Big D Service Co /H Vac Incorporated *and* Sheet Metal Workers International Association, Local No 9, AFL-CIO Case 27-CA-8076

March 20, 1989

SUPPLEMENTAL DECISION AND ORDER AND ORDER REMANDING

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND CRACRAFT

On August 10, 1983, the National Labor Relations Board issued its Decision and Order in this proceeding[1] in which it ordered, inter alia, that the Respondent, Big D Service Co (Big D), its officers, agents, successors, and assigns, make its employees whole for any loss of wages or other benefits they may have suffered as a result of the Respondent's unfair labor practices, and to make payments on behalf of those employees to the various trust funds,[2] as provided by the May 1, 1980, through June 30, 1983 collective-bargaining agreement between the Colorado Association of Sheet Metal and Air Conditioning Contractors and Sheet Metal Workers International Association, Local 9, AFL-CIO On November 28, 1982, the United States Court of Appeals of the Tenth Circuit entered its judgment enforcing the Board's Order [3]

On May 13, 1985, the Regional Director for Region 27 issued a backpay specification and notice of hearing alleging, inter alia, that a controversy had arisen over the amount of backpay owed under the terms of the Board's Order and notified the Respondent that it must file a timely answer complying with the Board's Rules and Regulations The specification also alleged, for the first time, that the Respondent had an alter ego H-Vac Inc (H Vac), which was jointly and severally liable for the unfair labor practices committed by the Respondent In its answer to the specification, H-Vac denied, inter alia, that it was Big D's alter ego [4] Big D apparently also filed an answer, which is not in the record, but it withdrew this answer on January 19, 1988

On February 22, 1988, the General Counsel filed with the Board a Motion for Summary Judgment, with attachments The General Counsel submits that the Respondent has failed to file an answer to the backpay specification as required by the Board's Rules and Regulations The General Counsel further submits that a Federal district court found Big D and H Vac to be alter egos and, thus, the Board is bound by the principles of collateral estoppel to accept the finding as being determinative of the alter ego issue in this case The General Counsel therefore request, based on the backpay specification, the Respondent's failure to answer it, and the decision and order of the district court, as explained below, that the Board find that Big D and H-Vac 'are alter egos equally responsible, inter alia, for contributions to various trust funds of the union"[5] and that the Board issue an order finding all allegations in the backpay specification to be true

On February 25, 1988, the Board issued an order transferring this proceeding to the Board and a Notice to Show Cause why the General Counsel's Motion for Summary Judgment should not be granted On March 28, 1988, H Vac filed a response to the Notice to Show Cause

The National Labor Relations Board has delegated its authority in this proceeding to a three member panel

Ruling on the Motion for Summary Judgment

At the time of the issuance of the backpay specification, Section 102 54 of the Board's Rules and Regulations provided that if an answer is not filed within 15 days from service of the backpay specification, the Board may find the backpay specification to be true [6]

The backpay specification states that the Respondent shall file an answer within 15 days from the date of the specification, and that if the answer fails to deny the specification s allegations in the manner required under the Board's Rules and Regulations, and the failure to do so is not adequately explained, the allegations shall be deemed to be true

On January 19, 1988, Respondent Big D withdrew its answer to the backpay specification To date, Respondent Big D has not filed another answer or offered any explanation for its failure to

[1] 267 NLRB No 25 (1983) (not reported in Board volumes)

[2] These include the vacation plan local pension plan national pension plan health and welfare plan apprenticeship and training fund and the National Stabilization Agreement of Sheet Metal Industry (SASMI)

[3] No 83-2305 unpublished

[4] The General Counsel s Motion for Summary Judgment does not make reference to or include this answer The formal papers submitted with the motion however contain an answer from H Vac to the backpay specification

[5] In addition to seeking reimbursement to the trust benefit funds identified in fn 2 supra the specification also seeks backpay for one former employee

[6] We note that Sec 102 54 of the Board s Rules and Regulations was amended effective September 29 1986 to provide a 21 day period for filing an answer This amendment however was not applicable to Respondent Big D Moreover Respondent Big D withdrew its previously filed answer and has not filed another answer to date

We also note that the Board amended its rules governing proceedings concerning compliance with Agency orders effective November 13 1988 The substance of former Secs 102 54 and 102 55 has been incorporated into Sec 102 56 as revised and former Sec 102 56 with some modification has become the new Sec 102 57 while the substance of former Sec 102 57 has become par (c) of the new Sec 102 55 in the revised rules

do so Nor has Respondent Big D filed a response to the Notice to Show Cause

On March 28, 1988, however, H Vac responded to the Notice to Show Cause In its response, H-Vac asserts, as it had in its answer, that it is not the alter ego of the Respondent and also that the deci sion of the district court relied on by the General Counsel does not collaterally estop the Board from determining the extent of liability, if any, of H-Vac

Under the doctrine of collateral estoppel relied on by the General Counsel, once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation *Marlene Industries Corp v NLRB*, 712 F 2d 1011, 1015–1016 (6th Cir 1983), *Parklane Hosiery Co v Shore*, 439 U S 322, 326 fn 5 (1979) Such an issue is "necessarily determined" if its decision was necessary to support the judgment entered in the prior proceeding *Marlene Industries*, supra at 1015 A review of the district court proceedings on which the General Counsel relies to support her theory of collateral estoppel reveals that the alter ego relationship between Big D and H-Vac was not "nec essarily determined" by the court

Concurrently with the processing of the instant case, the Sheet Metal Workers trust funds and other trust funds filed a garnishment action against Big D and H Vac in the United States District Court for the District of Colorado seeking money owed various trust funds pursuant to the above stated collective-bargaining agreement The district court action also alleged that H-Vac was the alter ego of Big D and was thus liable for Big D's ac tions The backpay hearing in the instant case was postponed indefinitely pending issuance of the court s decision and order

On August 4, 1986, a United States magistrate's recommendation was issued in which the magis trate conclude that Big D and H-Vac were alter egos, would be treated as "synonymous terms and entities," and that H Vac was liable as a successor to Big D On April 15, 1987, the district court reviewed the magistrate s recommendation and issued a memorandum opinion and order in the case A supplemental order was issued by the court on September 4, 1987 Based on extensive testimony, documentary evidence, and written arguments by the parties, the court concluded that H-Vac is liable to Big D under a successor corporate liability theory, that there was merely a switch of names from Big D to H-Vac, and that Big D and H-Vac should be treated as the same entity

Based on these court proceedings, we find that the district court relied explicitly on a successor ship theory in holding H Vac liable to Big D Al though the court clearly had before it the magis trate's recommendation that Big D and H Vac be found to be alter egos, it did not address that rec ommendation Its general findings that there was a switch of names and that the two companies be treated as the same entity were made wholly in connection with its successorship determination and therefore fall short of reaching the magistrate's alter ego recommendation Because established Board law holds that the basis for a successorship finding may exist where no alter ego theory is supportable,[7] the grounds of the court's successorship finding and the finding itself do not resolve the alter ego issue in the present case We therefore reject the General Counsel's assertion that the doctrine of collateral estoppel applies to the backpay specification's allegation that Big D and H-Vac are alter egos [8] Accordingly, we deny the General Counsel's Motion for Summary Judgment with regard to H-Vac and shall order a hearing limited to the determination of the issue of the alter ego status of Big D and H Vac

However, as the Respondent, Big D, has failed to file an answer to the backpay specification, we deem those allegations to be true and grant the General Counsel's Motion for Summary Judgment with regard to Big D Accordingly, on the basis of the allegations of the specification, the Board finds the facts as set forth there with regard to Big D's backpay obligations, conclude that the contributions owed to the various trust funds and to the employee named below are as stated in the compu tations of the specification, and orders that payment be made by Respondent Big D as set forth below

ORDER

It is ordered that the Respondent, Big D Services Co , Denver, Colorado, its officers, agents, successors, and assigns, shall pay net backpay to Bill Leech in the sum of $1602, with interest, less tax withholdings required by Federal or state law, and shall pay the following fringe benefit trust funds the specified amounts owed on behalf of the employees listed below

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[7] See *Superior Export Packing Co* 284 NLRB 1169 (1987) in which the Board found that two corporations were not alter egos but that one was a legal successor to the other

[8] Member Johansen would in any event find it inappropriate for the Board to defer on an issue within the Board s primary jurisdiction which should be decided by the Board in the first instance See *Great Lakes Chemical Corp* 280 NLRB 1131 (1986) on remand of 746 F 2d 334 (6th Cir 1984) citing *Computer Sciences Corp v NLRB* 677 F 2d 804 at 807 (11th Cir 1982)

	Clarence Coleman	*Bill Leech*	*Quinton Maxwell*
Vacation	$1 813 90	$202 40	$1 662 10
Health and Welfare	2 090 11	182 16	2 089 16
Local Pension	3 474 46	333 96	3 540 68
National Pension	260 03	22 26	259 18
Apprenticeship and Training	349 33	31 28	350 70
SASMI	1 243 13	113 34	1 253 44

IT IS FURTHER ORDERED that the General Counsel's Motion for Summary Judgment against Respondent H-Vac, Inc is denied

IT IS FURTHER ORDERED that this proceeding is remanded to the Regional Director for Region 27 for the purpose of arranging a hearing before an administrative law judge, limiting the proceeding to a determination of whether H-Vac, Inc is the alter ego of Big D Service Co , and thus liable for the backpay awards ordered here

IT IS FURTHER ORDERED that the judge shall prepare and serve on the parties a decision containing findings, conclusions, and recommendations based on all the record evidence Following the service of the judge's decision on the parties, the provisions of Section 102 46 of the Board's Rules and Regulations shall apply