employer. The Association insisted on negotiating an agreement between itself and the Respondent on behalf of all its members who designated the Association as their bargaining agent. The Union

sought to negotiate a contract with the individual members of the Association, thereby obtaining the individual signature of each employer on each contract. The Association refused to negotiate under those circumstances. The meeting ended with no agreement.

According to Cannistraci, the Employer abruptly left the meeting and refused to resume bargaining that day because of the Respondent's demand concerning the name change. I need not resolve this dispute in view of the fact that bargaining resumed, and this matter was ultimately resolved.

The issue of the employer party continued to present a problem until late February, when it was decided to defer a decision as to who the employer agent was. Accordingly, the substantive negotiations then began.

Discussions resumed in March concerning the Employer's name, with Respondent's objection being that the Association's name should not appear alone in the agreement. The Union's concern was that inasmuch as certain members of the Association were nonunion, by entering into an agreement in which only the Association was named, it would appear that the Respondent was making an agreement with certain companies which were nonunion. Cannistraci stated the Union's objection being that since the Association is not an employer, and does not employ workers, its name should not appear in the contract.

The matter was resolved by an agreement that the first paragraph and the signatory page of the new agreement should read "Metro N.Y. Council Division of the Eastern Electrical Wholesalers Association, Inc." It was further agreed that an appendix would be attached to the contract listing the names of the companies bound by the agreement, and that Kenneth Lewis would not sign the agreement. He was a principal of an employer which did not have a collective-bargaining agreement with Respondent. It should be noted, too, that although Lewis was president of the Association, the Respondent demanded, and the Association agreed, that Lewis not be present at any collective-bargaining session.

Accordingly, the first paragraph of the agreement, which was agreed on by both parties at that time, states as follows:

Agreement made this thirtieth day of April, 1990, by and between Metro N. Y. Council Division of the Eastern Electrical Wholesalers Association, Inc., hereinafter referred to as "EMPLOYER," and Local Union No. 3, International Brotherhood of Electrical Workers, AFL-CIO, hereinafter referred to as the "UNION."

A 1-month strike occurred on about April 1 over monetary issues. By the time the strike occurred, the issue concerning the Employer's name had been resolved, as set forth above.

On April 27, the parties met and agreed to all the terms of a successor collective-bargaining agreement. During the negotiations the parties bargained from their respective set of demands. On April 27, the terms of the final agreement were set forth orally, and the bargainers shook hands on their agreement.

The parties met the following week for preparation of the final document. Each side had prepared a collective-bargaining agreement, and they went over each version with the purpose of arriving at one document. It took the parties 2 days to agree on the language for the new contract.

A third day was scheduled to proofread the final document. At that meeting, for the first time, the issue of the document's cover was raised. In fact, Cannistraci testified that during negotiations there was no discussion of the cover, and the issue of the contract's cover was never raised, prior to this time. The question arose when the parties discussed what type of cover should be used. The Respondent's suggested language for the cover of the agreement was "Metro N. Y. Council Division." The Association's suggested language was "Metro N. Y. Council, Division of Eastern Electrical Wholesalers Association." At that meeting, Association officials asked the Respondent to sign the agreement as set forth with the Association's version of the cover. Cannistraci refused. Similarly, the Association refused to sign the agreement with the Association's name as set forth by the Respondent.

Thereafter, Association official Lifton phoned Cannistraci and offered the following suggestions to resolve the issue of the cover: list the employer as "Supply Division" or put no name on the cover, or have no cover at all. Cannistraci refused those alternatives, but proposed putting "Electrical Wholesalers" on the cover, and Lifton apparently refused that offer.

Although the contract has not been signed, its terms were implemented on April 1, 1990, and the parties are now operating under it.

In its answer, Respondent admits that on about April 27, 1990, it and the Association reached full and complete agreement upon the terms of a new agreement, and further admits that since on about May 15, 1990, the Association has requested it to execute a written contract embodying the agreement reached.

Analysis and Discussion

General Counsel argues that Respondent's refusal to execute the agreed-upon contract solely because it disagreed with the name of the Association to be placed on its cover constitutes an unlawful refusal to bargain. General Counsel contends that such refusal constitutes an unlawful conditioning of its signing the agreement upon the inclusion of a nonmandatory subject of bargaining. I agree.

Respondent admits that it is required to *negotiate* an agreement with an agent which represents employers, such as the Association. However, it argues that it is not required to *make* an agreement with such an agent as a contracting party, and further states that it is compelled to make an agreement only with the actual employer of employees, and not its agent, particularly where, as here, the Association is comprised, in part, of nonunion employers.

Section 8(b)(3) states that it is an unfair labor practice for a union to refuse to bargain collectively with an employer, providing that the union is the majority representative of its employees. Section 8(d) defines the duty to bargain in good faith, including the requirement of "the execution of a written contract incorporating any agreement reached if requested by either party."

The threshold question, therefore, is whether an agreement was reached. The complaint alleges, and Respondent's answer admits that on about April 27, 1990, the Association and Respondent reached full and complete agreement with respect to the terms and conditions to be incorporated in a successor collective-bargaining agreement. Respondent's an-

swer also admits that since on about May 15, 1990, the Association has requested it to execute that contract. The evidence amply supports Respondent's admissions. On April 27, the negotiators met and shook hands on the terms of a successor collective-bargaining agreement that they had agreed to. It is clear that the parties came to a "meeting of the minds" on April 27, and had a contract beginning on that date. I also find that the document which Respondent refused to execute was the contract agreed to by the parties. *Electrical Workers IBEW Local 1464 (Kansas City Power)*, 275 NLRB 1504, 1505 (1985).

It is well settled that, when an employer and a union have reached agreement on terms and conditions of employment, it is unlawful for one of the parties to refuse to sign a contract embodying the terms of that agreement. [*Teamsters Local 251 (McLaughlin & Moran)*, 299 NLRB 30, 32 (1990), citing *H. J. Heinz Co. v. NLRB*, 311 U.S. 514, 526 (1941).]

It appears clear that Respondent refused to execute the agreed-upon collective-bargaining agreement because there was no agreement as to the name of the employer to be placed on its cover. This issue first arose after the negotiations had been concluded, and after agreement had been reached on all the terms and conditions thereof.

The question therefore is whether Respondent could lawfully refuse to execute the contract because it disagreed as to the employer's name which would appear on the contract's cover. I find that it could not. The Employer's name on the cover of the contract is not a mandatory subject of bargaining. The Board has defined that term:

An indirect or incidental impact on unit employees is not sufficient to establish a matter as a mandatory subject. Rather, mandatory subjects include only those matters that materially or significantly affect unit employees' terms and conditions of employment. Similarly, the phrase "terms and conditions of employment" is to be construed in a limited sense and does not include all subjects that may merely be of interest or concern to the parties. [*GTE Hawaiian Telephone Co.*, 296 NLRB 1 fn. 2 (1989), citing *United Technologies*, 274 NLRB 1069, 1070 (1985), *enfd.* 789 F.2d 121 (2d Cir. 1986).]

The Employer's name on the contract's cover does not "materially or significantly affect" employees' terms and conditions of employment. Those terms and conditions of employment are set forth in the body of the agreement, not its cover. The cover simply serves to identify the contracting parties.

Accordingly, the Employer's name on the contract's cover is not a mandatory subject of bargaining. Respondent was therefore not privileged to refuse to execute the contract it agreed to, because of the late-raised issue concerning the cover.

Respondent asserts that it now can refuse to execute the agreement with the Association because the Association does not represent any employees, and further, that it cannot be compelled to sign an agreement with an agent, as opposed to the actual employer or contracting party. I do not agree.

"A multiemployer bargaining relationship is established when employers manifest an unequivocal intention to be bound by group bargaining and the union assents and enters into negotiations with the group as a unit." (*United Steel Erectors*, 283 NLRB 314, 320 (1987).)

The Association and the Respondent have been parties to collective-bargaining agreements for over 50 years. The Association made clear its intention, in letters to Respondent prior to the negotiations, to act as the collective-bargaining agent for the negotiation of the successor contract, and the Respondent assented to such agency status by its negotiations with the Association and its agreement with it. The last two agreements, 1984-1987, and 1987-1990, were executed expressly by the Association.

The agreement as to which this dispute relates, the 1990-1993 contract, states on page 3 that the agreement was made "by and between Metro N.Y. Council Division of the Eastern Electrical Wholesalers Association, Inc., hereinafter referred to as 'EMPLOYER.'" Thus, this was the agreed-upon compromise between the parties to resolve the Respondent's demand concerning a return to the term "Electrical Wholesalers" in this contract. Here, Respondent agreed to execute the contract with the Association as the signatory, as set forth above, during the negotiations, and only refused to sign the contract after all terms of the contract had been agreed upon. Thus, Respondent agreed that the party executing the contract on behalf of the Employer would be that as set forth above. Its subsequent refusal to sign the contract with the Association is unjustified and a violation of the Act. *Asbestos Workers Local 42 (Delaware Contractors)*, 193 NLRB 504, 505 (1971).

The name of the employer which would appear on the cover of the agreement was not specifically agreed upon by the parties during the negotiations. It is undisputed that the issue of the cover was not raised during the bargaining sessions. Only after complete agreement had been reached upon all the terms of the contract contained in the body of the document was the issue of the cover brought up.

General Counsel asks that I order Respondent to execute the agreement with the cover as suggested by the Association, with the term "Metro N.Y. Council, Division of Eastern Electrical Wholesalers Association, Inc."

Respondent argues, as set forth above, that it is not required to execute an agreement with an employer agent as opposed to a principal. I have rejected this argument. Specifically with respect to the cover, Respondent argues that it cannot be compelled to "advertise to the world" that it has an agreement with an Association, some of whose members are nonunion.

General Counsel sets forth two reasons why I should direct the Respondent to execute the contract with the cover as set forth by the Association: (a) provisions in the prior contract which were not the subject of demands during bargaining were carried over into the new, agreed-upon contract without change and (b) as in prior contracts the name on the cover simply reflected the name on the signatory page.

As to (a) above, contrary to General Counsel's assertions, I find that certain terms of the 1987 to 1990 agreement have been changed in the agreed-upon 1990-1993 contract, notwithstanding that those terms were not the subject of demands by either party. There are differences in the following

articles of the agreed-upon contract as compared to the 1987 agreement: Jurisdiction, paragraph 1; Union Security Clause, paragraph 1; Insurance; Unlimited Trade; Classification; and Severance Pay.

However, all of these changes are cosmetic corrections of language and technical changes made, as testified by Hillstrom, during the postagreement "cut and paste" sessions, at which the two sides agreed on the language which would appear in the final document to be executed.

As to (b) above, the name of the Employer on the cover of the agreement "Eastern Electrical Wholesalers Association" was identical to the name which appears in the text of the last two contracts—those from 1984–1987 and from 1987–1990. However, I am aware that in the three contracts prior to the last two, those from 1977–1980, 1980–1982, and 1982–1984, the Employer's name on the cover "Electrical Wholesaler" is different from that in the text of those agreements which state that the contract was made "by and between the Electrical Wholesalers & Independent Wholesale Firms acting for the individual members, signatory hereto." However, it should further be noted that the heading of the agreement, immediately above the "by and between" paragraph states that it is the "agreement and working rules to cover contract relationship between the Electrical Wholesaler."

Accordingly, I find that the practice of the parties has been to list the Employer's name on the cover of the agreement in the same manner as appears in the body of the agreement. Inasmuch as the Employer's name, "Metro N. Y. Council Division of the Eastern Electrical Wholesalers Association, Inc." was the agreed-upon name of the Employer to be included in the text of the agreement, I find and conclude that that was the name of the Employer to be included on the cover thereof.

CONCLUSIONS OF LAW

1. The employer-members of the Eastern Electrical Wholesalers Association, Inc. are employers within the meaning of Section 2(2), (6), and (7) of the Act.

2. Respondent Local 3, International Brotherhood of Electrical Workers, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. By refusing, on and after May 15, 1990, to execute a written contract embodying the agreement reached between it and the Association, Respondent engaged in unfair labor practices affecting commerce within the meaning of Section 8(b)(3) and 8(d) of the Act.

THE REMEDY

Having found that the Respondent has engaged in unfair labor practices, I find it necessary to recommend that it cease and desist therefrom and take certain affirmative action necessary to effectuate the policies of the Act.

Having found that the Respondent, as the exclusive representative of the employees in the unit described above, engaged in collective-bargaining with the Association and agreed on the terms of a contract governing wages, hours, and other conditions of employment for those employees, and having found that the Respondent thereafter refused to execute a contract containing the agreed-upon terms and conditions of employment, I shall recommend that the Respond-

ent, on request by the Association, execute that contract, with the Employer's name set forth on the cover as follows: "Eastern Electrical Wholesalers Association, Inc."

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹

ORDER

The Respondent, Local 3, International Brotherhood of Electrical Workers, AFL-CIO, Stamford, Connecticut, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Refusing, on request, to execute the collective-bargaining agreement it agreed upon during negotiations with the Association from February to May 1990, and which the Association requested Respondent to execute on about May 15, 1990; from refusing to execute such contract bearing the name of the Association on its cover as follows: Eastern Electrical Wholesalers Association, Inc., in the following appropriate unit:

All persons employed by the establishments covered by the collective-bargaining agreement reached between Respondent and the Association, excluding officers, partners, supervisors, managers and confidential employees as defined in the agreement.

(b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request of the Association, execute the collective-bargaining agreement with the Association agreed to on about April 27, 1990, the agreement to include the name of the Association on its cover as follows: Eastern Electrical Wholesalers Association, Inc.

(a) Post at its office and meeting halls copies of the attached notice marked "Appendix."² Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

¹ 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.

² If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."