

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

Case 18-CA-18134

**LEIFERMAN ENTERPRISES, LLC d/b/a HARMON
AUTO GLASS; and its successor AUTO GLASS
REPAIR and WINDSHIELD REPLACEMENT
SERVICE, INC.**

AND

**INTERNATIONAL UNION OF PAINTERS AND
ALLIED TRADES-DISTRICT COUNCIL 82**

**AUTO GLASS REPAIR AND WINDSHIELD REPLACEMENT
SERVICE, INC.'S MOTION FOR RECONSIDERATION OR IN
THE ALTERNATIVE ADD HARMON AUTO GLASS
INTELLECTUAL PROPERTY, INC. AS A PARTY**

INTRODUCTION

Auto Glass Repair and Windshield Replacement Service, Inc. (“WRS”) moves for reconsideration of the June 26, 2009 decision in this action. In the alternative, WRS moves to have Harmon AutoGlass Intellectual Party, LLC joined as a party in interest to these proceedings.

General counsel for the NLRB does not oppose this Motion.

The parties to this action agreed that WRS could assert the defenses of the first secured creditor Harmon AutoGlass Intellectual Property (“HAIP”), a non-party, because of the inter-relationship of WRS defenses and that of HAIP to the underlying claims of successor liability and creditor priority relating to the NLRB’s unsecured claim for backpay. Particularly, the NLRB, through its General Counsel David Biggar, agreed to waive arguments of standing or to assert other defenses related to HAIP’s failure to intervene. The agreement sought to minimize the waste of judicial resources or further costs to the parties to ensure all legal arguments were before the Administrative Law Judge for a complete disposition on the merits.

Despite the agreement of counsel, Administrative Law Judge Robert Giannasi (the “ALJ”) failed to acknowledge the WRS and NLRB stipulation. The ALJ’s decision, in one sentence, asserted that WRS could not make HAIP’s arguments. The ALJ apparently was not aware of the stipulation at the time he rendered the decision. As a result, the ALJ’s analysis necessarily implicated HAIP because the ALJ found WRS was a *Golden State* successor and liable for Leiferman’s unfair practices payment for backpay. By not recognizing the stipulation, the ALJ severely prejudiced WRS’s arguments and legal position in this action.

As a result, WRS moves to reconsider the ALJ's decision or, in the alternative, WRS moves that HAIP be added as a party to this action in order that WRS can assert HAIP's defenses.

FACTS

HAIP was the primary lender to, and first secured creditor of, Leiferman Enterprises d/b/a Harmon Auto Glass ("Leiferman").¹ Leiferman defaulted on its obligations to HAIP and refused HAIP's demand to turnover possession of Leiferman's collateral in which HAIP had a first security interest. Consequently, HAIP commenced a receivership proceeding in Minnesota State District Court. On September 20, 2006, the Minnesota State District Court appointed a receiver over Leiferman's operations. Because of Leiferman's dire financial status, HAIP advanced a further \$300,000.00 to the receiver in order to ensure the receiver could provide for an orderly liquidation of continue Leiferman's operations including, but not limited to, paying Leiferman's payroll to its employees.

The state court appointed receiver ultimately solicited bids for the sale of Leiferman's assets in order to pay Leiferman's creditors including HAIP. In January 2007, WRS purchased Leiferman's assets. WRS, as well as all other prospective purchasers, required HAIP to

¹ The stipulated facts in the instant record are incorporated by reference.

indemnify them from pending claims against Leiferman from the NLRB and EEOC. The Minnesota State District Court approved the sale of Leiferman's assets to WRS on January 31, 2007. On August 20, 2007, the court entered judgment against Leiferman Enterprises, LLC and its owner, Scott Leiferman, awarding HAIP \$3,723,095.00 in total damages. After application of the proceeds of the sale of Leiferman's assets to WRS, over \$3,000,000.00 of the judgment still remains unpaid.

Prior to the commencement of the receivership proceeding, Leiferman had been engaged in negotiations with The International Union of Painters and Allied Trades-District Council 82 ("Union") with respect to the Union contract for Leiferman's employees. However, the parties reached an impasse and Leiferman unilaterally changed the terms and conditions of employment of its employees prior to the appointment of the receiver. As a result, the Union filed unfair labor practices charges with the NLRB and the NLRB issued a Complaint in Case 18-CA-18134. On February 21, 2008, the NLRB issued a Decision and Order finding that Leiferman had engaged in unfair labor practices and directing that Leiferman make employees whole for any loss of earnings or benefits as a result of Leiferman's unfair labor practices.

Because Leiferman's was out of business and its assets had been sold to WRS, the General Counsel for the NLRB sought to hold WRS liable for the NLRB's Decision and Order against Leiferman based on a successor liability theory. WRS denied liability and defended against the NLRB's position primarily asserting HAIP's defenses as a secured creditor. In a letter dated April 8, 2009, David M. Biggar, for NLRB General Counsel, stipulated that WRS could assert HAIP's defenses stating that the General Counsel had "no objection to Auto Glass Repair and Windshield Replacement Service, Inc. asserting defenses which are possessed by the indemnifying party Harmon AutoGlass Intellectual Property... [n]or will the General Counsel assert defenses like lack of standing or HAIP's failure to intervene as a real party in interest in the same case." See Letter from David Biggar to Gregory Erickson, dated April 8, 2009, attached as Exhibit A.

As a result of this stipulation, WRS asserted HAIP's defenses regarding liability in its underlying Responsive Brief. WRS relied almost exclusively on HAIP's defenses and WRS' Responsive Brief referenced HAIP's defenses repeatedly. Despite the parties' stipulation, the ALJ's decision ignored the stipulation and specifically held that "Respondent WRS has no standing in this proceeding to

advance the interests of HAIP, which is not, of course, a party in the instant case.”

ARGUMENT

The NLRB’s rules and regulations provide that “a party to a proceeding before the Board may... move for reconsideration”. NLRB Rules and Regulations, Sec. 102.48(d)(1). The ALJ’s decision finding that WRS had no standing to HAIP’s defenses is a material error because of the parties stipulation. As a result, the ALJ’s decision failed to address WRS’s position and resulted in an incomplete analysis of successor liability and issues related to creditor priority.

The General Counsel had stipulated to WRS’s right to assert HAIP’s defenses. Consequently, WRS did not attempt to seek other means of introducing HAIP’s defenses to the case, including seeking to add HAIP as a party. The ALJ’s Decision’s failure to recognize the parties’ stipulation resulted in the Decision not addressing WRS’s primary defense – HAIP’s position as the primary secured creditor of Leiferman.

The avoidance of recognizing the parties’ agreement resulted in prejudice to WRS because of WRS’s reliance on the General Counsel’s representations.

As of the parties' stipulation, WRS requests that the ALJ reconsider his decision and address all of WRS's arguments. WRS motion for reconsideration should be granted.

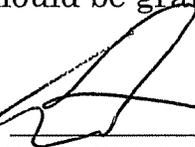
In the alternative, WRS moves that HAIP be added as a party to this proceeding. But for the stipulation and representations of General Counsel, WRS would have moved for HAIP's intervention previously. If General Counsel prevented WRS from asserting HAIP's defenses, WRS would have moved to join HAIP and allow it to assert its own defenses on its own behalf. HAIP, as the indemnifying party, is the real party in interest to this dispute in any case. HAIP's defenses should be heard, either from WRS as through the original stipulation with General Counsel, or through HAIP's on its own behalf.

CONCLUSION

For the reasons set forth above, WRS' Motion for Reconsideration

or, in the alternative, to add parties, should be granted.

Dated: July ²⁴, 2009

By 
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April 8, 2009

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Re: LEIFERMAN ENTERPRISES, LLC d/b/a HARMON AUTO
GLASS, and its successor AUTO GLASS REPAIR and
WINDSHIELD REPLACEMENT SERVICE, INC.
Case 18-CA-18134

Dear Mr. Erickson:

Per our conversation of earlier today, this will confirm the position of the General Counsel in the above-cited case.

The General Counsel has no objection to Auto Glass Repair and Windshield Replacement Service, Inc. asserting defenses which are possessed by the indemnifying party Harmon AutoGlass Intellectual Property (HAIP) (for example, the defense that successor liability would violate state and federal creditor priority rules because it would effectively place the NLRB's and the Union's claims ahead of HAIP's prior secured claim) in the above-cited proceeding. Nor will the General Counsel assert defenses like lack of standing or HAIP's failure to intervene as a real party in interest in the same case.

I trust that this addresses your concerns. Please call me with any questions.

Very truly yours,

David M. Biggar
David M. Biggar
Attorney

