

Alameda Glass & Mirror Company and Glaziers and Glassworkers Union Local 1621, International Brotherhood of Painters & Allied Trades, AFL-CIO. Case 20-CA-9492

June 17, 1975

DECISION AND ORDER

BY MEMBERS JENKINS, KENNEDY, AND PENELLO

On March 10, 1975, Administrative Law Judge James T. Rasbury issued the attached Decision in this proceeding. Thereafter, the General Counsel and the Charging Party filed exceptions and supporting briefs, and Respondent filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs, and has decided to affirm the rulings, findings,¹ and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

¹ We agree with the Administrative Law Judge that the glass replacement which Respondent performs for its insured customers is retail in nature. However, the record discloses that Respondent has performed some nonretail work for local stores, businesses, and the State Division of Highways. "[W]here an employer . . . operates both a retail and a nonretail enterprise, and the nonretail aspect of the employer's operations is clearly not *de minimis*, the Board will ordinarily apply nonretail standards in determining whether to assert jurisdiction where neither enterprise alone has sufficient commerce on which to assert jurisdiction" *Appliance Supply Company*, 127 NLRB 319, 320 (1960). In the instant case, the record provides no evidence with respect to Respondent's nonretail operations, other than a description that it is "not . . . a substantial amount." Since we cannot determine that "the nonretail aspect of the employer's operations is clearly not *de minimis*," we agree with the Administrative Law Judge's conclusion that our retail standard for determining whether to assert jurisdiction applies. Administering that standard, we find that Respondent does not meet the required \$500,000 sales volume. Accordingly, it would not

effectuate the purposes of the Act for the Board to assert jurisdiction in this matter, and we shall therefore order that the complaint be dismissed in its entirety.

In view of our decision to dismiss the complaint on jurisdictional grounds, we do not pass on the Administrative Law Judge's findings with respect to the merits of the complaint.

DECISION

STATEMENT OF THE CASE

JAMES T. RASBURY, Administrative Law Judge: This case was heard in San Jose, California, on December 10, 1974.¹ The charge was filed by Glaziers and Glassworkers Union Local 1621 (herein Union) on August 23. Complaint alleged that Alameda Glass and Mirror Company (herein Respondent) had failed to bargain with the Union and thereby violated Section 8(a)(5) of the National Labor Relations Act, as amended (herein Act). Respondent did not file a written answer until *after* the hearing, but appeared at the hearing by counsel and answered on the record.

The parties were given full opportunity to introduce relevant evidence, examine and cross-examine witnesses, and to submit briefs.

The pleadings, the evidence, and the briefs raise the following:

Issues

1. Should General Counsel's motion for summary judgment be granted?

2. Will the Board assert jurisdiction over the Respondent? This will be resolved by a determination of whether Respondent is to be considered a retail enterprise, nonretail, or mixed.

3. If the merits of the dispute are to be considered, were Respondent and the Union parties to a valid contract? If so, did Respondent wrongfully refuse and fail to provide information and/or abide by the contract?

Upon the entire record, including the pleadings (or lack of pleadings) and my observation of the demeanor of the witnesses, I hereby resolve the issues herein as follows:

I. MOTION FOR SUMMARY JUDGMENT

The charge in this case was filed on August 23. On August 26 the Regional Director advised Respondent by certified letter of the charge, the name of the investigative agent, and the telephone number where he could be reached. On November 1, some 60 days later, the complaint was served on Respondent by certified mail to which was attached a copy of the Board's standard procedures in unfair labor practice cases. The last

¹ All dates hereinafter will be in the year 1974 unless otherwise indicated.

paragraph of the complaint plainly set forth that, unless an answer was filed within 10 days, the allegations of the complaint would be deemed true and could be so found by the Board.

The counsel for General Counsel represented that on approximately November 13 Mr. Gingerich advised that he had been retained by Respondent. On November 27 the counsel for General Counsel advised Mr. Gingerich that an answer had been due on November 11 and, unless received forthwith, she would move for summary judgment. On the same date, November 27, Mr. Gingerich requested a 10-day extension to file an answer. On November 29, the request for extension of time to file an answer was denied.

The matter was set for hearing on December 10 without an answer ever having been filed and without counsel for General Counsel moving the Board for summary judgment.

Why a motion for summary judgment was not filed with the Board as provided for in Section 102.24 of the Board's Rules and Regulations was never explained. At the hearing, counsel for General Counsel stated: "I've been instructed to defer making a motion with respect to summary judgment prior to receiving Respondent's response concerning whether or not the allegations in the complaint had been admitted."

At the hearing, I deferred ruling on the motion for summary judgment made at the hearing and stated to the parties that, as all parties were present and ready, it seemed most expeditious and equitable to all concerned to go forward with the presentation of the evidence.

General Counsel's motion for summary judgment made at the hearing is hereby denied because, under all the circumstances, I feel that it was made untimely, and even though Respondent's counsel was careless in failing to promptly file an answer,² justice will not be served by denying Respondent a right to be heard after the Government, through its own failure to follow established procedure, has been put to considerable expense and loss of productive time in transporting the counsel, the witnesses, the reporter, and the Administrative Law Judge to the hearing site. The motion for summary judgment should have been filed with the Board as provided for in Section 102.24 of the Board's Rules and Regulations and Statement of Procedure.

II. JURISDICTION

The testimony and pleadings indicate that Respondent is a California corporation with one location in San Jose, California, involved in replacing broken glass in automobiles, homes, and stores. Its gross sales for fiscal 1973 were \$325,000. Approximately \$217,000 of that sum was paid to it by three insurance companies — State Farm Insurance, Farmers Insurance Group, and California State Automobile Association.

The Board has asserted jurisdiction over each of the three insurance companies by virtue of the established

\$500,000 retail standard.³ There was no testimony to prove that any of the materials used by Respondent are shipped directly in interstate commerce. The Respondent had answered "yes" to the General Counsel's commerce questionnaire in response to the question "Did your purchases equal or exceed \$50,000 for firms which, in turn, purchased those goods directly from outside the state?" Four firms were then listed with varying dollar amounts totalling \$92,000. The testimony indicated the Respondent performed all work directly for the ultimate consumer, but, when supplied with a release from the insured, would bill the insurance carrier and provide them the release.⁴ In other instances, the insurance company mailed the check directly to the insured and the insured then settled directly with Respondent. The charge for the services rendered is the same regardless of who pays the invoice. Frequently, insurance agents referred customers to Respondent. However, there was no obligation to do so. Respondent does not engage in any *new* construction work, but is only involved in *replacement*. Question: Under these facts, should Respondent be considered retail, nonretail, or mixed?

The General Counsel argues that Respondent derived two-thirds of its revenue from sales and services from businesses rather than a purchaser who desired to "satisfy his personal warrants or those of his family." General Counsel then argues that, because Respondent provides goods and services valued in excess of \$50,000 to each of the insurance companies over whom the Board has previously asserted jurisdiction, Respondent meets the Board's indirect outflow standards for the assertion of jurisdiction, citing *Siemons Mailing Service*, 122 NLRB 81 (1958).

General Counsel's argument is logical, except that it assumes the fact at issue. The critical fact relates to whether Respondent's business is services rendered to, and on behalf of, the ultimate consumer, or whether its sales and services are rendered to, and on behalf of, the insurance companies.

I disagree with the General Counsel's argument and am of the opinion that the Board will not assert jurisdiction under the facts of this case, because the Respondent is clearly a retail enterprise and does not meet the required \$500,000 annual sales volume. Unlike the facts of *Bob's Ambulance Service*, 178 NLRB 1 (1969), there is no proof that Respondent's services are rendered at the behest of a commercial establishment. The work is done at the request of, and for, the ultimate consumer. The insurance companies merely become agents of the individual customers for the purpose of making payment. If the Board were to assert jurisdiction in this case, it would soon be inundated with a flood of cases involving every "mom and pop" store that does any substantial amount of business with credit card patrons. Surely neither Congress nor the Board ever intended such an intrusion into purely local affairs. The mere fact that a large commercial establishment — i.e., Bank of America, American Express, an insurance compa-

Farmers Insurance Company, 209 NLRB 1163 (1974); *California State Auto Association*, 181 NLRB 797 (1970).

⁴ There was some insignificant amount of "new" business indicated that might be regarded as "non-retail." I have regarded this as *de minimis*. *Yakima Cascade Fuel Co., et al*, 126 NLRB 1316 (1960).

² Respondent counsel's posthearing answer consisted of two one-sentence paragraphs that were entirely adequate and could have been prepared and filed in the same or less length of time than it took to write a letter requesting an extension of time to file an answer.

³ *State Farm Mutual Auto Insurance Company*, 195 NLRB 871 (1972);

ny, etc. — pays the customer's invoice does not destroy the fact that the sales and services are being rendered for a purchaser who "desires to satisfy his personal wants or those of his family and friends." *J.S. Latta and Son*, 114 NLRB 1248 (1955).⁵ The instant case seems much more analogous to a credit card situation rather than a situation of the Respondent dealing directly with the commercial establishment, as was the case in *Bob's Ambulance Service, supra*.⁶ In each instance of Board law that my research has uncovered, there has been a direct contact or relationship between the Company (Respondent) and a large commercial establishment or a governmental agency whose operations are of sufficient magnitude to justify asserting jurisdiction. In this dispute, the evidence does not reveal that required direct relationship between Respondent and the insurance companies. I shall recommend that the Board not assert jurisdiction in this case.

III. THE ALLEGED UNFAIR LABOR PRACTICE⁷

A. *The Facts*

Respondent has been an independent signatory to the Union's contract with a multiemployer association, Glass Management Association, for several years. The most recent contract, prior to this dispute, expired June 30, 1973. (See letter dated April 18, 1973, from Union to Association members and independent employers. G.C. Exh. 12.)

As early as October 1972, Respondent's president, Donald Lipsey, sought to form a new association — United Glass Dealers' Association — comprised of employers involved *only* in replacement work. Basically Lipsey, at least, felt the glass replacement employers had problems peculiar to their own businesses which were sufficiently different from the new construction employers to warrant a different contract than that negotiated by the Glass Management Association. The Dealers' Association contacted the Union but was advised that the then current contract would not expire until June 30, 1973, thus no negotiations were possible (see Resp. Exh. 1). In May 1973, the Dealers' Association submitted a form of notice to the Union from 16 owner-operators of replacement glass shops, indicating their desire to be bound by any contract negotiated by the Dealers' Association (see Resp. Exh. 2). On June 11, 1973, the Dealers' Association was still trying to get the Union to negotiate a contract (see Resp. Exh. 3).

On June 19, 1973, the Union apparently anticipated a strike and mailed to the individual employers a "Temporary Working Agreement" which would serve to avoid strike problems if the employer signed the agreement (see Resp. Exh. 4). This Temporary Working Agreement also served to bind the employer to whatever final settlement was agreed to between the Union and the Glass Management Association.

Respondent refused to sign the Temporary Working Agreement. On July 2, 1973, the first strike action occurred although only two Glass Management Association members were picketed that day. However, within a week —

and after Lipsey had advised that he was not going to sign the Temporary Working Agreement — picketing occurred at Respondent's place of business. On July 17, 1973, a meeting took place, attended by Lipsey and his attorney, Ron Trapin of Quality Glass whose business was also being picketed, William J. Brown, the business manager and financial secretary of the Union, and the Union's attorney, David Leahy. Brown testified as follows:

Q. There were two matters being discussed. Is that a correct summarization?

A. Yes.

Q. One, getting the pickets off the shop; and the second, asking the Union to bargain with United Glass Dealers' Association separate from the other multi-employers group?

A. Yes.

On July 20, 1973, the Union, by its attorney, David Leahy, advised Respondent's attorney by letter, *inter alia*: "As soon as the present strike is concluded, the Union would be willing to meet again for the purpose of discussing recognition and in the event recognition is granted, at that time, the Union will also be willing to explore an agreement which reflects such recognition."

Following receipt of this letter, on July 23, Respondent signed the Temporary Working Agreement with the words: "This agreement is subject to letter from Glaziers, Local 1621, dated July 20, 1973" inserted above the signature of Respondent's president (see G.C. Exh. 3).

While these events were taking place, the Union and the Glass Management Association reached agreement on July 21, and the union membership ratified the agreement on July 23.

Everything that has been related up to this point is background to resolve the basic question as to whether or not Respondent is bound by the terms of the contract finally agreed to by Glass Management Association and the Union covering the period from July 1, 1973, to June 30, 1976.

On November 23, 1973, the Union, by letter, pointed up a violation of the contract on the part of the Respondent (see G.C. Exh. 6). Later a demand was made to audit the payroll records as permitted by article 18, section D, subparagraph (ii) (G.C. Exhs. 7, 8, and 9). Admittedly, Respondent has failed and is failing to supply necessary and needed information to administer the 1973-76 contract and thus would be in violation of Section 8(a)(5) and (1) of the Act, if it be determined that Respondent is a party to the aforementioned contract (see G.C. Exh. 10).

B. *Analysis*

In my opinion, Respondent is not now, nor has it ever been, a party to the 1973-76 contract between Glass Management Association and the Union. In the first place, the conversation at the July 17 meeting between Respondent and the Union, when coupled with the last paragraph

⁵ See *Roland Electrical Company v Walling*, 326 U.S. 657, for a further discussion of when merchandise and services are wholesale and when they are retail.

⁶ Cf. *Lang Towing Inc.*, 201 NLRB 629 (1973), and cases cited therein

⁷ The Board may choose to disagree with my recommendation concerning jurisdiction and for that reason it seems advisable to set forth a decision on the merits.

of the Union's July 20 letter, is sufficiently confusing (or ambiguous depending on how you wish to express it) to instill into the minds of a reasonably prudent person that something more (negotiations) would take place just as soon as it could be arranged. There was never a meeting of the minds on the terms and conditions of a contract, and I so find. Moreover, there is a second reason why the Temporary Working Agreement dated July 23, 1973, could not be construed as a valid contract. The terms of the Temporary Working Agreement were prepared and forwarded to Respondent with the signature of William J. Brown already affixed. Thereafter, Respondent added the words: "This agreement is subject to letter from Glaziers, Local 1621, dated July 20, 1973." The addition of the above-quoted sentence created a qualified acceptance, or in effect a new proposal, and thus required an acceptance by the Union which was never done.⁸

⁸ See "Restatement of the Law of Contracts," secs. 58, 59, and 60.

CONCLUSIONS OF LAW

1. Respondent, Alameda Glass and Mirror Company, is a retail enterprise whose annual dollar volume of business does not meet the heretofore required amount in order for the Board to assert jurisdiction.

2. The Union is a labor organization within the meaning of the Act.

3. Regardless of whether the Board considers the Respondent as a retail enterprise, wholesale, or mixed, the evidence fails to prove that Respondent was ever a party to the 1973-76 contract involving the Glass Management Association or the Union and thus cannot be guilty of having violated any of its terms or otherwise refused to bargain with the Charging Party.

[Recommended Order for dismissal omitted from publication.]