

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

UNITED KISER SERVICES, LLC

and

Cases 30-CA-18129 (E)

CONSTRUCTION AND GENERAL
LABORERS UNION, LOCAL 1329

and

NORTHERN WISCONSIN REGIONAL
COUNCIL OF CARPENTERS

Andrew S. Gollin, Esq., of Milwaukee, WI,
for the General Counsel.

David W. Croysdale, Esq., and Elizabeth M. Drew, Esq., of Milwaukee, WI,
for the Respondent Employer.

SUPPLEMENTAL DECISION AND ORDER

Bruce D. Rosenstein, Administrative Law Judge. This case was tried before me on June 10 and 11, 2009, in Iron Mountain, Michigan, pursuant to individual Complaints and Notice of Hearing in the subject cases (complaint) issued on December 31, 2008¹, by the Regional Director for Region 30 of the National Labor Relations Board (the Board). Thereafter, by order of the Regional Director, the cases were consolidated. The underlying charges were filed by Northern Wisconsin Regional Council of Carpenters (the Charging Party or Carpenters) alleging that United Kiser Services, LLC, (the Respondent Employer or Employer) and Construction and General Laborers Union, Local 1329, (the Respondent Union or Laborers), has engaged in certain violations of Section 8(a)(1), (2), (3) and (5) and 8(b)(1)(A) and (b)(2) of the National Labor Relations Act (the Act). The Respondent Employer and the Respondent Union filed timely answers to the complaint denying that they had committed any violations of the Act.

On August 28, 2009, I issued my decision in this matter and dismissed the complaint allegations that the Respondent Employer and the Respondent Union violated Section 8(a)(1), (2), (3) and (5) and Section 8(b)(1)(A) and (b)(2) of the Act, respectively, by entering into a collective-bargaining agreement at a time when the Charging Party was the recognized representative of the unit. In that regard, I found that the allegations were barred by Section 10(b) because the Charging Party filed them more than six months after it knew or should have known about the conduct in question.

¹ All dates are in 2008 unless otherwise indicated.

The General Counsel and the Charging Party each filed exceptions and a supporting brief. The Respondent Employer and the Respondent Union each filed an answering brief to the General Counsel's and the Charging Party's exceptions. The General Counsel filed reply briefs to both the Respondent Employer's and the Respondent Union's answering briefs. The Charging Party filed a reply brief to the Respondent Employer's and the Respondent Union's answering briefs.

On July 22, 2010, the Board affirmed my decision in *United Kiser Services*, 355 NLRB No. 55 (2010), finding that the Respondents have established that the Charging Party had constructive notice of the facts when its business representative Greg Dhein visited the shop on January 11, prior to the commencement of the 10(b) period. The Board also sustained my dismissal of paragraph 10 of the complaint that alleged the Respondent Employer refused to negotiate with the Charging Party from August 25 to October 22, holding that the Employer's request to delay bargaining so that it could consult with legal counsel was reasonable under the circumstances of the case.

On August 19, 2010, the Respondent Employer filed with the Board an Application for Attorney's Fees and Expenses pursuant to the Equal Access to Justice Act, 5 U.S.C. § 504 (1982) (EAJA), and Section 102.143 of the Board's Rules and Regulations (Application). The Board issued an Order referring the matter to me on August 24, 2010. On September 13, 2010, the General Counsel filed an Opposition To and Motion to Dismiss Respondent's Application. Thereafter, on October 1, 2010, the Respondent Employer filed a brief in opposition to the General Counsel's Motion to Dismiss.

A. Propriety of an Award

EAJA, as applied through Section 102.143 of the Board's Rules and Regulations, provides that a "respondent in an adversary adjudication who prevails in the proceeding, or in a significant and discrete substantive portion of that proceeding" and who meets certain eligibility requirements relating to net worth, corporate organization, number of employees, etc. is eligible to seek reimbursement for certain expenses incurred in connection with that proceeding.² Section 102.144 states that a reimbursement of such expenses will be awarded "unless the position of the General Counsel over which the party has prevailed was substantially justified". To meet the burden, the General Counsel must establish that he was substantially justified at each stage of the proceeding, i.e., at the time of the issuance of the complaint, taking the matter through hearing, and in filing exceptions to the judge's decision. An examination of the circumstances and evidence available to the General Counsel at these junctures is required in order to determine whether the General Counsel has carried his burden.

In order to determine whether the General Counsel has satisfied the test, it is necessary first to identify what constitutes substantial justification. The Board has stated that substantial justification does not mean substantial probability of prevailing on the merits,³ and that it is not intended to deter the agency from bringing forward close questions or new theories of the law.⁴

² The Respondent Employers request contained in its Application to Withhold Information from Public Disclosure in accordance with Section 102.147(g)(1)(2) of the Board's Rules and Regulations is deferred in light of my decision herein. Therefore, the financial data submitted by the Employer shall remain under seal pending the outcome of this matter.

³ *Jim's Big M*, 266 NLRB 665 (1983).

⁴ *Laborers Funds of Northern California*, 302 NLRB 1031 (1991); *Craig & Hamilton Meat Co.*, 276 NLRB 974 (1985).

The Supreme Court has defined the phrase “substantial justification” under EAJA as “justified to a degree that could satisfy a reasonable person” or having a “reasonable basis both in law and fact.” *Pierce v. Underwood*, 487 U.S. 552, 565 (1988). Thus in weighing the unique circumstances of each case, a standard of reasonableness will apply.

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B. The 8(a)(1) and (5) Allegations

1. The Complaint Allegations

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The underlying complaint alleged that the Respondent Employer recognized the Charging Party as the representative of its millwright craft unit employees but when it secured additional production work to be performed at its facility it assigned the work to employees represented by the Respondent Union rather than to the Charging Party. Additionally, the complaint alleged that the Respondent Employer granted recognition to, entered into an agreement and since about March 1, 2007, has maintained and enforced a collective-bargaining agreement with the Respondent Union as the exclusive representative of employees performing the additional work even though the Respondent Union was not the exclusive collective-bargaining representative of the employees performing the work. The complaint further alleged that the Respondent Employer refused to bargain with the Charging Party and thereafter, unlawfully delayed bargaining.

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2. Evidence of the General Counsel

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During the course of the initial unfair labor practice hearing before me, the General Counsel introduced testimony and documentary evidence that during their 2006 collective-bargaining negotiations the Employer and the Carpenters added to their shop addendum agreement a definition of the categories of work that would be performed by employees represented by the Charging Party who were classified as shop worker, shop worker I, and shop worker II. An examination of the shop addendum agreement and testimony received from Charging Party shop steward Michael Manowski establishes that employees represented by the Respondent Union were performing tasks listed in the shop agreement, rather than those employees represented by the Charging Party.⁵

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It is noted that when the Respondent Employer introduced the marine equipment line of work in the shop, it entered into a collective-bargaining agreement with the Respondent Union that included a union security clause and permitted the employees of the Respondent Union to perform the marine equipment work.⁶ Accordingly the General Counsel, when issuing the

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⁵ In my initial decision, at fn 12, I did not address the General Counsel’s or the Charging Party’s arguments regarding this issue due to my decision to dismiss the complaint primarily relying on Section 10(b). I note, however, that work which was added by the Respondent Employer in 2007 such as sand blasting, spray painting and production welding falls under the job descriptions of the shop addendum agreement. While the Board did not find it necessary to pass on my finding that the Carpenters had actual notice of the violations outside of Section 10(b) through Manowski, the evidence presented by the General Counsel conclusively established that this was a triable issue and it was necessary for me to make credibility resolutions.

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⁶ Under Board law, an employer violates Section 8(a)(1), (2), (3) and (5) of the Act when it recognizes and enters into a collective-bargaining agreement containing, among others, a union-security clause, with a labor organization that does not represent an uncoerced majority of the employees in the unit, or at a time when the employer was bound to a collective-

Continued

subject complaint that alleged those Section 8(a)(1), (2), (3) and (5) allegations, was “substantially justified” in doing so.⁷

Additionally, when it issued the underlying complaint, the General Counsel possessed evidence that between January 1, 2006 and June 2008, Dhein visited the Employer’s facility on eight occasions. Indeed, the General Counsel introduced his written day-timer and spiral-notebook of telephone calls that reflected records of meetings and appointments. The purpose of this evidence was to establish that Dhein exercised due diligence by visiting the facility on a number of occasions prior to the Section 10(b) cut-off period of February 21, but no one affiliated with the Employer or the Respondent Union ever informed him that laborers were performing the marine equipment line of work nor that the Respondent Union and the Employer had executed a collective-bargaining agreement that covered the work. Indeed, it was not until June 19, a time period within Section 10(b), when the Employer and the Carpenters held a negotiation session to open the existing shop agreement for modification, that Dhein first learned that laborer employees had been hired in early 2007 to perform the work.

I ultimately found, and the Board agreed, that by January 11 the Employer had hired approximately 11 new individuals and there were now more than twice as many employees in the shop represented by the Laborers as were represented by the Carpenters. Accordingly, the Board determined that the employees’ who were not represented by the Carpenters was “open and obvious” and Dhein should have discovered this had he exercised reasonable diligence. For these reasons, the Board concluded that the Carpenters had constructive notice of the alleged violations more than 6 months before it filed its initial charge on August 21, and the allegations were time barred under Section 10(b).

The above finding was based primarily on the testimony of Dhein. However, when the General Counsel issued the complaint it possessed evidence that Dhein had visited the facility on a number of occasions during 2007 and 2008 without discovering or being informed by the Employer or the Respondent Union that new employees had been hired to perform the marine equipment line of work and a collective-bargaining agreement had been executed between the Employer and the Respondent Union covering these employees.

Under these circumstances, I find that the General Counsel was “substantially justified” when it issued the subject complaint and continued to litigate these issues while the case was pending before the Board. *David Allen Co.*, 335 NLRB No. 64 (2001).

3. Refusal to Bargain Allegations

The General Counsel alleged in paragraph 10 of the complaint that between August 25 and October 22, the Respondent Employer refused to bargain with the Charging Party and by its actions unlawfully delayed bargaining in violation of Section 8(a)(1) and (5) of the Act.

The Board, in sustaining my recommendation that paragraph 10 of the complaint should be dismissed, held that the Employer’s request to delay bargaining so that it could consult with legal counsel was reasonable under the circumstances of the case.

bargaining agreement with another labor organization covering the work or employees at issue. *Advanced Architectural Metals, Inc.*, 351 NLRB 1208 (2007).

⁷ The General Counsel also submitted documentary evidence that the Charging Party is and has been the recognized Section 9(a) representative of the shop employees for the last thirteen years.

First, it should be noted that this allegation was not dismissed by me or the Board under the auspices of Section 10(b). Rather, it was based on the totality of the record and the circumstances of this case.

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Second, as background to this allegation the record establishes that on March 24, the Charging Party sent the Employer a reopener letter to commence negotiations over a successor agreement. Not hearing from the Employer, Dhein telephoned Jeff Kiser to schedule negotiations and they agreed to meet on June 19, even though the Charging Party was available to meet in May 2008. The parties met on June 19, and exchanged proposals. The next bargaining session was scheduled for early July 2008 but was cancelled by the Employer. The parties then resumed bargaining on August 14 and scheduled a third session for September 4. However, on August 25, the Employer sent the Charging Party an e-mail cancelling the September 4 bargaining session after it received the underlying unfair labor practice charge filed by the Charging Party on August 21. Bargaining did not resume until October 22, a period of approximately two months.

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The General Counsel relied on Board precedent found in *Dresser Industries*, 264 NLRB 1088 (1982) (employer cannot postpone or cancel bargaining in response to representational issues) and *Butera Finer Foods, Inc.*, 343 NLRB 197 (2004) (employer cannot cease statutory and contractual obligations in response to issues over union status as bargaining representative), that fully supported this argument.

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Under these circumstances, I find that when the General Counsel alleged the violation in paragraph 10 of the complaint and continued arguing its position before the Board, it was “substantially justified” in doing so.

Conclusions of Law

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1. United Kiser Services, LLC, prevailed in a significant and discrete substantive portion of the underlying unfair labor practice proceeding, which was an adversary adjudication.

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2. The General Counsel’s position in issuing the subject complaint was “substantially justified.”

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁸

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⁸ If no exceptions are filed as provided by Sec. 102.46 of the Board’s Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The General Counsel's Motion to Dismiss United Kiser Services, LLC, Application for an
.5 Award of Costs and Attorney's Fees under the Equal Access to Justice Act is granted.
Therefore, the Application is dismissed.

Dated: October 15, 2010

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15 Bruce D. Rosenstein
Administrative Law Judge

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