

Naftalie Deutsch, Frank Demascio, Kenneth Childs, a Partnership d/b/a Westbrook Bowl, Valley View Bowl, Verdugo Hills Bowl and Hospital and Service Employees Union, Local 399, SEIU, AFL-CIO. Cases 31-CA-11524-1, 31-CA-11524-2, and 31-CA-11524-3

19 March 1985

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS
HUNTER AND DENNIS

On 27 March 1984 Administrative Law Judge Jay H. Pollack issued the attached Order Dismissing Complaint. The General Counsel filed a request for review and exceptions, and the Respondent filed its brief previously submitted to the judge.

The Board has considered the Order and the record in light of the request for review, exceptions, and briefs, and has decided to affirm the judge's rulings, findings,¹ and conclusions² and to adopt the Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

MEMBER DENNIS, dissenting.

My colleagues find that the General Counsel failed to serve the charges on the Respondent, and they dismissed the complaint. I respectfully dissent.

¹ The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd 188 F.2d 362 (3d Cir 1951). We have carefully examined the record and find no basis for reversing the findings.

² We agree with the judge's conclusion, for the reasons fully set forth by the judge, that the General Counsel did not prove service of the charge on the Respondent within the 6-month limitation period of Sec 10(b) of the Act. In response to our colleague's dissent, we emphasize the following facts found by the judge: the Respondent's September 1981 "RM" petition had been filed by the Respondent's attorney who had used the Respondent's former address contained in his files, at the time the charges were remailed to him, the attorney had not been designated by the Respondent as its agent for the purposes of service, the attorney had conveyed doubt as to his representative capacity to the Board agent investigating the charges, and the attorney testified that he had never received copies of the charges. (We point out, contrary to our dissenting colleague, that there has been no finding that the Respondent's attorney provided a statement of position to the Board agent. Even if there were such an additional factor, however, it would not in the circumstances mentioned above affect the results.) Further, the copies of the charges which were sent by the Region to the Respondent by certified mail did not generate return receipts, yet the Region took no steps at any time to perfect service of the charges. Based on the foregoing and all of the circumstances here, we find that proper service was not made on the Respondent and further that the Respondent did not have actual notice of the charges. We therefore conclude, in agreement with the judge, that the complaint must be dismissed for failure to meet the requirements of Sec 10(b).

Sometime between 1978 and 1980, the Respondent moved from Suite 580 at 9911 West Pico Boulevard. Some of the Respondent's operations relocated to Suite B51 in the same building.

On 3 September 1981, only 2 weeks before the Union filed the charges at issue, the Respondent petitioned the Regional Office to conduct an election. Although the Respondent had vacated Suite 580, the Respondent listed Suite 580 as its address on the RM petition. The petition was served on the Union. The Respondent also listed Suite 580 as its address on the commerce questionnaire it submitted during the representation case investigation.

On 17 September 1981 the Union filed the instant charges, using Suite 580 as the Respondent's address. The General Counsel mailed copies of the charges to the Respondent at Suite 580.

The General Counsel also sent a letter, purportedly enclosing copies of the charges, to the Respondent's attorney. The Respondent's attorney claimed that the letter did not contain copies of the charges, and asked for copies to be sent "so that . . . we might consider submitting a position." The General Counsel sent another letter enclosing the charges, after which the Respondent's attorney orally provided a statement of position on the charges.¹

The Union routinely mailed documents to Suite 580. The record establishes that Suite 580's new occupants forwarded the Union's mail to Suite B51, where the Respondent received at least some of it. Only the Respondent's refusal to produce evidence pursuant to a court-enforced subpoena precludes determining with certainty whether it received all such mail. The General Counsel mailed the complaint to Suite 580, and it is undisputed that the Respondent received the complaint.

At no time did the Respondent's attorney complain that the General Counsel had failed to serve the charges on his client. By all outward appearances the General Counsel had every reason to believe service of the charges had been perfected,² until almost a year after the charges were filed and 8 months after the Respondent filed the answer to the complaint, when the issue surfaced.

On the facts described above, I believe it is a miscarriage of justice to hold that the General

¹ Counsel for the General Counsel testified to a 2 October 1981 phone conversation with the Respondent's attorney in which they discussed in detail the merits of the charges. The Respondent's Exh 8 confirms that the attorneys discussed the Respondent's position on the charges.

² The Respondent denied every complaint allegation, thereby technically denying receipt of the charges. Given that the Respondent (through its attorney) provided and did not correct the erroneous address and acted on the charges (without alluding to an alleged failure of service) for almost a year, I do not believe the Respondent's pro forma general denial should outweigh its conduct, which demonstrated full awareness of the charges.

Counsel did not perfect service and to dismiss the complaint. I would find, at a minimum, that the Respondent had actual notice of the charges against it, was fully apprised of the complaint allegations, and was not prejudiced by the alleged non-receipt of the charges.³ Cf. *Pasco Packing Co.*, 115 NLRB 437, 438 (1956) (service on respondent's attorney provides respondent adequate notice where respondent's acts made service on respondent impossible); *Peterson Construction Co.*, 106 NLRB 850, 851 (1953) (actual notice equated with legal notice where error is one of misnomer and respondent not misled or prejudiced). Accordingly, I would remand the proceedings to the judge for completion of the hearing.

³ My colleagues find that the Respondent had no actual notice of the charges. Yet, after the Respondent's attorney asked the General Counsel to mail him another copy of the charges "so that we might consider submitting a position," the attorney provided a statement of position

ORDER DISMISSING COMPLAINT

On September 10, 1981,¹ the Hospital and Service Employees Union, Local 399, SEIU, AFL-CIO (the Union) filed three charges with the National Labor Relations Board (the Board). The charges identified Frank Di Massio (sic) as the owner of Westbrook Bowl (Case 31-CA-11524-1), Valley View Bowl (Case 31-CA-11524-2), and Verdugo Hills Bowl (Case 31-CA-11524-3).² Each charge alleged a failure to bargain "within the last two months" and gave the Respondents' address as 9911 West Pico Boulevard, Suite 580, Los Angeles, California 90035 (Suite 580). A complaint issued on November 23. The Respondents filed an answer on December 3, in which they denied, inter alia, service of the charges. The trial was postponed indefinitely on February 9, 1984, for consideration of Respondents' motion to dismiss the complaint. The threshold issue is whether the Respondents were properly served with the charges.

Facts

On September 17, 1981, the Board's Regional Office mailed copies of the charges by certified mail to the respective Respondents. The three charges were addressed to Suite 580 and contained only the name of the respective bowling alleys, i.e., Westbrook Bowl, Valley View Bowl, and Verdugo Hills Bowl. Counsel for the General Counsel was unable to produce returned receipts or other evidence to show that the Respondents actually received the charges. Frank DeMascio, the principal witness for the Respondents, denied having seen the charges prior to the trial. Naftalie Deutsch, the managing partner for all three Respondents, did not recall having seen the charges.

The evidence shows that Deutsch is the general partner in a limited partnership known as Lazben Investment Co. and that Frank DeMascio, Kenneth Childs, and Lazben Investment Co. are partners in Verdugo Hills Bowl. Deutsch has a partnership interest in both Westbrook and Valley View Bowl.³ Although DeMascio's ownership interest is limited to Verdugo Hills Bowl, he nevertheless is the "general supervisor" for all three bowling alleys. DeMascio's responsibilities are similar to those of a general manager. DeMascio apparently reports to Deutsch.

Mail addressed to the bowling alleys is routinely directed to DeMascio.

DeMascio was a difficult and uncooperative witness who delighted in the vague or argumentative response. Normally, the testimony of a witness who engaged in such obvious game playing would not be credited. Here, however, there is evidence that the charges were mailed to an incorrect address and that the Respondents notified the Board in a timely manner that the charges had not been received. This evidence tends to corroborate DeMascio's denial. In any event, I refuse to draw the inference, argued by the General Counsel, that the opposite of DeMascio's testimony is true.

Deutsch apparently owns the 15 or 20 story office building located at 9911 West Pico Boulevard. A number of his businesses, including the business office for the three bowling alleys, once occupied Suite 580.⁴ However, sometime prior to the mailing of the charges, the Deutsch operations vacated Suite 580. Some of the operations, including C. D. Investments and Deutsch's personal office, moved to Suite B-51 in the basement of the same building.⁵ Some of Deutsch's operations, including the business office for the bowling alleys, moved to 14235 Oxnard, Van Nuys, California (Van Nuys). It appears that the business office moved to Van Nuys at least a year prior to September 1981. Deutsch credibly testified that he did not recall seeing the charges prior to the instant hearing. As noted above, in the normal course of Respondent's business, Deutsch would not receive such mail unless forwarded by DeMascio.

Each month the Union sends to each of the three bowling alleys three statements under separate cover, one statement concerns pension fund contributions, one concerns health and welfare fund contributions, and one concerns the deduction of union dues. Typically, all nine statements are mailed to the same address, although that address has changed from time to time. For instance, from early 1977 through September 1979 the statements

³ The record does not clearly establish the other partners in Westbrook and Valley View

⁴ None of the bowling alleys are located at 9911 West Pico Boulevard. At all pertinent times, both the Union and the Regional Office were aware of the addresses of the respective bowling alleys. Copies of the charges were not mailed or hand-delivered to the bowling alleys

⁵ Counsel for the General Counsel introduced Fictitious Business Name Statements for all three businesses, a statement for Valley View Bowl dated 1980, one for Westbrook Bowl dated 1978, and one for Verdugo Hills dated 1979. The statements give 9911 West Pico Boulevard, Suite B-51 as the Respondents' address. As indicated above, copies of the charges were mailed to Suite 580, not Suite B-51

¹ All references are to 1981 unless otherwise noted

² The business involved are bowling alleys and will be referred to as the Respondents or the bowling alleys

were usually addressed to Suite 580.⁶ Beginning in October 1979, all statements were mailed to P.O. Box 67058, Los Angeles, California. In January 1981 the Union began to send *some* statements to the Van Nuys address. In May, an internal memorandum was circulated among union employees advising them that the Respondents' address had changed to 14235 Oxnard, Van Nuys. Beginning in June, all statements were sent to Van Nuys.

If the Union was late in updating its mailing list, the Respondents' attorney was even later. On August 10, Michael Schmier filed a representation petition with the Board in Case 31-RM-902 on behalf of "Verdugo Hills/Valley View/Westbrook Bowl." He gave the "address(es) of the establishment(s) involved" as 9911 West Pico Boulevard, Suite 580, Los Angeles, California. Schmier's action appears to have been inadvertent, rather than calculated.⁷ Shortly thereafter, the Union filed the instant charges, using Suite 580 as the Respondents' address, and the Regional Office mailed copies of the charges to that address.

At the time the charges were mailed, Suite 580 was occupied by Camelot Travel and Ipanema Tours (Camelot). There is no suggestion that Deutsch or the other parties in the bowling alleys have any interest in Camelot. Evelyn Thomson, Camelot's controller, described Suite 580 as "a small office" and explained Camelot's procedure for handling the mail. If the mail is certified, the employees are expected to read the envelope and to refuse to accept it if it is addressed to another company. Thomson was unaware of any incident in which certified mail addressed to another company was accepted by a Camelot employee. It is inferred that Camelot, in accordance with procedure, refused to accept the charges because they were addressed to another company.⁸ There is no evidence that the charges were forwarded to Suite B-51 or to the Van Nuys address once they were rejected by Camelot. Accordingly, it cannot be found that Deutsch, DeMascio, or any other agent for the Respondents received a copy of the charges until after the trial had opened.

It is noted that the complaint was misaddressed in the exact same fashion as the charges but, unlike the charges, the complaint generated a return receipt. Although the signature on the receipt was not identified, it is clear that the complaint reached the Respondents. Respondents filed a timely answer to the complaint and stated at trial they did not contest service of the complaint.⁹ However, the fact that the complaint was received does not necessarily imply that the charges were also received. Indeed,

the fate of the charges, after they were received by the post office, remains a matter of speculation.

The record further reveals that between April and November the Union sent six certified letters to the Respondents at Suite 580 and all six letters produced a signed receipt. One of the receipts shows that Suite 580 was crossed out and Suite B-51 was penciled in. The signature on the "Suite B-51 receipt" was identified as that of an employee of C.D. Investments. It is thus clear that some mail addressed to Suite 580 was reaching the Respondents at Suite B-51, but again, such evidence does not explain what happened to the instant charges.

It is noted that each charge contains a notation of a "cc" or courtesy copy to Michael Schmier, the Respondents' attorney. At the outset of the trial, Schmier denied receiving copies of the charges in the mail and, among other things, objected to their introduction on that basis. Although the charges were nevertheless admitted as part of the formal documents, counsel for the General Counsel was warned that he still retained the burden of proving service of the charges. Counsel subsequently called a Regional Office employee and succeeded in proving that the charges were indeed mailed to Respondents at Suite 580. Counsel, however, did not elicit any testimony to show that courtesy copies were mailed to Schmier. There is, therefore, no evidence that courtesy copies were placed in the mail.

Before the complaint issued, Schmier became aware that charges had been filed. He telephoned Beverly Ware, a Board attorney, and asked her to send him copies of the charges. Ware sent Schmier a cover letter stating that copies of the charges were enclosed; Ware, however, forgot to enclose the charges with the letter. Schmier telephoned Ware and explained that he received the cover letter but not the charges. Ware then mailed copies of the charges but Schmier denied receiving such charges. During his conversations with Ware, Schmier stated that he had been retained for the RM case and did not believe that his client wished to use his services for the unfair labor practice case.

Analysis

Section 10(b) of the Act provides that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made"

Section 11(4) provides that a charge "may be served either personally or by registered mail or by telegraph or by leaving a copy thereof at the principal place of business of the person required to be served. The verified return by the individual so serving the same setting forth the manner of such service shall be proof of the same, and the return post office receipt or telegraph receipt thereof when registered and mailed or telegraphed as aforesaid shall be proof of service of the same."¹⁰

⁶ During the spring and summer of 1979, statements were mailed to Westbrook Bowl and Valley View Bowl at Suite B-51 instead of Suite 580. From December 1977 through September 1979 statements were mailed to Verdugo Hills Bowl at 9911 West Pico Boulevard, S580-B51.

⁷ Schmier had represented Respondents in some labor-related matters in the past and used the old address contained in his files.

⁸ Camelot employees were familiar with the names Naftalie Deutsch and C. D. Investments and would forward regular mail containing those names to Suite B-51. The charges, however, did not contain either name.

⁹ The complaint is dated November 23, the answer, December 9. Since the charges alleged a violation on or after July 17, the answer was filed within 6 months of the alleged violation and thus gave the Regional Office and the Union an opportunity to reserve the charges.

¹⁰ See also Sec. 102.112 of the Rules and Regulations of the National Labor Relations Board.

Although the Board's Regional Office, as a matter of course, causes a copy of the charge to be served, the Charging Party remains primarily responsible for service of the charge. Section 102.14 of the Rules and Regulations of the National Labor Relations Board. An affidavit of services on return verification is normally needed to prove service, but in the absence of such proof, the General Counsel may prove service by other means. *General Marine Transport Corp.*, 238 NLRB 1372, 1376-77 (1978).

In *General Marine Transport*, relied on by the General Counsel, the charge was mailed to the correct address but there was no affidavit of service or return verification. However, the General Counsel proved that the Regional Office maintained a file in which it routinely made a notation whenever a verification was returned to the office, and that the file contained a notation next to the respondent's name. Because the charge had been mailed to the correct address, and there was evidence that a return verification had been received by the Regional Office, it was reasonable for the administrative law judge to infer that the charge had been mailed to and received by the respondent.

The judge found that the inference of receipt was not rebutted by the assertions of respondent's attorney that he could find no one who recalled seeing the charge. Moreover, the respondent called no witness to explain respondent's procedure with respect to the receipt of registered mail or to deny that the charge was received.

In the instant case, the charges were mailed to an incorrect address. No presumption of delivery to Respondents follows. I draw the inference that the charges were delivered to the occupant of that address. The evidence shows that the charges then would have been rejected as the addressee was no longer at that address. It is then possible to draw three inferences concerning the charges: (1) they were returned to the sender; (2) they were lost in the mail; or (3) they were forwarded to the Respondents. Absent additional evidence, each inference is equally plausible, and the General Counsel has failed to show by the preponderance of the evidence that service was effectuated. Contrary to the General Counsel's argument, *General Marine Transport* does not hold that proof of mailing provides sufficient proof of service.

A case more on points in *Seafarers (American Barge Lines)*, 244 NLRB 641 (1979). There the charge named an international union as the party to be charged and indicated that "Mr. Worley" was the "union representative to contact." Worley participated in the Board's investigation and provided two affidavits. In one affidavit Worley identified himself as the agent of the local union; in the other, he omitted any reference to the local union. Worley was in fact an employee of the local and not an agent of the International. The administrative law judge held, with Board approval, that the affidavits gave the Regional Office actual notice that the original charge "possibly erroneously named the international as the charged party" (244 NLRB at 647) and thus the Regional Office was under an "obvious and imperative" duty to amend the charge. Because it failed to amend within the 10(b) period, a subsequent complaint against the local was dismissed. In the instant case, the problems with service were, or should have been, even more obvious to

the Regional Office. Not only did the Regional Office lack a return verification, but Respondents requested a second mailing of the charges and then filed an answer denying service when the charges were not received. The answer was filed within the 10(b) period and thus the Regional Office could have tried to personally serve DeMascio (in which case it would have discovered that DeMascio was no longer at Suite 580), or it could have left copies of the charges at the respective bowling alleys. Instead, it ignored its "obvious" duty to act and did nothing.¹¹ The complaint must therefore be dismissed.

The fact that Respondents' attorney provided a wrong address does not dictate a contrary result. Although the attorney's mistake may have contributed to the aborted service, that mistake does excuse the Union and the Regional Office from perfecting service. At the time the charges were mailed, a confusing mosaic existed; the Union was sending contributions to one address, the RM petition revealed a different address, and the fictitious business name statements contained yet a third.¹² Prudence thus required that some precautions, such as delivering copies to the respective bowling alleys, be taken. If precautions were not taken at the time of the initial service, then they certainly should have been taken when complaint issued and return receipts were not received or when service was denied in the answer. Having failed to use obvious and available alternatives after service was denied, neither the Regional Office nor the Union may claim that it reasonably and detrimentally relied on Schmier's mistake.

The failure to use obvious alternatives distinguishes this case from *NLRB v. Ashville-Whitney Nursing Home*, 468 F.2d 459, 464-465 (5th Cir. 1972), in which it was held that where, to all appearances, a respondent is still occupying its former location, substituted service at the former location is insufficient. In that case, Clark was the owner and Pierce the administrator of a nursing home. Clark leased the entire enterprise to Pierce, who continued to operate the home in a similar manner. The state authorities were not notified of the lease and thus at the time the charge was served the state license, which was the sole public record concerning the business, showed Clark as the owner and Pierce as the administrator. Relying on the public record, the Regional Office served Pierce at the home with a charge naming Clark as the owner and Pierce as the administrator. Pierce knew the descriptions were inaccurate but failed to inform the Region of its error until after the 10(b) period had run. The court, expressing concern about respondents who "becloud" their whereabouts (468 F.2d at 464), held that service on both Clark and Pierce was adequate. Service on Clark was held to be valid "because to all possible outward appearances, the home on [the date of service of the charge] was still Clark's 'principal place of business' within the meaning of section 11(4)." In light of

¹¹ An affidavit of service shows that the Union, the party ultimately responsible for effectuating services, received a copy of the answer and was thus also on notice that service was being denied.

¹² Neither the Union nor the Regional Office relied on the fictitious name statements.

Pierce's own, undisclosed knowledge, the charge was held to have adequately identified Peirce as a "person against whom the charge is made." Thus, amendment of the charge after expiration of the 10(b) period was held to be valid.

In the instant case, unlike *Ashville-Whitney*, Respondents were not avoiding service or beclouding their whereabouts. Respondents' attorney requested a copy of the charges and Respondents denied service in a timely manner, thus giving the Region and the Union the opportunity to make proper service. The Region and the Union ignored that opportunity. Accordingly, it is appropriate that the complaint be dismissed.

Finally, assuming arguendo that Schmier received the charges after Ware remailed them, service on Respondents has still not been proven. Schmier had not been designated as Respondents' agent for purposes of service. Schmier's appearance in the representation case did not constitute representation in the unfair labor practice case. Moreover, Schmier told Ware that he did not know if Respondents would engage his services in the unfair labor practice case. *Pasco Packing Co.*, 115 NLRB 437 (1956), relied upon by the General Counsel inapposite. In the *Pasco Packing* case, the charges and complaint were returned to the Regional Office marked "refused." The

Board held that the post office's tender was sufficient to establish service. Further, the Board held that the respondent could not justly complain if service of the complaint on its attorney was made the equivalent of that which its acts had made impossible. As stated above, in this case, Respondents did not refuse service, avoid service, or otherwise make service impossible. Most importantly, this case involves service of the charges (an issue of jurisdiction under Sec. 10(b)) as opposed to service of the complaint. Here, there exists no reason the failure to serve Respondents within the 10(b) period should be excused.

Accordingly, for the reasons expressed above, I find that the General Counsel has not established that Respondents were served properly with a copy of the charges. Thus,

IT IS ORDERED that the complaint be dismissed in its entirety.¹³

¹³ All outstanding motions inconsistent with this Order hereby are denied. Any party may obtain review of this action by filing a request therefrom with the Board in Washington, D.C., stating the grounds for review and immediately on such filing shall serve a copy thereof on the other parties. Unless such request is filed within 20 days from the date of this Order, the case shall be closed. See Sec. 102.27 of the Rules and Regulations of the National Labor Relations Board.