

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

INTERNATIONAL BRIDGE & IRON CO.,

Respondent

and

CASE 34-CA-12616

**SHOPMEN'S LOCAL UNION NO. 832 OF
THE INTERNATIONAL ASSOCIATION OF
BRIDGE, STRUCTURAL, ORNAMENTAL
& REINFORCING IRON WORKERS, AFL-CIO,**

Charging Party

**COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF TO
RESPONDENT'S EXCEPTIONS
TO THE ADMINISTRATIVE LAW JUDGE'S DECISION**

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Sarah Pring Karpinen, Counsel for the Acting General Counsel, pursuant to Section 102.46 of the Board's Rules and Regulations, respectfully submits this Answering Brief to the Exceptions to the Administrative Law Judge's decision filed by Respondent.¹

INTRODUCTION

On February 26, 2010², during the term of a three-year collective bargaining agreement with the Charging Union, Shopmen's Local Union No. 832 of the International Association of Bridge, Structural, Ornamental & Reinforcing Iron Workers, AFL-CIO (the Union), Respondent International Bridge & Iron (Respondent) ceased operations. Employees' life insurance and health and dental benefits were terminated two days later, on February 28. Respondent made the decision to close on February 24, but did not notify the Union of the closure until the day it closed its doors. The Union requested bargaining over the effects of the closure, but its requests were ignored.

Complaint issued in this matter on June 29. A hearing was conducted by Administrative Law Judge (ALJ) Michael A. Marcionese on November 9. At the hearing, Respondent made a motion for a continuance to amend its answer to include a defense that Manafort Bros. was a successor to Respondent and was liable

¹ The following abbreviations are used in this brief:

ALJD: Administrative Law Judge Decision

GC Ex or Exhs: General Counsel Exhibit(s)

Tr.: Transcript

² All dates in this brief are in 2010, unless otherwise noted.

for the alleged unfair labor practices. (Tr. 8) Respondent's counsel acknowledged in arguing the motion that the asserted successor did not take over until about March 4. (Tr. 10) Noting that the only issue before him at the hearing was whether or not an unfair labor practice occurred prior to March 4, the ALJ denied the motion and the hearing proceeded as scheduled. (Tr. 11)

In Respondent's post-hearing brief, it moved for dismissal of the complaint or re-opening of the hearing to address its assertion that Manafort Bros. was Respondent's successor and was liable for its unfair labor practices. The ALJ again rejected the motion. ALJD at p. 2, lines 3-22. The ALJ held that Respondent violated its duty to bargain in good faith with the Union by failing to provide it with timely notice that it planned to close, and by failing to bargain with the Union over the effects of the closure on unit employees. ALJD at p. 6, lines 28-31 and 45-47 and p. 7, lines 28-32.

Respondent has raised six exceptions to the Administrative Law Judge Decision (ALJD) in this matter. The first, fifth and sixth exceptions involve Respondent's motions to postpone or to re-open the hearing. The second exception involves the ALJ's rejection of Respondent's claim that Manafort Bros. should be held liable for its unfair labor practices. In its third exception, Respondent asserts that the ALJ erred in finding that employees were paying insurance premiums at the time that their coverage was cancelled. Respondent's fourth exception takes issue with the ALJ's credibility determinations with regard to the testimony of Re-

spondent's witnesses. This brief will address exceptions 1, 5, and 6 together, and then address exceptions 2, 3 and 4.³

ARGUMENT

Section 8(a)(5) of the Act requires an employer to provide an opportunity to the union representing its employees to bargain “in a meaningful manner and at a meaningful time” over the effects of a decision to close a facility. *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 681-682 (1981). An employer violates its duty to bargain in good faith about the effects of its decision to close if it fails to notify the union in a timely manner of its decision. *Woodland Clinic*, 331 NLRB 735, 738 (2000); *Los Angeles Soap Co.*, 300 NLRB 289, 295 (1990).

Respondent closed its doors on February 26, the date of the closure. It provided notice to the Union on the same day. Same day notice is “clearly insufficient” to provide a meaningful opportunity to bargain. *Willamette Tug & Barge Co.*, 300 NLRB 282, 283 (1990); see also *Genesee Family Restaurant and Coney Island*, 322 NLRB 219, 227 (1996); *Penntech Papers v. NLRB*, 706 F.2d 18, 26 (1st Cir. 1983). As the ALJ noted, “[t]here is simply nothing in [the] record which establishes that the Respondent had to close on February 26. Because the Respondent was in control of the timing of its decision, it had the ability to give the Union effective and meaningful notice of that decision.” ALJD at 6, lines 26-28. By choosing not to notify the Union or to allow it to engage in meaningful

³ This discussion relies upon the facts as set forth in the ALJD.

bargaining over the decision, Respondent violated Section 8(a)(1) and (5) of the Act.

At the hearing and in its exceptions, Respondent takes no responsibility for its unlawful actions, and instead attempts to blame its conduct on its former customer, Manafort Bros., and on its insurance carriers. Respondent's claims are not supported by either the facts or the law, and should be rejected. As the ALJ stated in his decision, "[i]t was the Respondent that made the decision to go out of business, to lay off all its unit employees and to cause the termination of their benefits." ALJD at 7, lines 1-2.

A. The ALJ did not err in denying Respondent's motions to postpone or re-open the hearing (Exceptions 1, 5 and 6)

At the hearing in this matter, Respondent moved for a continuance in order to amend its answer, subpoena witnesses and proceed with a defense based upon a theory that Manafort Bros., Respondent's customer at the time of the closure, is liable for Respondent's unfair labor practices. (Tr. 8) The ALJ denied that motion, stating that any issue of liability under *Golden State Bottling Co. v. NLRB*, 414 U.S. 168 (1973) could be addressed in compliance, if the allegations in the complaint were upheld. (Tr. 10) In its post-hearing brief, Respondent moved to dismiss the complaint or re-open the hearing to include Manafort Bros. as "the appropriate respondent." ALJD at 2, lines 2-3.

1. The ALJ did not err in denying Respondent's motion to postpone or re-open the hearing to present evidence that Manafort Bros. was its successor (Exceptions 1 and 6)

In Exception 1, Respondent asserts that the ALJ erred in failing to state the grounds for Respondent's motions to postpone or to re-open the hearing and his basis for denying those motions. Respondent also claims that the ALJ erred in referencing claims Respondent did not make in denying its motion. In Exception 6, Respondent excepts to the ALJ's finding that it failed to produce evidence to demonstrate that Manafort Bros. was its successor.

The ALJ had ample grounds for denying Respondent's motions for a postponement or to re-open the hearing. He noted that Respondent's grounds for its motion to dismiss the complaint or re-open the hearing were Respondent's asserted desire to "investigate the successorship status of Manafort Bros." ALJD at 2, lines 9-10. He rejected Respondent's motion, stating that Respondent's "claim that Manafort is a successor is irrelevant to the issues raised by the complaint because any successorship, if it occurred, post-dated the alleged unfair labor practices and would not affect the Respondent's obligations, if any, to bargain with the Union regarding the cessation of operations and termination of benefits." ALJD at 2, lines 13-17, citing *TNT Logistics North America*, 346 NLRB 1301, fn. 10 (2006). Pointing out that Respondent did not claim to have any newly discovered evidence that would materially affect the case, the ALJ noted that any evidence Respondent could have with regard to the successorship status of Manafort Bros.

had been known to Respondent since the time that it went out of business, and did not provide a basis for re-opening the hearing. ALJD at 2, lines 10-13.

Section 102.35(a)(8) of the Board's Rules and Regulations, Series 8, as amended, states that an ALJ shall have authority, with respect to cases assigned to him, between the time he is designated and transfer of the case to the Board to, *inter alia*, consider motions to reopen the record. When considering such motions, an administrative law judge shall consider the standards set forth in in Section 102.48(d)(1) of the Board's Rules and Regulations. Under Section 102.48(d)(1), only "newly discovered evidence, evidence which has become available only since the close of the hearing, or evidence which the Board believes should have been taken at the hearing" will be considered as grounds for re-opening the hearing.

In *Fitel/Lucent Technologies, Inc.*, 326 NLRB 46, fn. 1 (1998), the Board held that newly discovered evidence is "evidence which was in existence" at the time of the trial, and the movant was "excusably ignorant" of it, i.e. the movant "acted with reasonable diligence to uncover and introduce the evidence." See also *Planned Building Services, Inc.*, 347 NLRB 670, fn. 2 (2006) (Board affirmed judge's refusal to accept documents submitted by respondent after close of hearing on grounds that the evidence was not newly discovered). If any evidence existed that Manafort Bros. was Respondent's successor, such evidence would have been known to Respondent far in advance of the hearing. The ALJ did not err in rejecting Respondent's motion to re-open the hearing.

Further, with regard to Exception 6, the ALJ did not err in noting that Respondent failed to produce any evidence at the hearing demonstrating that Manafort Bros.’ was its successor. As noted above, Respondent made no showing that such evidence was newly discovered, or that it was unavailable to it prior to the hearing. Any evidence of a purchase agreement or any other contract between Manafort Bros. and Respondent should have been known to Respondent, and either in its possession or available to it, well in advance of the hearing.

Finally, even if such evidence existed and was Respondent’s successor, that fact would not relieve Respondent of its duty to bargain over the effects of its decision to close. *TNT Logistics North America*, 346 NLRB 1301, fn. 10 (2006); *Sierra International Trucks, Inc.*, 319 NLRB 948, 948-949 (1995). Respondent was therefore not prejudiced by the ALJ’s denial of its motions to postpone or reopen the hearing in this matter.

2. The ALJ did not err in denying Respondent’s motion for a continuance to obtain evidence from insurance carriers (Exception 5)

In its fifth exception, Respondent asserts that the ALJ erred in finding that Respondent offered no evidence to support its claim that its insurance carriers were responsible for terminating employee benefits because Respondent’s motion to postpone the hearing in order to gather more evidence in support of its claim was denied. In its exceptions, Respondent cites to a November 3, 2010 request for postponement that it made to the ALJ. However, that postponement request is

not on the record in this matter. Respondent did not move to include it as an exhibit at the hearing. Respondent made a motion on the record to postpone the hearing, but that motion addressed only its asserted claim that Manafort Bros. should be named as a respondent, and not its need to obtain more evidence from its insurance carriers. (Tr. 8)

The ALJ did not err in denying Respondent's motion to postpone the hearing. The Complaint and Notice of Hearing in this matter issued on June 29, 2010. (GC Ex. 1(c)) The Complaint specifically alleges that Respondent terminated its business operations and the health, dental, life insurance and COBRA benefits of unit employees, without prior notice to the Union and without affording the Union an opportunity to bargain over the effects of its conduct. Most of the documents Respondent claims were crucial to its case, such as policies and correspondence between Respondent and its insurance carrier, are documents that should have been in its possession and not that of a third party. Even if the documents were in the possession of the insurance carrier, Respondent had ample time between June 29 and the November 9 hearing date to obtain those documents.

B. The ALJ did not err in finding that Manafort was not a successor prior to the date of the unfair labor practice. (Exception 2)

Respondent excepts to the ALJ's finding that its claim that Manafort Bros. is a successor is not relevant "because any successorship, if it occurred, post-dated the unfair labor practice." ALJD at 2, lines 14-16. Respondent asserts that Mana-

fort Bros. had an employment relationship with Respondent's employees prior to the commission of the unfair labor practice, because it made payroll and benefit payments on behalf of Respondent at certain times before Respondent ceased operations.

In order for a successor employer to be liable for the unfair labor practices of its predecessor, it must be a bona fide purchaser, and must acquire the employing enterprise with knowledge of the unfair labor practices. *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 178 (1973). There is no evidence that Manafort Bros. purchased Respondent's business or had any employment relationship whatsoever with Respondent's employees before Respondent closed its doors. Manafort Bros. made some payments for Respondent when Respondent claimed a financial inability to make those payments itself. ALJD at p. 5, fn. 5; Tr. 51, 52. Manafort's purpose in making those payments was in ensuring that the fabrication work that it contracted with Respondent to perform was completed. *Id.* The ALJ did not err in finding that these payments did not establish that Manafort Bros. was Respondent's successor. There is no evidence that they were made pursuant to any purchase contract or other arrangement between Manafort and Respondent for Manafort to purchase Respondent's business.

C. The ALJ did not err in finding that employees were paying premiums at the time their insurance coverage was cancelled. (Exception 3)

Respondent asserts in its third exception that the ALJ erred in stating that

employees receiving health insurance coverage under COBRA were paying premiums to continue their coverage at the time their benefits ceased. It is unclear how this claim, even if true, has any bearing on the merits of the ALJ's decision. The statement was not made in support of a finding of a violation, but was simply a statement of fact. Further, there is evidence on the record to support the ALJ's statement. The COBRA provider sent an email to Anthony Rosaci on March 12 listing five employees who had been paid up through February 28. (GC Ex. 7)

D. The ALJ did not err in deciding not to credit the testimony of Respondent's witnesses that Respondent closed under emergency conditions. (Exception 4)

Respondent asserts that the ALJ erred in finding that the testimony of its witnesses regarding the cessation of its operations were self serving and elicited by leading questions by Respondent's counsel. The Board has a longstanding policy of not overturning an ALJ's credibility determinations unless the preponderance of the evidence does not support them. *Beverly Health and Rehabilitation Services, Inc.*, 335 NLRB 635, fn. 3 (2001); *Standard Drywall Products*, 91 NLRB 544 (1950).

The testimony by Respondent's witnesses concerning the asserted emergency conditions under which it closed was not compelling. Respondent's vice-president, Linda Lough, testified that it was her opinion that Respondent's financial circumstances constituted an emergency requiring immediate closure. (Tr.

93) Owner Joseph Bachta testified that his attorneys told him he must cease operation and could not take on any more debt. (Tr. 104) However, Respondent acknowledged that it had not even filed for bankruptcy as of the date of the hearing. (Tr. 106)

Respondent's witnesses acknowledged that its financial problems had been ongoing for some time, a fact which supports the ALJ's finding that Respondent was not forced to close without notice to the Union. Lough acknowledged that Respondent's financial problems had been ongoing for some time. (Tr. 96, 97) She testified that Respondent had "quite a few lawsuits," but did not testify as to when those suits were filed, by whom, or for what amount. (Tr. 92) She also testified that Respondent owed money to Webster Bank, but admitted that Respondent had been receiving letters from Webster Bank as early as November 2009 stating that it planned to collect on its debt. (Tr. 97) In short, the testimony of Respondent's witnesses did not support a finding that Respondent was facing exigent circumstances that would excuse its failure to notify or bargain with the Union.

As the ALJ noted, the advice Respondent received from its attorneys on February 24 to stop incurring debt "was not the type of emergency recognized by the Board to excuse advance notice of a decision to terminate unit employees." ALJD at 6. lines 18-20. There is no evidence that Respondent was faced with a "rapidly developing catastrophe or emergency" which forced it to close without providing the notice with a meaningful opportunity to bargain. *Compu-Net Communications*, 315 NLRB 216, 223 (1994). To the contrary, the evidence

demonstrates that Respondent was aware of its financial condition for some time, and could have contacted the Union long before it did to discuss the issue and work out a resolution.

CONCLUSION

For the reasons set forth above and in the Administrative Law Judge's Decision, it is urged that Respondents' Exceptions be denied in their entirety. It is further requested that the Board affirm the ALJ's findings of fact, conclusions of law, and recommended Remedy.

Dated at Detroit, Michigan this 27th day of May, 2011.

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CERTIFICATE OF SERVICE

I certify that on the 27th day of May, 2011, I electronically served copies of Counsel for the Acting General Counsel's Exceptions to the Decision of the Administrative Law Judge on the following parties of record:

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