

The South Texas Chapter of the Associated General Contractors, Inc.¹ and Allied Specialty Company, Inc., H. E. Jones Construction Company, Gunn Tile Company, Contractors Building Supply Company, Grimes Plumbing Company, Olson Plastering Company, Bobby Braselton General Contractor, Inc., Paul Freeman Lath & Plastering, H. S. Sizemore & Son Co., and Laborers' International Union of North America, AFL-CIO, Local Union 1179. Cases 23-CA-6654, 23-CA-6655, 23-CA-6656, 23-CA-6657, 23-CA-6658, 23-CA-6659, 23-CA-6660, 23-CA-6661, 23-CA-6662, and 23-CA-6663

September 15, 1978

DECISION AND ORDER

BY CHAIRMAN FANNING AND MEMBERS PENELLO
AND TRUESDALE

On June 28, 1978, Administrative Law Judge Henry L. Jalette issued the attached Decision in this proceeding. Thereafter, the Charging Party filed exceptions and a supporting brief, and Respondent H.S. Sizemore & Son Co. 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,² and conclusions³ of the Administrative law Judge and to adopt his recommended Order.

¹ Herein called Respondent AGC.

² The Charging Party has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an Administrative Law Judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (C.A. 3, 1951). We have carefully examined the record and find no basis for reversing his findings.

³ We agree with the Administrative Law Judge that under Board precedent the notice given to the Union of the withdrawal of Respondent Employers from the multiemployer unit was timely, but we do not adopt his entire rationale. In reaching his conclusion, the Administrative Law Judge noted that the exact details of the sequence of events at the first bargaining session held on May 24, 1977, are in dispute. According to union trustee Vazquez, the first order of business was the submission of the Union's contract proposal; according to Kendrick, Respondent AGC's attorney, the first order of business was the presentation of a list of those employers who had withdrawn bargaining rights from the multiemployer bargaining association. In fn. 3 of his Decision the Administrative Law Judge stated: "My conclusion that the notice was timely does not depend on whether it was given to the Union before or after it made its initial proposal." However, the Administrative Law Judge also indicated that, "Were I to resolve the conflict in testimony on the point, I would credit attorney Kendrick whose version was much more complete and detailed."

Unlike the Administrative Law Judge, we consider the sequence of events at the May 24 meeting to be critically important. Our conclusion that the notice of withdrawal was timely is predicated on the credited testimony of attorney Kendrick which reveals that the notice of withdrawal was given prior to the onset of negotiations. See *The Carvel Company and C and D Plumbing and Heating Company*, 226 NLRB 111 (1976), enfd. 560 F.2d 1030 (C.A. 1, 1977).

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.

DECISION

STATEMENT OF THE CASE

HENRY L. JALETTE, Administrative Law Judge: This consolidated proceeding involves allegations that all of the above-named Respondents violated Section 8(a)(1) and (5) of the Act by reason of Respondent AGC's refusal to meet and bargain with the Union on behalf of the Respondent Employers named above; that Respondents Olson Plastering Company and Paul Freeman Lath & Plastering violated Section 8(a)(1) and (5) of the Act by unilaterally and without consultation with the Union failing to make contractually required payments to certain benefit funds and to pay hourly rates of pay specified in a collective-bargaining agreement; and that Respondent Freeman Lath & Plastering violated Section 8(a)(1) and (3) of the Act by its failure to make contractually required payments to benefit funds and to pay employees the hourly rates of pay specified in a collective-bargaining agreement. The proceeding is based on the charges enumerated above, all of which were filed on August 4, 1977,¹ with the charge in Case 23-CA-6660 being amended on August 22; pursuant to such charges, complaint issued on September 9. On December 7, hearing was held in Corpus Christi, Texas.

Upon the entire record, and including my observation of the witnesses, and upon consideration of the briefs of the parties, I hereby make the following:

FINDINGS OF FACT

I. THE FACTS

Respondent, The South Texas Chapter of the Associated General Contractors, Inc., herein called AGC, is a Texas nonprofit corporation with its principal office and place of business at Corpus Christi, Texas, where it is engaged in the business of representing its employer-contractor members in the business and construction industry in the south Texas area. For its members who have appointed it as their collective-bargaining agent, AGC negotiates collective-bargaining agreements with various labor organizations covering the employees of said members in appropriate bargaining units. At all times material herein, Respondents Allied Specialty Company, Inc., H. E. Jones Construction Company, Gunn Tile Company, Contractors Building Supply Company, Grimes Plumbing Company, Olson Plastering Company (herein called Olson), Bobby Braselton General Contractor, Inc., Paul Freeman Lath & Plastering (herein called Freeman), and H. S. Sizemore & Son Co. (herein called

¹ Unless otherwise indicated, all dates hereinafter are in 1977.

Sizemore), have been employer-contractor members of the AGC. The complaint alleges, the answer admits, and I find, that during the 12-month period preceding the issuance of complaint the employer-contractor members of the AGC in the course and conduct of their business operations collectively purchased goods and materials valued in excess of \$50,000 from firms located outside the State of Texas, which goods and materials were shipped directly to said employer-contractors at locations within the State of Texas.

The parties stipulated that the Union and the AGC have been parties to a series of collective-bargaining agreements dating from June 1, 1966, to May 31, 1977, which was the expiration date of the contract which was in effect at the time of the events leading up to this proceeding.

On March 29, the Union, by Joseph H. Vazquez, its trustee, notified Kenneth W. Painter, executive vice president of the AGC, of its desire to terminate the agreement scheduled to expire on May 31 and to enter into negotiations for a new agreement. Vazquez suggested a meeting for the week of April 11 and also requested that prior to such meeting, Painter furnish the Union with a list of all contractors who had assigned their bargaining rights to the AGC. The Union never received a written response to its request and although Vazquez met Painter between 10 and 15 times between March 29 and May 24 in connection with the administration of the existing contract, in none of these meetings was any mention made of the Union's letter and its request for a list of contractors. On May 23, Painter called Vazquez and a meeting was agreed to for May 24.

On May 24, Vazquez, accompanied by acting business manager Fausto Delgado, met with Painter and attorney Michael Kendrick, Jr., at the offices of the AGC. Vazquez testified that he submitted the Union's written proposal and that in turn Painter gave him a letter which listed three contractors as having assigned bargaining rights to the AGC. Vazquez asked Painter what had happened to the rest of the contractors and he was advised that the other contractors had withdrawn their bargaining rights. Vazquez said he would need proof and he was told that the AGC would furnish him letters from the contractors the following morning at 8:30. Vazquez testified he went to the AGC the following morning, but did not receive the letter until 3 or 4 p.m. The letters of withdrawal were all addressed to the AGC. Two of the letters were dated May 6, one April 6, five May 4, and two May 11.

The parties met again on May 31, June 21, June 24, and July 6. Vazquez testified that the Union's position was that the AGC should be bargaining for all of the contractors for whom it had bargained in 1976; and at the meeting on July 6 he told the AGC that unless or until that issue was resolved negotiations should be adjourned. There were no negotiations thereafter.

II. ANALYSIS AND CONCLUSIONS

Except in the cases of Sizemore, Freeman and Olson, there is no dispute that prior to May 1977 the Respondent Employers had agreed to be bound by group bargaining and had assigned their bargaining rights to the AGC. Furthermore, it is undisputed that since on or about May 24, the AGC has refused to bargain with the Union on behalf of the Respondent Employers named herein and that such

Respondent Employers have refused to bargain with the Union as a multiemployer group. The refusals are defended on the ground of withdrawal of bargaining rights from the AGC.

In *Retail Associates, Inc.*, 120 NLRB 388, 395 (1958), the Board held:

Among other things, the timing of an attempted withdrawal from a multiemployer bargaining unit, as Board cases show, is an important lever of control in the sound discretion of the Board to ensure stability of such bargaining relationships. We would accordingly refuse to permit the withdrawal of an employer or a union from a duly established multiemployer bargaining unit, except upon adequate written notice given prior to the date set by the contract for modification, or to the agreed-upon date to begin the multiemployer negotiations. Where actual bargaining negotiations based on the existing multiemployer unit have begun, we would not permit, except on mutual consent, an abandonment of the unit upon which each side has committed itself to the other, absent unusual circumstances.

On the basis of the foregoing, as no notice of withdrawal was given to the Union prior to May 24, the agreed-upon date to begin the multiemployer negotiations, General Counsel and the Union contend the withdrawals were untimely. In his brief, General Counsel asserts that "Apparently the instant case is the first since *Retail Associates* to turn upon whether written notice must be given *prior* to the calendar date set for the beginning of negotiations."

Robert Becker d/b/a Lenox Grill, 170 NLRB 1027 (1968), cited by Respondents, indicates otherwise. In that case, the respondent had given timely written notice of withdrawal to the multiemployer association and the association had not advised the union until the date of the first and only bargaining session, at which time oral notice was given. The Board held that in those circumstances adequate notice was given the union before negotiations commenced and the respondent's withdrawal was effective. While there were circumstances in that case which the Administrative Law Judge had deemed "unusual" and sufficient to relieve the respondent from an obligation to sign a contract, the Board stated it was not relying upon them. Moreover, although the Board noted in a footnote that the union had made no protest at the negotiations, unlike here, it did not state that it was relying on that circumstance for its holding.

In accordance with *Lenox Grill*, and inasmuch as the withdrawals herein were in writing and had been submitted to the AGC prior to May 24,² I conclude that the notice of withdrawal given on May 24 was both adequate and timely,³ and I shall recommend dismissal of the complaint

² There is no basis for finding that the letters of withdrawal were not prepared on the dates appearing thereon and submitted to Respondent AGC.

³ My conclusion that the notice was timely does not depend on whether it was given to the Union before or after it made its initial proposal. (The initial proposal made no substantive changes in the prior contract.) According to Vazquez, the first order of business was the submission of the Union's proposal; according to attorney Kendrick, the first order of business was the discussions of the withdrawal issue. Were I to resolve the conflict in testimony on the point, I would credit attorney Kendrick whose version was much more complete and detailed.

insofar as it alleges a refusal by the AGC and the Respondent Employers to meet and bargain with the Union on a multiemployer basis.

Since the foregoing disposes of the refusal to bargain on a multiemployer basis as it relates to all Respondents, I deem it unnecessary to detail and analyze the additional defenses advanced by Olson, Freeman and Sizemore. In certain respects, these defenses are predicated on testimonial assertions that defy the credulity of the most naive. For example, there is the testimony of Ronnie Sizemore regarding the limitations he placed on his assignment of bargaining rights and Freeman's explanation of his answer to a union request for arbitration. In light of the fact that both undertook to execute withdrawals in May 1977, I would be disposed to discredit them. However, in light of the uncontradicted testimony of both Sizemore and Freeman that they had not complied with a union contract for a number of years, including not paying the contract rate and not contributing to the fringe benefit funds, and as the Union can be charged with knowledge of that circumstance, I am persuaded that the Union can be said either to have acquiesced in their withdrawal of bargaining rights from the AGC long before 1977 or that it is estopped from asserting that they are obligated to bargain on a multiemployer basis. In Olson's case, as he had withdrawn bargaining rights from the AGC in 1973, and thereafter executed a separate contract with the Union for a period of 1 year, and refused to execute further contracts, a finding of acquiescence or estoppel is likewise warranted.

The complaint alleges that Olson and Freeman violated Section 8(a)(1) and (5) of the Act by failing, since February 4, 1977, to make contractually required payments to the fringe benefit funds on behalf of various employees and in paying various employees less than the contract rate of pay, without notice to or consultation with the Union. As I have found that the Union had acquiesced in Freeman's and Olson's withdrawal of bargaining rights from the AGC long before February 1977, and as Freeman had operated without a union contract since 1972 and Olson since 1974, nei-

ther was contractually obligated to make payments to fringe benefit funds or to pay contract rates to employees in 1977. Accordingly, their failure to do so was not violative of Section 8(a)(1) and (5) of the Act. In Freeman's case, the complaint alleges additionally that his failure to make the payments in question was violative of Section 8(a)(1) and (3) of the Act. There is no evidence to support the allegation.

CONCLUSIONS OF LAW

1. Respondents, The South Texas Chapter of the Associated General Contractors, Inc., Allied Specialty Company, Inc., H. E. Jones Construction Company, Gunn Tile Company, Contractors Building Supply Company, Grimes Plumbing Company, Olson Plastering Company, Bobby Braselton General Contractor, Inc., Paul Freeman Lath & Plastering, and H. S. Sizemore & Son Co., and each of them, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Laborers International Union of North America, AFL-CIO, Local Union 1179, is a labor organization within the meaning of Section 2(5) of the Act.

3. General Counsel has failed to establish by a preponderance of the evidence that the Respondents named above engaged in conduct violative of Section 8(a)(1), (3), and (5) of the Act, as alleged.

Upon the foregoing findings of fact, conclusions of law, and the entire record in this case, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER⁴

The complaint is dismissed in its entirety.

⁴ In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.