

Harris Glass Industries, Inc. and Harris Dependable Industries, Inc., a Single Employer and Glass Warehouse Workers and Paint Handlers Local 206, International Brotherhood of Painters & Allied Trades, AFL-CIO. Case 2-CA-26790

May 25, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS
AND BROWNING

On February 14, 1995, Administrative Law Judge Joel P. Biblowitz issued the attached decision. The Respondents filed exceptions and a supporting brief. The Charging Party filed an answering 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 brief and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order as modified and set forth in full below.²

AMENDED REMEDY

Having found that the Respondents failed to fully comply with and implement the 1993-1997 contract between the Union and the Window and Plate Glass Dealers Association, we shall order the Respondents to make whole unit employees by paying any and all delinquent contributions to contractually required fringe benefit funds and any liquidated damages thereon, including any additional amounts applicable to such delinquent payments as determined in accordance with

¹We agree with the judge that the Respondents constitute a single employer. The record shows that Respondent Harris Glass Industries, Inc. was originally named L. Harris & Son Glass Co., Inc. Implicit in the judge's single employer finding is that L. Harris & Son Glass Co., Inc.—the entity that authorized the Window and Plate Glass Dealers Association to bargain on its behalf in 1975—is in reality the same employer as the Respondents. The mere technical change in the identity of the employing entity does not absolve the newly named employer of the single employer's legal obligations. See *Howard Johnson Co. v. Hotel & Restaurant Employees*, 417 U.S. 249, 259 fn. 5 (1974).

Member Stephens notes that the finding that the Respondents are bound to the 1993-1997 collective-bargaining agreement between the Association and the Union is not inconsistent with his dissenting opinion in *Chel LaCort*, 315 NLRB 1036, 1037 (1994). In that case, the employer sought to withdraw from the employer bargaining association before expiration of the predecessor agreement and at a time when, pursuant to affirmative representations made to it by the association, it had reason to believe negotiations for a new agreement had not commenced. In the present case, when the Respondents sought to withdraw, the old agreement had expired and four or five bargaining sessions for a new agreement had taken place; and there was no active concealment of those negotiations.

²We shall modify the judge's remedy and recommended Order to provide standard remedial language for the violation found.

Merryweather Optical Co., 240 NLRB 1213, 1216 (1979). In addition, the Respondents shall reimburse unit employees for any expenses ensuing from its failure to make such required payments, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. 661 F.2d 940 (9th Cir. 1981), such amounts to be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).³

ORDER

The National Labor Relations Board orders that the Respondent, Harris Glass Industries, Inc. and Harris Dependable Industries, Inc., a single employer, New York, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively with Glass Warehouse Workers and Paint Handlers Local 206, International Brotherhood of Painters & Allied Trades, AFL-CIO as the exclusive collective-bargaining representative of certain employees.

(b) Refusing to fully implement and give effect to the collective-bargaining agreement between the Union and Window and Plate Glass Dealers Association of New York, Inc. effective for the period April 1, 1993, through March 31, 1997.

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

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

(a) Comply with and implement the terms of the 1993-1997 collective-bargaining agreement between the Union and the Association, retroactively to its April 1, 1993 effective date, including by paying all contractually required fringe benefit fund contributions and liquidated damages thereon that have not been paid, and by making unit employees whole for any expenses resulting from its failure to make such contributions, with interest, as set forth in the amended remedy section of this decision.

(b) Make whole its employees who are represented by the Union for any loss of pay and other benefits that they suffered as a result of its refusal to fully comply with the terms of the 1993-1997 collective-bargaining agreement between the Union and the As-

³To the extent that an employee has made personal contributions to a fund that are accepted by the fund in lieu of the employer's delinquent contributions during the period of the delinquency, the Respondents will reimburse the employee, but the amount of such reimbursement will constitute a setoff to the amount that the Respondents otherwise owe the fund.

sociation, with interest, as set forth in the amended remedy section of this decision.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, time-cards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its office and place of business copies of the attached notice marked "Appendix."⁴ 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 employees customarily are posted. Reasonable steps shall be taken by the Respondent to insure that the notices are not altered, defaced, or covered by any other material.

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

⁴If 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."

APPENDIX

NOTICE TO EMPLOYEES
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 to bargain collectively with Glass Warehouse Workers and Paint Handlers Local 206, International Brotherhood of Painters & Allied Trades, AFL-CIO as the exclusive collective-bargaining representative of certain of our employees.

WE WILL NOT refuse to fully implement and give effect to the collective-bargaining agreement between the Union and Window and Plate Glass Dealers Association of New York, Inc. effective for the period April 1, 1993, through March 31, 1997.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL comply with and implement the terms of the above-described contract, retroactively to its April 1, 1993 effective date, including by making all contractually required fringe benefit contributions that have not been made, and by making whole the unit

employees for any expenses ensuing from our failure to make such contributions, with interest.

WE WILL make whole our employees in the bargaining unit for any loss of pay or other benefits they may have suffered by reason of our refusal to comply with and implement the terms of the above-described contract, with interest.

HARRIS GLASS INDUSTRIES, INC. AND
HARRIS DEPENDABLE INDUSTRIES, INC.,
A SINGLE EMPLOYER

Ruth Weinreb, Esq., for the General Counsel.
Alan B. Pearl, Esq. (Portnoy, Messinger, Pearl & Associates, Inc.), for the Respondent.
Ralph P. Katz, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

JOEL P. BIBLOWITZ, Administrative Law Judge. This case was heard by me on December 12, 1994, in New York, New York. The complaint, which issued on December 27, 1993,¹ and was based on a charge and an amended charge that were filed on August 23 and September 27 by Glass Warehouse Workers and Paint Handlers Local 206, International Brotherhood of Painters & Allied Trades, AFL-CIO (the Union), alleges that Harris Glass Industries, Inc. (Respondent Glass) and Harris Dependable Industries, Inc. (Respondent Dependable), and at times jointly referred to as Respondents, allegedly joint employers, violated Section 8(a)(1) and (5) of the Act from about April through August, by attempting to withdraw untimely from Window and Plate Glass Dealers Association of New York, Inc. (the Association) and by refusing to execute the collective-bargaining agreement agreed to by the Union and the Association.

FINDINGS OF FACT

I. JURISDICTION

Respondents admit, and I find, that they are an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION STATUS

Respondents admit, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. FACTS AND ANALYSIS

A. *Single Employer Status*

The operation involved here was originally named L. Harris & Son Glass Co., Inc. (L. Harris), and was owned shortly prior to 1982 entirely by Howard Kaplan. In November 1982, Kaplan, as president, and Harold Fein, as secretary, filed forms with the State of New York to change the company name to Harris Glass Industries, Inc. From that time until 1987, Kaplan and Fein were each half owners of Re-

¹Unless indicated otherwise all dates referred to 1993.

spondent Glass, with Kaplan as the president and Fein the vice president. About 1987 this situation changed when Fein became the sole owner and president of Respondent Glass. Both Respondent Glass and L. Harris & Son Glass Co. had identical operations: delivering, installing, cutting, polishing, and measuring glass and mirrors. Fein was the sole supervisor of Respondent Glass' employees, at least since 1987. The Union has represented most of the employees of Respondent Glass and L. Harris since, at least, about 1975.

On or about April 15 Fein ceased operations as Respondent Glass and commenced operations as Respondent Dependable, of which Fein is the sole shareholder and supervisor, with the same employees and at the same location. Respondent Dependable filed a certificate of incorporation on the same day. Two months later, Respondent Dependable moved to a different location, although Fein maintained the same telephone number that he had for Respondent Glass. He testified that when he moved the Respondent Dependable's operation, he notified "the Union" of the change in name and location, but on cross-examination, he testified that he notified Local 1087, which represents one of his employees, of these changes. He never specifically testified that he notified the Union, and Michael Kis, president and business manager for the Union, testified that he never received any such notification from Fein. Fein testified that, when he established Respondent Dependable, it was to perform glasswork, but he was not sure whether he would reemploy the employees that he had employed at Respondent Glass, or whether he would perform freelance work and work independently of his prior employees. His affidavit given to the Board states: "It was my intention when Harris Dependable was formed to employ employees who would do similar work to the work performed by Harris Glass." When Fein converted his operation from Respondent Glass to Respondent Dependable on or about April 15 he continued to use the same employees. Subsequently, however, these employees refused to cross a Local 1087 picket line and did not return to work for Respondent until about December.

On August 8 Fein sent the Union the deducted dues and other remittances, for the month of June, as required by his contract with the Union. His checks to the Union's annuity, pension, and welfare fund, as well as the check for the dues, were written on Respondent Dependable's checks, dated August 6. The accompanying remittance report lists the employer as Respondent Glass. Fein testified that Respondent Dependable performs work for "some" of Respondent Glass' customers; his affidavit to the Board states that Respondent Dependable "provides services to the same customers." On April 14 Respondent Glass had about \$5000 worth of inventory (plate glass and mirrors) and one polishing machine. Over the next month or so, Respondent Dependable used up that inventory and employed the polishing machine. For, at least, the first 2 months of Respondent Dependable's operation, it used Respondent Glass' trucks.

In its answer Respondents admits "that Harris Dependable Industries, Inc. is a successor to Harris Glass Industries, Inc., and that, for this proceeding, has a duty to recognize and bargain with Local 206." The initial issue is whether Respondent Glass and Respondent Dependable constitute a sin-

gle employer within the meaning of the Act.² There can be no doubt that they do. In *Radio & Television Broadcast Technicians Local 1264 v. Broadcast Service of Mobile*, 380 U.S. 255 (1965), the Court stated that the controlling criteria in determining single employer status are interrelation of operations, common management, centralized control of labor relations, and common ownership. It is difficult to imagine a more obvious single employer situation than the instant one. Respondent Glass and Respondent Dependable have the same employees, supervision, ownership, customers, and labor relations. In addition, Respondent Glass ceased operations on April 14 and Respondent Dependable commenced operations on the following day at the same location using the balance of Respondent Glass' inventory, its machine, trucks, and telephone number. The division between the two companies was so nebulous that, in August, Fein sent his remittances to the Union on Respondent Dependable checks, but with a Respondent Glass remittance form. I therefore find that Respondent Glass and Respondent Dependable constitute a single employer within the meaning of the Act.

B. Association Membership

The complaint alleged, and Respondent admits, that Window and Plate Glass Dealers Association of New York, Inc. (the Association) has been an organization composed of various employers, and which exists for the purpose, among other things, of representing its employer-members in negotiating and administering collective bargaining with various labor organizations, including the Union. Jerome Haber, who is the president of a glass company, is, and has been, the president of the Association for about 20 years, testified that the Association negotiates contracts with the Union and Local 1087 on behalf of member shops in the industry and has periodic meetings of members, and that its members appoint the negotiating committee and ratify the contracts that it enters into. Members have not been charged dues over the last 12 years. He produced a document signed by Kaplan on July 29, 1975, stating that L. Harris & Son authorized the Association to bargain on its behalf and agreed to be bound to any contract resulting from such negotiations. No more recent authorization was produced. Haber testified that he has met Fein, Kaplan, and "Billy Kaplan" at Association meetings, but Fein was not on the negotiating committee, nor did he attend bargaining sessions. Prior to the 1990 negotiations with the Union that resulted in the contract that expired on March 31, Haber prepared, and gave to the Union, a list of the Association's members. The list contained the names of 19 employers, including L. Harris & Son, at Respondents' address. Prior to the commencement of negotiations on February 12, the only notification that the Association provided to its members (including Respondents) was a form letter in late 1992 notifying them of a meeting to discuss the approaching negotiations. Fein did not regularly attend Association meetings, and the last meeting that Haber remembers Fein attending was a general membership meeting in the fall of 1992. Prior notification for this meeting was sent to each member of the Association. Fein testified that during the period that he was involved with Respondent he has attended

²Counsel for the Charging Party, in his brief, states that at the hearing Respondents withdrew their denial of single employer status. I cannot locate any such withdrawal.

some Association luncheons: "Someone from the industry would call up and say that they had a lunch, and if you felt like stopping in, having a meal, be free to do so." These luncheons usually lasted for over an hour, and negotiations with the Union were never discussed while he was present. Over the 6 years prior to April he received no correspondence from the Association. During the period of his involvement with Respondent it has had a collective-bargaining relationship with the Union and applied the terms of the agreement that expired on March 31, although he never signed the 1990-1993 agreement on behalf of Respondent and never negotiated separately with the Union. He testified: "Well, we were given a schedule and that is what we paid the men" as well as making the required contributions to the Union. Kis testified that during his employment with the Union, Respondent never signed any agreement with the Union. Rather, he complied with the terms of the agreements negotiated by the Association.

In *United Steel Erectors*, 283 NLRB 314 (1987), the administrative law judge, as affirmed by the Board, stated: "A multi-employer 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." In *Hillsdale Inn v. NLRB*, 764 F.2d 739 (10th Cir. 1985), the court stated that the test to determine whether an employer has delegated a multi-employer association with the required authority to negotiate on its behalf, is whether the employer has indicated an unequivocal intention to be bound by group action. The court also quoted language from *Travelers Insurance Co. v. Morrow*, 645 F.2d 41, 44-45 (10th Cir. 1981), which stated: "To establish that an agent has apparent authority to bind its principal it must be shown that the principal knowingly permitted the agent to exercise the authority in question, or in some manner manifested its consent that such authority be exercised." In 1975 Kaplan authorized the Association to bargain on behalf of L. Harris and agreed to be bound by any contract resulting from these negotiations. At least until April 15 Respondent never withdrew this authorization. In 1982 the corporate name L. Harris was changed to Respondent Glass and I have found that Respondent Harris and Respondent Dependable constitute a single employer. Therefore, at least shortly prior to April 15, Respondents were still a member of the Association and bound by its actions. Respondents defend that Fein had little connection with the Association other than attending an occasional luncheon where industry, rather than labor relations matters, were discussed. That is not a valid defense here. The cases require employers to indicate an unequivocal intention to be bound by group action. Respondent joined the Association in 1975 and never did anything to withdraw prior to April 15. Respondent complied with every contract negotiated by the Association and the Union subsequent to 1975 without signing any of them. Even if he only attended occasional Association luncheons where labor relations were not discussed,³ by joining the Association in 1975, and by complying with the contracts negotiated by the Association for about 18 years, Respondent un-

equivocally indicated its intention to be bound by the Association's actions.

C. Alleged Untimely Withdrawal

The agreement between the parties that expired on March 31 states that it would "automatically renew itself from year to year thereafter unless either party desires to discontinue or modify the existing Agreement upon any termination date; at least sixty (60) days prior written notice of such intent must be given to the other party hereto." By letter to the Association dated January 22, Kis stated: "You are hereby notified that Glass Warehouse Workers and Paint Handlers Local Union 206 proposes to modify its collective bargaining agreement with the Window and Plate Glass Dealers Association of New York, Inc. which expires on March 31, 1993." Haber received this letter on or about January 22. Fein testified that he never received this, or any letter from the Union, indicating an intention to modify or change the agreement.

The first negotiation session between the Association and the Union took place on February 12. On that date Haber gave Kis a list of the Association's member employers, including "L. Harris and Son," and the parties exchanged initial proposals for changes in wages, benefits, and conditions of employment. Four or five negotiating sessions took place between February 12 and April 15; there were a total of about seven sessions before an agreement was entered into between the Association and the Union in May. Fein did not attend any of these meetings nor did Haber discuss the status of these negotiations with Fein during this period. On or about April 1, Fein called Haber and spoke about the possibility of withdrawing from the Association; Haber told Fein that he would have to do it in writing, and called Kis and told him that Fein said that he was going to resign from the Association. By letter to the Association, dated April 15, Fein wrote: "Please be advised that as of April 15, 1993, Harris Glass Industries, Inc. is resigning from the National Plate Glass Dealers Association."

Fein testified that he called Haber on or about April 1 and told him that he really didn't know whether or not he was a member of the Association, but that contract negotiations were approaching for Local 1087, and the industry contracts were "quite severe," so he wanted to resign from the Association and negotiate on his own. Kis testified that Haber told him on or about April 1 that Fein stated that he was going to withdraw from the Association. He told Haber that Fein was still obligated to the contract. Kis next spoke to Fein on August 10, when he called Fein about the June benefit contributions, and Fein said that they were in the mail. Kis asked him about his problems with Local 1087 and Fein said that they were still picketing. Kis asked if Fein would continue to recognize the Union as its members were still working for him. Fein said that they did not work for him (apparently because they were refusing to cross the Local 1087 picket line) and that he didn't have a contract with the Union. Kis told him that he was bound by the new agreement entered into by the Union and the Association and Fein said that if he had anything further to say he should speak to his lawyer. Since that time, Respondent has complied with the terms and conditions of employment of the new agreement executed by the Union and the Association for certain of its employees, but formally denies being bound by this

³It should be noted that I found Haber and Kis to be more credible and believable witnesses than Fein and I would credit their testimony over that of Fein.

agreement. Fein testified that he is following the contractual terms for some of his employees because, if he didn't do so, they would leave him and he would have no work force. He testified, additionally, that he is paying the increased wages and benefits to protect himself in case he loses the instant matter.

Initially, Respondent defends that it did not violate the Act because there was no need for any negotiations or a new contract because the old contract automatically renewed itself. The basis for this defense is the fact that the Union never served Respondent with a timely notice that it wished to modify or discontinue the 1990–1993 contract. This defense is without merit. The termination clause of the contract provides that either party may terminate by giving timely notice to the other party hereto. The two parties to the agreement are the Union and the Association and they are the only parties that need be served according to the terms of the contract. When the Union notified the Association of its intention to terminate the agreement on January 22, that was all it was required to do.

I have some difficulty understanding Fein's testimony that he withdrew from the Association because of the situation with Local 1087, principally because it occurred in the middle of the negotiations with the Union. Even if I were to credit Fein, it would not affect the outcome of this matter. His subjective reasoning for attempting to resign from the Association is immaterial; he told Kis that he was not bound by the new contract and, admittedly, is not totally complying with the new agreement.

In *Retail Associates*, 120 NLRB 388 at 395 (1958), the Board found that it would refuse to permit withdrawal from a duly established multiemployer bargaining unit, "except upon adequate written notice given prior to the date set by the contract for modification, or to the agreed-upon date to begin the multi-employer negotiations." The Board further found that "where actual bargaining negotiations based on the existing multi-employer unit have begun, we would not permit, except on mutual consent, an abandonment of the unit upon which each side has committed itself to the other, absent unusual circumstances." The "unusual circumstances" exception of *Retail Associates* has been limited to extreme situations, such as when the employer can establish that it faces dire economic circumstances, such as bankruptcy, or when the multiemployer unit is no longer a viable entity. None of these "unusual circumstances" is present here. Respondent's defense is that it was not a member of the Association, and I have previously found that this defense lacks merit. Respondent also defends that the Associa-

tion did not keep it notified of the negotiations. In *Chel LaCort*, 315 NLRB 1036 (1994), the employer contended that the finding that its withdrawal from the multiemployer association was untimely was in error because both the employer and the employees had not been informed of the initial meeting between the union and the association, which occurred several months prior to the deadline set in the contract for notification to reopen. The Board majority rejected this argument:

Whether and to what extent a multiemployer association communicates with its members is an internal association matter which is properly and readily resolved by and between the multiemployer association and its members. Were we to find "unusual circumstances" in cases of this kind where the multiemployer association fails to notify its members of the start of negotiations, we would effectively be imposing a notice requirement on the multiemployer association and inserting ourselves into the association/member relationship unnecessarily and with uncertain consequences. [Id. at 1036–1037]

I therefore find that by attempting to withdraw from the Association on April 15, 2 months and four or five meetings after the commencement of the negotiations between the Union and the Association, Respondent violated Section 8(a)(1)(5) of the Act.

CONCLUSIONS OF LAW

1. Respondents constitute a single employer within the meaning of the Act and an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondents violated Section 8(a)(1)(5) of the Act by untimely attempting to withdraw from the Association on or about April 15, 1993, and by failing and refusing to fully comply with the terms of the contract entered into by the Association and the Union for the period April 1, 1993, through March 31, 1997.

THE REMEDY

Having found that Respondents have engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and take certain affirmative action necessary to effectuate the policies of the Act.

[Recommended Order omitted from publication.]