

Alpha-Omega Electric, Inc. and International Brotherhood of Electrical Workers, Local Union No. 305, a/w International Union of Electrical Workers, AFL-CIO-CLC. Case 25-CA-21165(E)

September 22, 1993

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND RAUDABAUGH

On January 21, 1993, Administrative Law Judge Wallace H. Nations issued the attached supplemental decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed a reply 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 and to adopt the recommended Order, for the reasons set forth below.

We agree with the judge and find that the General Counsel was substantially justified in bringing and prosecuting this case because his position had a reasonable basis in law and fact. In the underlying unfair labor practice case, the judge dismissed the complaint alleging that the Respondent violated Section 8(a)(5) of the Act by refusing to provide information requested by the Union on February 7, 1991. In this regard, the judge credited the testimony of the Respondent's witnesses, which he found was supported by other record evidence, to conclude that the Respondent had no collective-bargaining relationship with the Union on the date of the Union's information request, because the Respondent lawfully had given the Union the required notice of its intent to repudiate its 8(f) relationship. In the absence of exceptions, the Board adopted the judge's decision. Thus, we agree with the judge's reasoning, set forth in detail in his supplemental decision, that his resolution of the parties' bargaining relationship issue in the Respondent's favor resulted from his credibility resolutions, and that had he credited the General Counsel's evidence instead, it might well have resulted in the General Counsel's prevailing on that and the related 10(b) issues.

We further reject the Respondent's contentions that the General Counsel's complaint was facially defective warranting a finding he was not substantially justified in law and fact in pursuing it. The complaint alleged that the Respondent failed to supply the Union with information the Union requested by letter on or about February 7, 1991. Although, as the judge noted in his underlying decision, the description of the information in the complaint allegation did not comport with the actual contents of the Union's request, the letter that was at issue was clearly referenced in the complaint. Further, that February 7 letter was submitted into evi-

dence in the underlying unfair labor practice hearing. In sum, although the description of the document in the complaint may have been flawed, the parties were clearly on notice and understood that the information requested in the Union's letter of that date was at issue. In light of the above, even assuming, as the Respondent asserts, that the judge in his supplemental decision mischaracterized his findings on this issue made in the underlying unfair labor practice case, we conclude that the General Counsel was substantially justified in issuing a complaint on this matter and pursuing the finding of a violation through the hearing stage.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the application be denied.

Theofilos G. Galoozis and Ann Rybolt, Esqs., for the General Counsel.

M. Scott Hall, Esq., of Fort Wayne, Indiana, for Applicant.

SUPPLEMENTAL DECISION

Equal Access to Justice Act

WALLACE H. NATIONS, Administrative Law Judge. On March 26, 1992, the National Labor Relations Board (the Board) issued its Order in the above-entitled proceeding, adopting the findings and conclusions of this administrative law judge as contained in his decision dated February 10, 1992. The Board's Order, inter alia, dismissed the complaint against Alpha-Omega Electric, Inc. insofar as it alleged that the Company committed any unfair labor practices.

On April 22, 1992, Alpha-Omega Electric, Inc. (Applicant or Company) filed a verified application for award of attorney fees and other expenses under the Equal Access to Justice Act (EAJA) and Section 102.143 of the Board's Rules and Regulations.¹ Applicant asserts in this pleading that it prevailed finally and completely in the adversary proceeding. It further asserts and supports these assertions with appropriate affidavits and financial reports that it is an Indiana corporation engaged in the business of an electrical contractor in the building and construction industry, employing less than 500 employees and having a net worth of less than \$5 million. Attorneys fees and expenses totaling \$24,447.43² incurred in defending against the General Counsel's allegations is sought.

On July 1, 1992, General Counsel filed an answer to the application, contending the application should be dismissed because General Counsel's position in the litigation was substantially justified under the law and, alternatively, that the attorneys fees sought are excessive as they are based on a higher-than-allowable hourly fee and include expenses incurred prior to the filing of the complaint. Thereafter, on July

¹ 5 U.S.C. § 504 (1982), amended by Pub. L. 99-80, 90 Stat. 193 (9185).

² As amended by Applicant's reply to General Counsel's answer here.

21, 1992, the Company filed its reply to General Counsel's answer.

The Substantial Justification Question

EAJA provides for the award of attorney fees and other expenses to eligible parties who prevail in litigation before administrative agencies, unless the Government can establish that its litigation position was either "substantially justified" or that special circumstances exist which would make such an award unjust. Although the EAJA statute is silent as to the meaning of "substantially justified," the Supreme Court, in *Pierce v. Underwood*, rejected a standard of something more than simple reasonableness:

The statutory phrase "substantially justified" means justified in substance or in the main—that is, justified to a degree that could satisfy a reasonable person. This interpretation of the phrase . . . is equivalent to the "reasonable basis in law and fact" formulation adopted by the vast majority of Courts of Appeals.

The Board has utilized a case-by-case approach in analyzing EAJA cases.³ It has interpreted the reasonableness standard in such a way as to not interfere with the General Counsel's vigorous enforcement of the labor laws. Where there have been close questions of law and facts, no awards have been made.⁴ In cases where conflicting inferences can be drawn from the evidence, the General Counsel is entitled to resolve the conflict in favor of the violations alleged.⁵ The General Counsel's failure to prevail raises no presumption that he was not substantially justified in asserting his position in the underlying litigation.⁶ It should also be remembered that it is settled law that if a credibility conflict cannot be resolved administratively through documentary evidence, Board practice and procedure require that such credibility issues be resolved at a hearing before an administrative law judge. This is important in the instant case because the outcome of the case turned on a number of credibility resolutions.

Although I will summarize the necessary facts for an understanding of the case below, in a nutshell the case before me involved an allegation that Applicant violated Section 8(a)(1) and (5) of the Act by failing to supply certain information requested by the Charging Party Union. The primary defense raised by Applicant was that it was under no obligation to supply such information as it had lawfully severed its relationship with the Union almost 2 years before the information request was made. In making my finding that Applicant had indeed severed the relationship, I was required to make several credibility resolutions in favor of Applicant, which, if they had been made in favor of General Counsel's witnesses, would have in all likelihood resulted in a finding of a violation by the Applicant.

For a further understanding of how these credibility resolutions built on themselves to reach the outcome set forth in my decision, a brief recitation of the facts and position of the parties at hearing is necessary.

³ *Enerhaul, Inc.*, 263 NLRB 890 (1982).

⁴ *Derickson Co.*, 270 NLRB 516 (1984).

⁵ *Westerman, Inc.*, 266 NLRB 799 (1984); *Iowa Parcel Service*, 266 NLRB 392 (1983).

⁶ *Wyandotte Savings Bank v. NLRB*, 682 F.2d 119 (6th Cir. 1982).

A. Relationship Between Applicant and Union

The Company has engaged in the business of electrical contracting in the Ft. Wayne, Indiana area since it was formed in 1974 by its owner and president, John W. Young Sr. Its primary focus is in industrial and commercial building, though it does some residential work. The two types of contracting are covered by different collective-bargaining agreements, both negotiated between the Union and the National Electrical Contractors Association (NECA). The industrial and commercial building work is covered by an "inside" agreement, and the residential work is covered by the "residential" contract. On August 4, 1980, the Company signed a Letter of Assent, whereby it became bound by the Inside Collective Bargaining Agreement between the Central Indiana Chapter, National Electrical Contractors Association, and the Union. Young Sr. testified that he also signed a similar agreement with the Union covering residential contracting in 1980.

The National Labor Relations Board (Board) has never certified the Union as the exclusive collective-bargaining representative of a unit of the Company's employees, nor has the Company ever recognized the Union as such. Its relationship with the Union is solely grounded in its execution of the Letters of Assent to be bound by the involved collective-bargaining agreements, which appear to be lawful prehire agreements under Section 8(f) of the Act. By virtue of the Letters of Assent, the Company designated NECA as its bargaining agent with the Union.

The Company remained a party to successive agreements between NECA and the Union, the last Letters of Assent being signed on September 26, 1989. These letters bound the Company to the current or any future contract between NECA and the Union for both inside and residential contracting work. The then-current contracts for both inside and residential contracting expired on May 31, 1990. Both letters by their written terms allowed the Company to terminate its relationship created by the letters by giving written notice to NECA and the Union at least 150 days prior to the then-current anniversary date of the applicable approved labor agreement. With respect to the issue of termination, the contracts provided the following:

Section 1.01: This agreement shall take effect June 1, 1987, and shall remain in effect until May 31, 1990, unless otherwise specifically provided for herein. It shall continue in effect from year to year thereafter, from June 1 through May 31 of each year, unless changed or terminated in the way provided herein.

Section 1.02: (a) Either party desiring to change or terminate this Agreement must notify the other, in writing, at least 90 days prior to the anniversary date.

These provisions will be referred to as the automatic renewal provisions.

B. The Violation of the Act Alleged in the Complaint

The allegations of unlawful activity by the Company are found in paragraph 6 of the complaint. These allegations presume a bargaining relationship existed at the involved time-frame between the Company and the Union. Paragraph 6 of the complaint reads as follows:

6. (a) Since on or about February 7, 1991, the Union, by letter, has requested the Company to furnish the Union with the information (i) regarding work currently available to be performed by Unit employees, (ii) the identity of the individuals assigned said work, (iii) the entities to which such work was being subcontracted, (iv) the interrelation of such subcontractors to Company.

(b) The information requested by the Union, as described above in subparagraph 6(a) is necessary for, and relevant to, the Union's performance of its function as the collective-bargaining representative of the Union.

(c) Since on or about February 7, 1991, the Company, including by letter dated February 12, 1991, has failed and refused to furnish the Union the information requested by it as described above in subparagraphs 6(a) and (b).

C. Facts Adduced in Support of the Company's Defense and Discussion of General Counsel's Contentions

The Company's defense was based on its contention that it had effectively severed its relationship with the Union in compliance with all contract and other legal procedures as of May 1990.

On February 7, 1991, the Union sent the Company the following letter:

Local 305 is currently investigating the extent to which Alpha Omega may be operating in violation of the collective bargaining agreement.

Alpha Omega's operations erode bargaining units and endanger the financial integrity of fringe benefit funds. They jeopardize the competitiveness of the other Union contractors generally and threaten Union members' jobs. Alpha Omega's operations violate several provisions in Articles I, II, III, IV and V of Local 305's Labor Agreement. Local 305 must determine the necessity for grieving any violations of the Labor Agreement. Local 305 also must determine whether the issue of Alpha Omega's operations should be addressed in collective bargaining negotiations or elsewhere.

As part of Local 305's investigation of this matter, we are contacting you directly for pertinent information. We require that you supply us with information concerning your Company's operation.

Please respond to the attached questionnaire, which is directed at the time period of the most recent Labor Agreement June 1, 1990 to May 31, 1993. If you are unable to furnish some of the information requested, please provide all information you can and state under oath that you cannot furnish the rest.

To determine the appropriateness of the grievance and or to determine whether these matters can be resolved in negotiations in a timely fashion, we require a response within one week of the date of this letter.

The Company, by letter dated February 12, 1991, and signed by its office manager, Julie A. Glant, responded to the Union's February 7 information request thusly:

We have received your letter dated 2/7/91 and the attached questionnaire.

Since Alpha-Omega sent a letter of dissent from the Union in December of 1989 to you and NECA, we no longer are under the confines of the agreement of June 1, 1990.

Therefore we do not believe that it is necessary to respond to the questionnaire which you have sent us.

If there has been a misunderstanding concerning these matters, please do not hesitate to contact me immediately.

Previously, on February 7, 1991, Glant sent to Union Business Manager John Smith the following letter:

Enclosed please find letter copy and certified mail receipt copy for the letter which we sent you and NECA on December 14, 1989.

We understand that you cannot find this in your file. Fortunately, NECA has the copy which was sent to them.

If you have any questions concerning this matter, please do not hesitate to contact us.

Glant evidently sent this letter with the involved attachments because the Union filed a grievance a week earlier which would indicate that it was asserting that Company was still a signatory contractor. With respect to the earlier letter, Glant testified that on December 14, 1989, she prepared and mailed by certified mail, letters to both NECA and the Union at their correct addresses, which letters read:

Alpha-Omega Electric, Inc. does not recognize the National Electrical Contractors Association (NECA) as our bargaining agent between contractors and Union, as of the termination of the present contract. Any negotiations for a new contract must be made directly between Local #305 IBEW and Alpha-Omega Electric, Inc. This includes both the commercial and industrial contract and the residential and light commercial contract.

It is undisputed that NECA received its copy of the letter. John Smith, business manager for the Union, testified that the Union did not receive a copy of the letter. The letter to the Union was properly addressed and mailed according to Glant. Glant credibly testified that the letter was not returned to the Company by the Postal Service. She also testified that within a week after sending the letter, Smith telephoned, asking to speak with Young Sr. Young Sr. testified that Smith asked, "What is this shit about not recognizing the NECA as your bargaining agent, I'm not going to write a separate contract for you or any other contractor that doesn't want to be signatory, we are not—we have lots of good contractors, signatory contractors, union contractors and if you want to be nonunion, so be it. I've mellowed over the years, and I'm not going to fight you, if you want to be non-union, be non-union." Young Sr. responded that if Smith was not going to bargain with him for a separate agreement, that he was going to be a nonunion contractor.

Smith testified that he did not recall having this conversation with Young Sr. At a grievance meeting held in January 1991, he testified that he did not remember this conversation. For the reasons set forth in my decision, I credited the mailing and receipt of the involved letter and the telephone con-

versation between Young and Smith.⁷ Had I believed Smith, which General Counsel was required to do, I could have found that the Union had not received notice of the repudiation of the bargaining relationship and it would have continued to exist past the May 1990 expiration date of the current agreement.

In part, I found support for my credibility resolutions noted above in some other evidence of record. The Company was shown to have had a habit of being late in filing contractually required reports to various union benefit funds and making the payments called for by the contracts. The Union was shown to have had a regular practice of sending written requests for the reports and payments within 2 or 3 months after the reports and/or payments became delinquent. The Company was shown to have ceased making these contractually required benefit payments to various union funds after February 1990. Following its normal practice, the Union began making requests for these payments in June and July 1990.

I found it significant that the Union had never sought payment for any fund payments after May 31, 1990, a course of inaction consistent only with the position that the Union did not consider the Company to be a signatory contractor after that date. The Union offered evidence, which again the General Counsel was required to accept as there was not clear documentary evidence to refute it, that it was not diligent in pursuing these late payments because the Union did not believe that Applicant was working in its jurisdictional territory. This testimony was offered in some detail in the record. If believed, it would have supported the General Counsel's contention that the bargaining relationship had not been effectively repudiated and thus a bargaining relationship continued to the date of the involved information request.

Further, the Union sought to force the payment of the amounts due for the months of March, April, and May 1990 in a grievance filed with NECA in January 1991. At this meeting, held February 21, 1991, presiding over determination of the grievance were three union representatives and three NECA representatives. Smith urged that a determination be made whether the Company was still a signatory contractor. Young Sr. cited his letter of December 14, 1990, and the subsequent telephone conversation with Smith. Smith stated that the Union had not received the letter until February 7, and did not remember the telephone conversation. An NECA representative noted that he had received the December 14 letter. The Union and NECA representatives voted on the issue and deadlocked, with the Union contending that

the Company was still a union contractor. This deadlocked vote indicates to me that the grievance committee recognized that a crucial credibility issue existed. The grievance panel ruled that the Company owed benefit payments for March, April, and May 1990, and ordered the Company to pay the amounts owed. The Union has not sought by any means to force the Company to make corresponding benefit payments for any period after May 31, 1990, though, as noted, the Company has made no such payments. Although I did not do so, I could have found that the Union's filing of this grievance supported its contention that the Company was still bound by the involved contracts. Smith's position was consistent with his position taken throughout the proceeding. The fact that the Union did not go further and seek back payments for the period subsequent to May 1990 could be explained by the deadlocked vote of the management and union representatives on the issue of continuing relationship, and because the matter was being presented to the Board for determination. Had I made this finding in favor of General Counsel, along with the earlier ones above, finding a bargaining relationship as of the date of the information request would have been called for, based on the cases cited by General Counsel on brief.⁸

On March 4, 1991, the Union, by Smith, filed an internal charge against John Young Jr., an employee of the Company and member of the Local, alleging that Young Jr. violated the Union's constitution by working for a company (Company) that refuses to be signed to an agreement with Local 305. The wording of this charge indicated to me that the Union did not consider the Company to be a signatory contractor. Young Jr. was found guilty of the violation and fined \$1000. He could not have been found guilty if the Union considered the Company to be a signatory contractor. However, one could reasonably view the Union's action in bringing these charges as a response to the Company's actions in the grievance proceeding and its refusal to supply the information requested in the February letter from the Union. Perhaps the Union was trying to pressure the senior Young into reconsidering his position or penalize him for taking the position. Whatever the reason, the Union was clearly not giving up its position that the Company was still in a bargaining relationship as it pursued its Board charges based on such a relationship.

In conclusion on this point, if I had credited the evidence on which General Counsel was bound to rely, I would have agreed with him that the case was governed by the cases on which his case rested and not the ones I did rely on. In such circumstances, the General Counsel may well have established that a bargaining relationship existed as of the date of the involved information request. The Company's 10(b) timeliness defense would also be without merit in such circumstances. I find that without doubt that General Counsel had substantial justification in bringing this action and, further, that had the credibility resolutions involved in the proceeding been in favor of his witnesses, he would have pre-

⁷I could have found that Glant did not mail a copy of the letter to the Union. She had no certified mail receipt and, thus, had just her testimony to support the conclusion that such a letter to the Union was properly mailed. The letter does not in itself clearly repudiate the Company's relationship with the Union as it does with NECA. Therefore, without more, it is arguable whether it is sufficient notice of repudiation. The followup telephone conversation thus becomes crucial. In the investigatory stage of this proceeding, this phone call is only mentioned in passing in a position paper filed by the Company's attorney. I do not believe under these circumstances that the Board was properly put on notice of the significance of the call and had no probative evidence that it actually took place, or of its contents. In any event, given Smith's denial that the conversation ever took place, in the absence of any documentary evidence that it did, the Board was obligated to place this credibility dispute before an administrative law judge for resolution.

⁸*Kenmore Contracting Co.*, 303 NLRB 1 (1990); *Reliable Electric*, 286 NLRB 834 (1987); *Kephart Plumbing*, 285 NLRB 612 (1987); *Cedar Valley Corp.*, 302 NLRB 823 (1989); *Teamsters IBEW Local 532 (Brink Construction)*, 291 NLRB 437 (1988); and *Carthage Steel Metal Co.*, 286 NLRB 1249 (1987).

vailed or the very least the case would have been extremely close on the issue of the bargaining relationship.

D. The Matter of the Complaint Comporting with the Facts

That leaves the question of whether the Company would have prevailed at the hearing because of my belief that the information that the complaint alleged it failed to supply was not the information actually requested by the Union's letter of February 7. Although much is made of this question, it is really a minor part of this case. The Company's primary defense to this case was based on its contention that it was not in a valid bargaining relationship with the Union at the time of the request, as discussed above. The Company acknowledged that it received the information request, the request was correctly referenced in paragraph 6(a) of the complaint, the request was admitted into evidence as Joint Exhibit 7, and the Company did not deny that the information requested was necessary and relevant. At the time I wrote the decision in this matter, I believed this matter was moot because of my finding that the Company and the Union did not have a bargaining relationship as of February 7 which would give rise to an obligation on the part of the Company to supply the requested information. I encouraged General Counsel at the hearing to amend the complaint to comport with the Union's letter request, which he did, albeit after the record closed. I did not allow the amendment at that time as the issue was by then moot in my mind. Had I determined that a bargaining relationship did exist, then the amendment would have been granted. On further consideration, I believe I was incorrect in stating in my decision that another hearing would have been necessary, because the only issue that could have been raised at the further hearing would have been the

necessity and relevance of the information sought. As noted above, these matters were not denied by the Company and thus could not form the basis for a request for further hearing. Thus the General Counsel would have prevailed on the question of whether the Company violated the Act by refusing to supply the information.

For the reasons set out above, I find that there were substantial credibility resolutions presented at every crucial point of this case, credibility resolutions which could not have been made under the Board's Rules without a hearing before an administrative law judge. Had these credibility resolutions been decided in favor of General Counsel, then he would have most likely prevailed in this case on the facts and the law applicable to those facts. I find therefore that General Counsel was substantially justified in bringing and prosecuting this case and his position therein had a reasonable basis in law and fact. Accordingly, I must conclude that the General Counsel's motion to dismiss the application be granted.⁹ I therefore issue the following recommended¹⁰

ORDER

The General Counsel's request that the Application of Alpha-Omega Electric, Inc. be dismissed, as contained in General Counsel's answer to the application, is granted and the Application for attorneys fees and expenses is dismissed.

⁹In view of my disposition of the substantial justification issue, I deem it unnecessary to reach the additional points and arguments raised by the General Counsel in opposition to the application.

¹⁰If 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.