

Howell Insulation Company, Inc. and International Association of Heat & Frost Insulators and Asbestos Workers Local 90. Case 26-CA-14570

August 26, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND RAUDABAUGH

On January 11, 1993, Administrative Law Judge William F. Jacobs issued the attached decision. The Respondent filed exceptions, a supporting brief, and a reply to the General Counsel's answering brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has considered the decision and record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.¹

The judge found that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to furnish certain information requested by the Charging Party. For the reasons set forth below, we reverse the judge's finding and dismiss the complaint.

The Respondent was signatory to several 8(f) agreements with the International Association of Heat & Frost Insulators and Asbestos Workers Local 78 (Local 78). The most recent agreement, which expired in June 1991, covered 50 counties in Alabama. In addition, article 1 of the agreement stated, in pertinent part:

The Employer further agrees on all operations outside of the jurisdiction of the chartered territory of the Union he will abide by the rates of pay, rules, and working conditions established by the collective-bargaining agreement between the local insulation contractors and the local Union in that jurisdiction. The Employer may send a Journeyman (Job Foreman) on any one operation within the jurisdiction of another local Union, and in the event of insufficient supply of local labor in that territory, such additional employees as may be necessary.

Prior to April 1991,² the Respondent always accepted the obligations imposed by article 1 of its agreement with Local 78 when working on projects outside of Local 78's jurisdiction. Whenever the Respondent successfully bid on a project in another jurisdiction, it would contact the local in that jurisdiction, and the

local would refer its members to work as the Respondent's employees on that project. Further, the Respondent would apply the terms of that local's collective-bargaining agreement to the Respondent's employees at that project.

In April, Carl Ellis, business manager for International Association of Heat & Asbestos Workers Local 90 (Local 90), noticed an advertisement seeking insulators and other workers for a project in Counce, Tennessee, which is in the jurisdiction covered by Local 90's collective-bargaining agreement. Ellis called the telephone number listed in the advertisement, which had an Alabama area code, and learned that the project was to be performed by Universal Insulation (Universal). Ellis then spoke with Local 78 Business Manager James McDonald. McDonald informed Ellis that the Respondent had a contract for the project in Counce, but that Universal was now the contractor on that job. McDonald further stated that the Respondent and Universal were intertwined, and that they had an alter ego or single employer relationship with the Respondent acting as a union contractor and Universal acting as a nonunion contractor. Ellis then asked McDonald if it would bother Local 78 if Local 90 pursued a grievance against the Respondent for performing the work at the Counce project without adhering to the terms of Local 90's collective-bargaining agreement. McDonald replied that it would not.

By letter dated June 19, Ellis informed the Respondent that Local 90 was filing a grievance alleging that the Respondent was operating as Universal in order to circumvent certain provisions of Local 90's collective-bargaining agreement. The letter also requested that the Respondent provide answers to 81 questions concerning the Respondent's relationship with Universal. The letter stated that this information was needed in order to determine whether the Respondent had, in fact, violated provisions of Local 90's collective-bargaining agreement. By letter dated June 27, John Howell, the Respondent's president, denied Ellis' request for information, stating that the Respondent had no obligation to supply Local 90 with the requested information.

The judge found that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to furnish Local 90 with information necessary to process the grievance against the Respondent. The judge found that the Respondent's relationship with locals outside of Local 78's jurisdiction was, by virtue of article 1 of the Respondent's collective-bargaining agreement with Local 78, exactly the same as its relationship with Local 78. Thus, the judge concluded that Local 90 was the exclusive bargaining agent for the Respondent's employees at the Counce project, and that the Respondent had a duty to provide Local 90 with the requested information because it was relevant to Local 90's statutory duties and responsibilities as those em-

¹ The Respondent has moved to reopen the record to include an August 13, 1991 letter from the Respondent's counsel to the General Counsel concerning the Respondent's position whether it was obligated to process Local 90's grievances. We deny the Respondent's motion because the evidence it seeks to admit is neither newly discovered nor previously unavailable within the meaning of Sec. 102.48(d)(1) of the Board's Rules and Regulations.

² All dates are in 1991 unless otherwise stated.

ployees' exclusive collective-bargaining representative. Moreover, the judge found that the Respondent was obligated to provide Local 90 with the requested information because Local 90 had sought and obtained the authorization of Local 78 to file a grievance against the Respondent.

In its exceptions, the Respondent argues, *inter alia*, that it was not required to provide Local 90 with the requested information because Local 90 was not the statutory representative of the Respondent's employees. The Respondent also argues that Local 78 never authorized Local 90 to obtain the requested information on behalf of Local 78, and thus Local 90 was not acting as Local 78's agent when it requested the information from the Respondent. We agree with both of these arguments.

The duty to supply requested information arises from a statutory bargaining obligation. *Cowles Communications*, 172 NLRB 1909 (1968). Indeed, an employer must furnish the statutory representative of its employees with requested information potentially relevant to the union's duties as the bargaining representative of the employer's employees. *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1976). The Act does not obligate an employer, however, to comply with a request for information from a union that is not the statutory representative of the employer's employees. See *E. L. Wagner Co.*, 294 NLRB 493, 494 (1989) (the employer's refusal to furnish information to the union after expiration of an 8(f) agreement does not violate the Act).

We find, contrary to the judge, that Local 90 is not the statutory representative of the Respondent's employees. Local 90 is neither signatory to an 8(f) agreement with the Respondent, nor is it the 9(a) representative of the Respondent's employees. The Respondent's relationships with outside locals may, by virtue of article 1 of Local 78's collective-bargaining agreement, confer certain contractual rights on those locals as third party beneficiaries to the Respondent's collective-bargaining agreement with Local 78. Such a relationship does not, however, confer *statutory* rights on those outside locals. Consequently, the Respondent did not enjoy a statutory relationship with Local 90, and thus the Respondent did not have a statutory obligation to furnish Local 90 with information concerning the grievance.

We further find, contrary to the judge, that Local 90 was not acting as Local 78's agent, and thus was not authorized to obtain the requested information on behalf of Local 78. Indeed, Local 90 never received authorization from Local 78 to file a grievance on behalf of Local 78. Rather, Local 90, through Business Manager Ellis, merely asked Local 78 Business Representative McDonald if it would bother Local 78 if Local 90 filed a grievance against the Respondent, and McDon-

ald replied that it would not. While this communication suggests that Local 78 did not object to Local 90 filing the grievance, it does not indicate that Local 78 authorized Local 90 to pursue the grievance on behalf of Local 78. Further, there is no evidence that Local 90 had apparent authority to request the information, as Local 78 never communicated with the Respondent concerning Local 90's grievance or information request. Accordingly, we find that Local 90 pursued the grievance on its own behalf, and was not authorized by Local 78 to obtain information relevant to the processing of that grievance. Thus, there is no basis to conclude that Local 90 had any statutory right to obtain the requested information from the Respondent.³

Our concurring colleague concludes that there would be no 8(a)(5) violation even if Local 78 requested the information, because the information concerned nonunit employees. We agree with our colleague that a breach of contract concerning nonunit employees is not a violation of Section 8(a)(5). However, a breach of contract is cognizable by the grievance machinery of the contract. Our colleague concludes that an employer is privileged to refuse to furnish information relevant to such a grievance. In our view, it is at least arguable that such information must be supplied under Section 8(a)(5) because it is germane to the effective functioning of the grievance machinery, a mandatory subject. Unlike our colleague, we do not pass on this issue.⁴

As Local 90 was not the statutory representative of the Respondent's employees, and as Local 90 was not authorized to request the information on behalf of Local 78—the actual statutory representative of the Respondent's employees, we find that the Respondent did not violate Section 8(a)(5) of the Act by refusing to provide Local 90 with the requested information. Accordingly, we shall dismiss the complaint.

ORDER

The complaint is dismissed.

CHAIRMAN STEPHENS, concurring.

I agree with my colleagues that the Respondent did not violate Section 8(a)(5) of the Act by refusing to furnish Local 90 with the requested information. I find, however, that the Respondent's refusal to comply with

³In light of our findings that Local 90 was not the exclusive bargaining agent of the Respondent's employees and that Local 90 was not authorized to obtain the information on behalf of Local 78, we find it unnecessary to pass on the judge's findings that Local 90—at the time of its request—had an objective, factual basis for believing that the Respondent and Universal were a single employer, and that even if Local 90 did not have an objective, factual basis at the time of its request, it was free to perfect its case after making its request for information.

⁴*Service Employees Local 535 (North Bay Center)*, 287 NLRB 1223 (1988), cited by our colleague, does not resolve the issue. That case did not involve information relevant to a grievance.

the information request was not an unfair labor practice because the requested information did not concern an issue that is a mandatory subject of bargaining.

Local 90 requested the information in order to determine whether the Respondent was operating in Local 90's jurisdiction without adhering to the terms of Local 90's collective-bargaining agreement. The Respondent was signatory to an 8(f) agreement with Local 78, but not with Local 90. Article 1 of the Respondent's collective-bargaining agreement with Local 78 requires the Respondent—when working outside of the jurisdiction of Local 78—to hire its employees from the local that has a collective-bargaining agreement in that jurisdiction and to apply the terms of the local's collective-bargaining agreement to the Respondent's employees. Thus, the Respondent's failure to adhere to the terms of Local 90's contract while operating in Local 90's jurisdiction would, presumably, constitute a violation of the extraterritorial provision of article 1 of Local 78's contract.

I find that to the extent that the extraterritorial provisions of article 1 extend beyond the terms and conditions of employment of unit employees, i.e., employees represented by Local 78, those provisions do not concern a mandatory subject of bargaining. Indeed, the issues raised by Local 90's information request did not concern terms and conditions of employment of bargaining unit employees, but rather concerned extraneous nonbargaining unit considerations over which Local 78 could not have lawfully bargained to impasse. See *Paperworkers Local 620 (International Paper Co.)*, 309 NLRB 44 (1992). Further, the subjects raised by Local 90 did not involve matters that vitally affected terms and conditions of employment for bargaining unit employees so as to make them mandatory subjects of bargaining. See *Allied Chemical Workers Local 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 179 (1971).

Thus, as certain extraterritorial provisions of article 1 do not concern mandatory subjects of bargaining, the Respondent's unilateral failure to comply with those contractual provisions would not violate the Act. *Pittsburgh Plate Glass*, supra at 185. Consequently, it follows that the refusal to furnish information necessary to administer or enforce those contractual provisions would also not violate the Act. *Service Employees Local 535 (North Bay Center)*, 287 NLRB 1223 (1988), affd. 905 F.2d 476 (D.C. Cir. 1990), cert. denied 111 S.Ct. 952 (1991). Accordingly, I find that the Respondent's failure to furnish the requested information does not violate Section 8(a)(5) of the Act because the requested information was necessary only to the enforcement of contractual provisions that are not mandatory subjects of bargaining. For this reason, I agree

with my colleagues that the complaint should be dismissed.¹

¹In light of my finding that the Respondent did not violate the Act because the requested information did not concern a mandatory subject of bargaining, I find it unnecessary to address the other issues resolved by the judge and my colleagues concerning the Respondent's obligation to furnish the requested information.

Grace E. Speer and Ron Hooks, Esqs., for the General Counsel.

Margaret H. Campbell, Esq., of Atlanta, Georgia, for the Respondent.

Danny Ellis, of Memphis, Tennessee, for the Charging Party.

DECISION

STATEMENT OF THE CASE

WILLIAM F. JACOBS, Administrative Law Judge. This case was tried at Memphis, Tennessee, on May 13 and 14, 1992. International Association of Heat & Frost Insulators and Asbestos Workers Local 90¹ filed the charge on July 2, 1991. Complaint and notice of hearing issued September 6, 1991, alleging that Howell Insulation Company, Inc.² violated Section 8(a)(1) and (5) of the Act by failing and refusing to furnish Local 90 with information requested by it.³ Respondent denies the commission of any unfair labor practices.

All parties⁴ were represented at the hearing and were afforded full opportunity to be heard and to present evidence and argument. Briefs were duly filed. On the entire record, including my observation of the demeanor of the witnesses, and after giving due consideration to the briefs, I make the following

FINDINGS OF FACT

I. JURISDICTION

The complaint alleges, the answer admits, and I find that Respondent was, at all times material, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATIONS INVOLVED

Local 90 and International Association of Heat & Frost Insulators and Asbestos Workers Local 78⁵ are now, and have been, at all times material, labor organizations within the meaning of Section 2(5) of the Act.

¹Local 90.

²Respondent or Howell.

³Local 90's request for information was made part of the complaint and identified as attachment A (omitted from publication). The Region filed a subpoena in order to obtain the information which was the subject of Local 90's request and of attachment A. Respondent filed a motion to revoke. The motion to revoke was granted at the hearing. Counsel for the General Counsel, at the hearing, requested that an adverse inference be drawn based on Respondent's refusal to comply with the subpoena. The request is hereby denied. Cf. *Electrical Energy Services*, 288 NLRB 925 (1988).

⁴Universal Insulation Company, Inc., Parties in Interest (Universal).

⁵Local 78.

III. THE UNFAIR LABOR PRACTICES

A. *Background*

Howell, at all material times, has been a corporation with an office and place of business in Birmingham, Alabama. From this place of business, Howell contracted to perform thermal insulation and asbestos abatement work at projects located in Alabama and neighboring States from 1974 to 1992.

Throughout its existence, Howell was signatory to several 8(f) agreements with Local 78, the most recent of which expired on June 30, 1991. That collective-bargaining agreement was not renewed.

Article 1 of the most recent collective-bargaining agreement between Howell and Local 78 contains the following provision:

Article 1

It is hereby agreed that the provisions of this agreement shall be binding upon the Employers individually and upon the membership of the Union individually and as members of the Union within the jurisdictional area of Asbestos Workers Local 78 consisting of the following fifty counties in the State of Alabama:

Autauga	Lauderdale
Barbour	Lawrence
Bibb	Lee
Blount	Limestone
Bullock	Lowndes
Calhoun	Macon
Chambers	Madison
Cherokee	Marengo
Chilton	Marion
Clay	Marshall
Cleburne	Montgomery
Colbert	Morgan
Coosa	Perry
Cullman	Pickens
Dallas	Pike
DeKalb	Randolph
Elmore	Russell
Etowah	St. Clair
Fayette	Shelby
Franklin	Sumter
Greene	Talladega
Hale	Tallapoosa
Jackson	Tuscaloosa
Jefferson	Walker
Lamar	Winston

The Employer further agrees that on all operations outside the chartered territory of the Union he will abide by the rates of pay, rules, and working conditions established by the collective-bargaining agreement between the local insulation contractors and the local Union in that jurisdiction. The Employer may send a Journeyman (Job Foreman) on any one operation within the jurisdiction of another local Union, and in the event of insufficient supply of local labor in that territory, such additional employees as may be necessary. Such employees shall receive, in addition to transportation cost, the wage rate, board or travel allowance highest

in either of the two Locals, but shall receive the fringe benefits, such as Welfare, Pension and Vacation Funds, etc., of their home Local, which shall be payable to their home Local in accordance with its admission of same.

Article 1 is not peculiar to the labor agreement between Local 78 and Howell. On the contrary, all of the employers who sign agreements with locals of the Asbestos Workers Union, throughout much of the United States, have historically signed contracts containing similar provisions. The practice, under article 1, is for a company who is signatory to such a labor agreement, who successfully bids on a project in the jurisdiction of a local other than the one with which it has signed the agreement, is permitted to send one employee (presumably a foreman) to the project, then obtain all other employees by referral from the local in whose jurisdiction the project is located. He must then operate under the terms and conditions of employment of the labor agreement in effect in the jurisdiction of the local where the project is located. A business manager or other officer of that local is responsible for policing and for enforcement of that labor agreement. This has been the procedure universally practiced since about 1950.

Howell,⁶ over the years, has bid on and won jobs on a large number of projects outside the jurisdiction of Local 78. According to the General Counsel's credited witnesses, he worked in accordance with the provisions of article 1 of his collective-bargaining agreement with Local 78, i.e., he applied the terms of the collective-bargaining agreement, in effect, in the jurisdiction where the project was located, to his employees who were members of the local who had jurisdiction at that location, rather than applying the terms of his contract with Local 78.

Fred Raulerson, the business manager for Asbestos Workers Local 13, Jacksonville, Florida, testified that in 1984 he worked on the Owen, Illinois papermill project in Fayetteville, Georgia, where, for a time, he was the foreman. Howell Insulation had the contract and Robert Howell, John Howell's brother, was superintendent on the project. On this occasion, Howell's employees were members of Local 13 and contributions made by Howell on their behalf were sent to their home local.

Documentation was also received into evidence indicating that Howell was the contractor on numerous projects located within Local 13's jurisdiction in the years 1984 through 1991 and that on all of these projects Howell used Local 13's members and contributed on their behalf to Local 13's vacation, pension, and apprenticeship funds and deducted dues from their wages which it forwarded to Local 13. Fred Raulerson credibly testified that Howell, during this period, fully complied with the requirements of Local 13's collective-bargaining agreement on pay and fringe benefits.

In April 1991, Howell Corporation was awarded a contract in Local 13's jurisdiction at a Georgia-Pacific papermill in Paladka, Florida. Ted Thompson, one of Howell's employees, advised Raulerson of the project and was eventually sent

⁶Howell Corp., Howell Insulation, Howell Environmental Services, and Howell Limited were entities split up for insurance purposes but considered as one entity for purposes of application and enforcement of Howell's collective-bargaining agreement with Local 78.

there as foreman. Thompson was a member of Local 78 but requested referrals from Local 13. Raulerson visited the job-site and dealt personally with Rick Howell, John Howell's son, and with Thompson.

The Georgia-Pacific project lasted until July. No separate agreement was necessary for this job because of article 1 of Howell's contract with Local 78.

Under Local 13's collective-bargaining agreement, Howell forwarded fringe benefit contributions and dues, on behalf of its Local 13 employees, to Local 13. The fringe benefit reports were prepared by Howell's Yana Thomason. Checks were signed by Sue Howell, wife of John L. Howell.

In May, one of Howell's Local 13 employees was short a couple of hours. The matter was straightened out on a local level when Howell sent a check for additional dues to the local. Sue Howell signed the check.

Carl Daniel Ellis, the business manager for Asbestos Workers Local 90, testified and offered supporting documentation indicating that Howell Insulation, between 1984 and 1986 worked on one or more projects in Counce, Tennessee. In accordance with article 1 of its collective-bargaining agreement with Local 78, Howell sent one employee, Charles McClendon, to the Counce project and had all other employees referred to the project by Local 90 within whose jurisdiction the project was located. Deductions were made from all employees' wages and sent to the Local to which the employee belonged. Thus, contributions were made by Howell to the National Asbestos Workers Medical, Pension, and Retirement Funds and to various Local 90 funds, including its Apprenticeship and Training Fund, and forwarded to Local 90. Howell also paid referral and service fees to Local 90 and deducted dues from the wages of Local 90 members and forwarded them to their local. Similar deductions were made on behalf of McClendon and forwarded to Local 78.

John Riddick testified that he was the business agent for Local 90 during the period of time that Howell was on the Counce projects. He administered and policed the Local 90 collective-bargaining agreement under which Howell's employees worked at Counce. Although Howell and Local 90 never signed a separate agreement, John Howell contacted Riddick whenever he needed asbestos workers referred to the Counce job. On the most recent Howell project at Counce, which lasted about 3 months, from March until May 1986, Riddick had a number of contacts with John Howell, Robert Howell, and Susan Howell. He also had a conversation with Howell Insulation's bookkeeper concerning fringe benefit reports.

According to Riddick, Howell obtained its most recent project at Counce as a result of a subcontract from Flame Refractories. Flame is a union company.

Don Cundiff, business manager for Local 86, Nashville, Tennessee, testified that his local has had in effect, a series of collective-bargaining agreements over the past 30 years containing the same language as article 1 of the Local 78 contract. On August 25, 1986, an addendum was added to the Local 86 contract providing that if the local union cannot refer to the employer, the number of individuals desired within 48 hours of the date and time the men were to report for work, the employer may procure employees up to the number desired without using the referral procedure.

Sometime prior to April 6, 1987, Howell was awarded a contract covering a project in Cumberland City, Tennessee,

located within the jurisdiction of Asbestos Workers Local 86. On that date, John Howell sent the following telegram to Local 86:

This is to confirm our verbal order for 20 journeyman insulator mechanics and 4 improvers for TVA job at Cumberland City, TN. This project has liquidated damage completion schedule and these men must be at job by 7:00 am work time Wednesday, April 8, 1987. Failure to do so will force us to exercise the 48 hour clause in your current working agreement as we man the job.

Clearly, John Howell, by the telegram, indicated to Local 86 that he considered both his company an Local 86 bound by the provisions of the contents of Local 86's most current collective-bargaining agreement.

On April 20, 1987, John Howell wrote a letter to William Mahoney, vice president of the Southeastern Conference of the International Association of Heat and Frost Insulators and Asbestos Workers located in Miami, Florida, complaining about cost overruns on the Cumberland City job, and blaming the losses sustained on employees referred to that job by Local 86, on their poor work habits and on the disadvantageous ratio of journeymen to improvers. He requested permission to replace some of the least productive referrals with travelers or members of Local 78. This letter further indicates that Howell considered himself bound by the provisions contained in the Local 86 contract and by article 1 of his contract with Local 78.

Sometime after Howell's April 20 letter, he received a call from Mahoney who complained that certain Local 86 members, on the Cumberland City job, had alleged that Howell owed them money. In an undated letter, probably sent in late April or early May 1987, Howell advised Mahoney that he felt that Howell, not only did not owe any wages but was in the process of "working up invoices for monies owed Howell Insulation for failure [of Local 86] to abide by working agreement (Local 86) including but not limited to the following articles":

Article V—Flagrantly violated the cessation of work portion of this article.

Article VI—Union recognizes employee need to maintain an efficient operation.

Article VIII—Flagrant violation of work breaks.

Article XI—Violation of change shack requirements.

Article XIII—Violated reasonable notice when members, including foremen quit job.

Article XV—Apparent violation here per discussion with traveling member while he was on job.

Howell, in this letter, again recounted his displeasure with the cost overruns which he again blamed on Local 86.

This letter is further evidence that Howell considered himself and Local 86 both bound by Local 86's collective-bargaining agreement.

On or before May 8, 1987, John Howell met with Mahoney and the differences between Local 86 and Howell Insulation were resolved. In a letter dated May 8, Howell thanked Mahoney for his prompt response to the problem. He also voiced his regret that the differences between Local 86 and Howell could not be resolved at the local level.

On May 29, 1987, Howell Insulation sent three checks to Local 86 for employee Jesse Walker who had one or more of Howell's paychecks bounce. Walker had refused to accept replacement checks. The three checks included 2 hours' double time for each day that Walker had been without his money, as apparently required under the Local 86 contract. The cover letter, which accompanied the checks, included an apology and was signed by Sue Howell. Thus, the problem which did not result in the filing of a written grievance, was settled between the parties on the basis of the provisions of the Local 86 contract, just as though it were a grievance.⁷

On July 16, 1987, Local 86 wrote to Howell Insulation advising Respondent that eight of Howell's Local 86 employees were due payment under article VIII of the Local 86 contract for bad checks and that one of the eight was also due payment under article XI of the Local 86 agreement for not receiving his layoff check 1 hour before quitting time. On October 7, 1987, Sue Howell replied to Local 86's July 16 letter advising that all moneys due the listed employees had been paid in full. This exchange of letters between Howell and Local 86 reflects an acknowledgement on Howell's part that it was bound by the provisions of the collective-bargaining agreement of the local in whose jurisdiction the project was located, in this case, that of Local 86. This is clear, despite the fact that Howell, at no time, signed a separate agreement with Local 86.

The business manager for asbestos workers Local 55 of Mobile, Pascagoula and Pensacola, Gerald Driskell, testified that Local 55's most recent collective-bargaining agreement contains language similar to article 1 of the Local 78 agreement. He referred to this provision as the extension language. This agreement is effective from August 1, 1991, until July 31, 1993. Previous Local 55 contracts contained similar language.

Driskell testified that the company he was working for, R. N. Pyle Contracting, Inc. of Pensacola, Florida, bid and won a contract to perform work at the Lynn Haven power plant, located just outside Pensacola. Part of the work required the removal of asbestos, work which Driskell's employer, the general contractor, did not perform. The superintendent of the general contractor therefore called the business manager of Local 55, Driskell's predecessor, Walter Stanley, and told him of a large asbestos removal and installation contract that was available, that involved several miles of piping. Stanley contacted four union companies, advised them of the existence of the asbestos contract and all four companies, Howell, North Brothers, Fletcher, and Anco bid on the job. Howell was awarded the contract and performed the installation work in accordance with Local 55's collective-bargaining agreement and article 1 of its contract with Local 78. However, Howell did not have the necessary license to do the asbestos removal part of the project whereas the Universal Insulation Company did. Therefore, Universal performed the asbestos removal while Howell did the rest.

Inasmuch as Universal was nonunion, it could not avail itself of the benefits of article 1. Local 55, therefore, required

Universal to sign a project agreement whereby it agreed to abide by the Local 55 local labor agreement. Stanley signed on behalf of the Union and John E. Howell (Rick Howell), John L. Howell's son, signed on behalf of Universal on September 25, 1990. Subsequently, both Universal and Howell worked on the Lynn Haven project together and members of Local 55, who were employed by these contractors, had contributions made on their behalf, by both contractors, to Local 55.

Driskell testified concerning a number of documents received into the record. One such document reflected the fact that Universal Insulation, under the September 25, 1990 project agreement deducted dues and benefit payments and forwarded them to Local 55 on behalf of its Local 55 employees for the five payroll periods ending September 30 through October 28, 1990. This document was signed for Universal by Yana Thomason of "Personnel."

A second document received into the record reflected that Howell Insulation Co. made the same contributions, for the same period of time, for its Local 55 employees and forwarded them to Local 55 on their behalf. This document was also signed by Thomason. Howell, unlike Universal, had not signed a separate project agreement because the extension language contained in article 1 of its contract with Local 78 was considered sufficient to bind Howell to Local 55's collective-bargaining agreement. Although the checks for contributions were separate—one from Howell and one from Universal, they were both signed by Sue Howell and were received on the same day, in the same envelope.

On March 11, 1991, Rick Howell wrote to Driskell, on Howell stationery, advising him that he had recently been awarded a contract by Combustion Engineering for a project located at the Lansing Smith Generating Station, that work was to begin April 1, and that he would require approximately five insulators.

Howell further advised Driskell that Howell was not licensed to perform asbestos removal in Florida and would have to subcontract that portion of the project to Universal Insulation. He then stated that he would like to get a project agreement drawn up for Universal to perform the asbestos removal job using Local 55 labor. He pointed out that this was the procedure used the previous fall and that it had worked out very well. Finally, he added that if such an arrangement were agreeable, he would have someone from Universal execute the project agreement and return it to Driskell.

In accordance with Rick Howell's request, a project agreement was drawn up and signed by Driskell and John E. Howell on March 13, 1991. Under this agreement, Universal agreed to abide by the then current Local 55 collective-bargaining agreement.

Just as on the Lynn Haven job, both Howell and Universal worked on the Lansing Smith job. As before, Yana Thomason prepared the fringe benefits reports for both Howell and Universal and Sue Howell forwarded checks on behalf of both.

About December 1990, John Howell telephoned the business manager of Asbestos Workers Local 46, John Wade, and advised him that he had been awarded a contract at a papermill just north of Chattanooga, Tennessee, within the jurisdiction of Local 46. In accordance with the usual practice, Howell sent one union employee to the jobsite and Local 46 referred the only member they had available be-

⁷On May 7, 1987, Business Agent Danny Berlin filed a grievance against Howell after Berlin's son was fired. The record is unclear as to the outcome of the grievance, but the absence of mention of any other agreement, indicates that it was filed under the Local 86 collective-bargaining agreement.

cause the other members were all employed. When Wade told Howell that he could only refer one man but would get him travelers to fill his needs, Howell requested permission to bring in people. Wade agreed.

When the Local 46 member arrived at the jobsite, he was hired. In accordance with the Local 46 contract, Howell deducted from his wages, dues, and benefit contributions which were sent to Local 46. Howell complied, in all respects, with his obligations under article 1 of his contract with Local 78 as well as Local 46's collective-bargaining agreement.

B. Recent Events

On April 19, 1991⁸ Local 90's Ellis noticed an advertisement in the Memphis Commercial Appeal. It was a help wanted ad for insulators and other workers for a project located at Counce, Tennessee. Ellis called the number listed in the newspaper and spoke with a person named Garry. The previous February, one Garry from Howell Insulation had called Ellis concerning a project at the TVA plant.

During his April 19 call, Garry told Ellis that the project was under Universal Insulation, was not yet under way but would be starting about the first week in May. The number which Ellis had called to talk to Garry included an Alabama area code. It was Ellis' understanding, as of the date of his call, that Universal was nonunion.

After determining that Universal had the job at Counce, Ellis discussed this matter with James McDonald, business manager with Local 78. McDonald told Ellis that Howell Insulation had had a contract at the Counce project and now Universal was on that job. Ellis asked McDonald what the relationship was between Howell and Universal. McDonald replied that Howell and Universal were one and the same, that Howell was the bargaining unit side and Universal was nonunion. They then discussed a number of jobs that had begun as Howell projects but later became Universal projects. Ellis then asked McDonald if he would mind if he, Ellis, filed a grievance, based on the fact that Universal had taken over the Howell job at Counce. McDonald said that he did not mind.

In June, Ellis again called the jobsite and was told that the job was in progress as of June 17 and that it was a precipitator job which consisted of applying fiberglass insulation with metal covering, work which, under article 1 of Local 78's contract, would have been performed by members of Local 90. On learning what kind of work was being done at Counce, Ellis filed a grievance with the Trade Board and on June 19 he also wrote a letter to John L. Howell charging Howell with being in violation of their collective-bargaining agreement by having Universal perform work that should have been performed in accordance with their agreement. Ellis advised Howell that his letter should be regarded as a grievance and requested that Howell answer 81 questions which were attached to the grievance and which were designed to clarify the connection between Universal Insulation and Howell so that the grievance could be processed.

On June 27, John L. Howell replied to Ellis' request for information. He denied that Howell Insulation had violated the collective-bargaining agreement articles cited by Ellis in his June 19 letter. He also denied that there was any obliga-

tion on his part to supply the information that Ellis had requested. The last paragraph read:

We stand ready and willing, as always, to process proper grievances under the agreement. If you wish to meet over a proper grievance, please inform us.

On June 30, Howell's collective-bargaining agreement with Local 78 expired. It was not renewed.

On July 2, Ellis filed the charge in the instant proceeding, alleging a violation of Section 8(a)(1) and (5) based on Howell's refusal to comply with Local 90's request for information.

Since Howell had refused to provide to Local 90 the information which Ellis felt he needed to process his grievance, Ellis pursued the matter as well as he could through the utilization of other sources of information. At the Memphis Public Library and Information Center Ellis researched the Howell companies and Universal Insulation. He found that Sue Howell was secretary-treasurer of both companies, that the Howell family members served on both boards of directors, that both shared the same address, employed the same accounting firm and were in the same type of business.

In addition to his uncovering the specific information about ties between the Howell companies and Universal, Ellis was informed by several witnesses who testified at the hearing that it was common knowledge throughout the industry that John L. Howell owned both companies and that the Howell companies were operated on a union basis whereas Universal was operated as a nonunion company.

Several instances came to light where, on different projects, Howell was initially the contractor, and later Universal took over, either as the second contractor for building purposes or as a maintenance contractor. It appeared to Ellis that this was what occurred at the Counce project and his attempt to obtain information about Howell and Universal was in pursuance of a clarification as to what had occurred there.

Conclusions

The above-cited facts clearly indicate that, for the past several years, Respondent was signatory to collective-bargaining agreements with Local 78; that it had abided by all of the provisions of those collective-bargaining agreements including article 1 which required that when Howell performed on a project outside the geographical jurisdiction of Local 78, it would abide by the terms and conditions of the Asbestos Workers' collective-bargaining agreement in effect in the jurisdiction where the project was located.

Respondent, for years, had obtained work on projects located outside the jurisdiction of Local 78 and, in each case, followed the provisions of article 1, without questioning its applicability to his situation. Thus, on successfully bidding a job, Howell would immediately contact the local in whose jurisdiction the project was located. He would advise that local's business agent that it was Howell's job and that so many men would be needed. The business agent would then refer that number of the local's members to work as Howell employees on the job. While these employees were employed by Howell, they worked under the terms and conditions of employment as provided in their home local's collective-bargaining agreement, not Local 78's collective-bargaining agreement. In each case, the business agent of the local

⁸Hereinafter, all dates are in 1991 unless noted otherwise.

where the project was located was recognized as the collective-bargaining representative of Howell's employees, responsible for policing and administering that local's contract. Local 78 did not take responsibility for policing collective-bargaining agreements on jobs located outside its jurisdiction. Whenever problems arose on a job outside of Local 78's jurisdiction, Howell would seek out the local business agent to help solve the problem. Similarly, if the local who had referred its members to Howell had complaints or grievances with the way Howell was treating these employees, its business agent would contact Howell to resolve the problem. Howell's employees, members of the local, always relied upon their own local's business representative to resolve any questions they had concerning wages, or terms and conditions of employment, never on Local 78's business agents or officers.

Howell's project in Counce, Tennessee, was handled the same as all the others. When Respondent was awarded the job, it immediately contacted Local 90, since the project was within its jurisdiction. It advised Local 90 that it was on the project, requested and was referred members of that local to work as Respondent's employees on the project. In accordance with article 1 of Local 78's collective-bargaining agreement, Howell applied Local 90's contract to his employee-members of Local 90 and accepted Local 90's business agent as the individual responsible for policing and administering the Local 90 collective-bargaining agreement and for representing its employees on the job.

The facts of this case clearly indicate that historically Respondent has always accepted and enjoyed the benefits of its collective-bargaining agreement with Local 78, including article 1. When engaged in construction projects outside of Local 78's jurisdiction, it always worked through the local in whose jurisdiction the project was located and accepted and dealt with that local as the collective-bargaining representative of the employees it referred. Respondent cannot now deny this relationship. I find that Respondent's relationship with Locals at projects located outside the jurisdiction of Local 78 was exactly the same as its relationship with Local 78 at projects located within the jurisdiction of Local 78.⁹

At the Counce project, Local 90 was the collective-bargaining representative of Respondent's employee-members of that local. Local 90's business representative had a duty to these employees to police and administer the collective-bargaining agreement to which Respondent had bound itself. Collaterally, it had the obligation to seek whatever information was necessary to effectively perform its function as the collective-bargaining representative. On its part, Respondent had a general obligation to provide the information requested as long as it was relevant and useful to the Union in fulfilling its statutory duties and responsibilities as the employees' exclusive collective-bargaining representative.¹⁰ Local 90 requested information from Howell and it was refused.

⁹Although neither the General Counsel nor Respondent cited any Board cases in point, and I could find none, see *McKinstry Co. v. Sheet Metal Workers Local 16*, 859 F.2d 1382 (9th Cir. 1988), for the application of the third party beneficiary theory to a Sec. 301 suit involving two separate locals.

¹⁰*NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967); *Assn. of D.C. Liquor Wholesalers*, 300 NLRB 224 (1990).

Respondent refused to provide the information requested by Local 90 on several grounds:

1. Respondent argues that Local 78, not Local 90, was the exclusive bargaining agent of Howell's employees and Local 78 did not authorize or direct Local 90 to make the request for information.

Contrary to Respondent's argument, however, I have found, *supra*, that Local 90 was, by virtue of article 1 of the Local 78 collective-bargaining agreement, the exclusive bargaining agent for Howell's Local 90 employees on the Counce project. Moreover, the facts indicate that Local 90, through Ellis, sought and obtained authorization to file a grievance against Howell.

2. Respondent argues that Local 90's right to information, if any, was strictly contractual and not the proper subject of 8(a)(5) action and that its failure to grieve and arbitrate its dispute, as required under that agreement, precludes it from any relief.

Contrary to Respondent's argument, it is the Act that requires an employer to furnish information requested by a union that is the bargaining representative of its employees, not the agreement between an employer and a union¹¹ and it is not required that there be grievances or that the information sought be such as would clearly dispose of them. The union is entitled to the information in order to determine whether it should exercise its representative function in the pending matter, that is, whether the information will warrant further processing of the grievance or bargaining about the disputed matter.¹²

3. Finally, Respondent takes the position that assuming, *arguendo*, that Howell had a statutory duty to provide Local 90 information, Local 90 lacked knowledge of sufficient objective facts concerning Howell and Universal's relationship to establish the relevance of its request and the relevance of the request must be determined at the time it was made.¹³

Contrary to Respondent's position, the record indicates that Local 90 had more than a mere suspicion that Universal and Howell were a single employer or that Universal was the alter ego of Howell. Thus, Ellis discovered through discussions with Garry, that Universal was undertaking a construction project at a site where Howell had previously been the contractor. This was confirmed by the Local 78 business agent who also advised Ellis that Howell and Universal were one and the same and that Howell was the bargaining unit side and Universal was the nonunion side. The Local 78 business agent informed Ellis of a number of jobs which had started out as Howell projects and finished as Universal jobs. After determining that the type of work being done on the Counce job was the kind performed by Local 90 members, Ellis filed his grievance with the Trade Board and with Howell, at the same time requesting information and advising Howell that the information sought was designed to clarify the connection between Universal and Howell so that the grievance could be processed.

Following Howell's refusal to provide the information sought by Local 90, Ellis undertook an investigation in order to obtain additional information concerning the connection

¹¹*Island Creek Coal Co.*, 292 NLRB 480 (1989); *Ohio Power Co.*, 216 NLRB 987 (1975).

¹²*Id.*

¹³Citing *M. Scher & Son*, 286 NLRB 688 (1987).

between Howell and Universal. Through this investigation, he determined that certain members of the Howell family served as officers and on the board of directors of both companies, that they shared the same address, employed the same accounting firm and, of course, were in the same business. By talking with people in the industry and by obtaining documentation from state governmental and other sources such as union records, Ellis determined that John L. Howell owned both companies and that a number of employees, at one time or another, worked for both companies.

Contrary to Respondent's position, I find that Local 90, at the time of its request, and at all times subsequent, had an objective, factual basis for believing that Howell and Universal were a single employer or that Universal was an alter ego of Howell.¹⁴ It was therefore justified in requesting the information it did¹⁵ and Respondent was in violation of Section 8(a)(1) and (5) in refusing to furnish it.¹⁶

¹⁴ Respondent relies on *M. Scher & Son*, supra for the proposition that a union, when it requests information concerning two companies which it believes to be a single entity or in an alter ego situation, must have an objective, factual basis for its belief, at the time of the request and that information obtained subsequent to the request may not be relied on. I do not believe Scher stands for this proposition. Indeed, as long as the request for information remains outstanding, it would appear that the union is free to perfect its case, right up to the close of the hearing. Cf. *Ohio Power Co.*, supra.

¹⁵ *George Koch & Sons, Inc.*, 295 NLRB 695 (1989).

¹⁶ Id.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Locals 90 and 78 are labor organizations within the meaning of Section 2(5) of the Act.

3. Respondent has failed and refused to furnish Local 90 with certain relevant information necessary for it to ascertain Respondent's compliance with the contractual obligations as specified in article 1 of the collective-bargaining agreement with Local 78 and has thereby failed and refused to bargain collectively with the representative of its employees. Respondent thereby has been engaging in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act.

THE REMEDY

Having found Respondent engaged in an unfair labor practice, I find it necessary to order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The order will require Respondent to furnish Local 90 with answers to the questionnaire published in appendix B (omitted from publication) to this decision.

[Recommended Order omitted from publication.]