

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

ANDERSON EXCAVATING COMPANY

and

Case No. 14-CA-156092

INTERNATIONAL UNION OF OPERATING
ENGINEERS LOCAL 571

William F. LeMaster and Julie M. Covel, Esqs.,
for the General Counsel.

Theodore R. Boecker, Jr., Esq., (Boecker Law, P.C., L.L.O)
Omaha, Nebraska, for the Respondent.

Timothy S. Dowd, Esq. (Dowd Howard & Corrigan, LLC)
Omaha, Nebraska, for the Charging Party.

DECISION

STATEMENT OF THE CASE

Arthur J. Amchan, Administrative Law Judge. This case was tried in Council Bluffs, Iowa from July 5-7, 2016. Local 571 of the International Union of Operating Engineers filed the initial charge in this matter on July 16, 2015 and an amended charge on January 22, 2016. The General Counsel issued the complaint on January 28, 2016.¹

On the entire record, including my observation of the demeanor of the witnesses, and after considering the brief filed by the General Counsel,² I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation, is a construction contractor based in Omaha, Nebraska. It performs in excess of \$50,000 worth of services for Kiewit Corporation. Kiewit is engaged in interstate commerce. Moreover, Respondent performed services in excess of \$50,000 in states

¹ Respondent appears to argue that paragraph 6(d) of the complaint is time barred under Section 10(b) of the Act. This is the only close issue in this case.

² Neither Respondent nor the Charging Party filed a post-trial brief.

other than Nebraska during the 12 month period ending July 31, 2015.³ Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The Union is a labor organization within the meaning of Section 2(5) of the Act.

5 The General Counsel alleges that Respondent violated Section 8(a)(5) and (1) of the Act by failing to make contractually mandated contributions to the Union's health and welfare fund, its pension fund and its training fund. He also alleges Respondent violated the Act by failing to remit contractually required union dues. By doing so, and by stating that it had no collective bargaining agreement with the Union, the General Counsel alleges that Respondent withdrew
10 recognition of the Union and/or unilaterally changed terms and conditions of employment of its represented employees, which are mandatory subjects of bargaining.

II. ALLEGED UNFAIR LABOR PRACTICES

15 Virgil Anderson established Respondent in the 1960s. The company has also gone by the name Anderson Excavating and Wrecking Company. The record does not indicate that this difference in names has any legal significance. Somewhere around 2012 or 2013, Virgil Anderson retired and his wife, Virginia Anderson, began operating Respondent's business.

20 Respondent has contributed to the union health and welfare fund, its pension fund and its training fund since the 1960s. It has also for years remitted dues of Local 571 members to the Union. Its contributions and remittances had been accompanied by signed reports acknowledging that they were made pursuant to a collective bargaining agreement.

25 Anderson Excavating has been a signatory to collective bargaining agreements with the Union for many years—possibly back to the 1960s. For example, on May 30, 1996, it executed the Heavy Highway Agreement with the Union, G.C. Exh. 12. On May 27, 2004, Virgil Anderson executed the Heavy Highway Agreement for May 1, 2004 to April 30, 2006.

30 On May 30, 1996, Vigil Anderson and the Business Manager of Local 571 also executed a document entitled "9A-9C Recognition Agreement." It provided that:

35 The Union has submitted proof and the Employer is satisfied that the Union represents a majority of the Employer's employees in the bargaining unit described in the current collective bargaining agreement between the Union and Employer.

40 The Employer therefore voluntarily agrees to recognize and does hereby recognize the Union as the exclusive bargaining agent for all employees within the contractually described bargaining unit on all present and future job sites with the jurisdiction of the Union, unless and until such time as the Union loses its status as the employees' exclusive representative as a result of an NLRB election requested by the employees. The Employer agrees that it will not request an NLRB election and expressly waives any right it may have to do so.

³ Respondent did not deny this factual assertion from the complaint in its Answer. It argued that it was irrelevant and immaterial. I deem that allegation to be admitted.

G.C. Exh. 12, p. 12.

5 The 2004-2006 Heavy Highway Agreement has been superseded by collective bargaining agreements covering the periods 2008-10, 2010-12, 2012-14 and 2014-18. For each of these contracts, the Union has bargained with a group of the large construction employers in the Omaha area. After ratification of these contracts, the Union has sent a one-page document to all signatories to complete. Anderson Excavating has never signed or returned any of these documents since 2004. On the other hand, Respondent has never explicitly refused to sign the agreement or, at least until 2014, indicated that it was not bound by the terms and conditions of these agreements.

15 To the contrary, since the expiration of the 2004-06 collective bargaining agreement, Respondent has faithfully complied with the terms and conditions of each subsequent agreement with exceptions noted later. It has for instance dutifully made the required payments to the Contractors, Laborers, Teamsters and Engineers Health and Welfare (CLT&E) Fund, the CLT&E Pension Fund and the Union's Training Fund.⁴ It has also remitted the dues of its employees to the Union as required by each subsequent contract in the amounts required by each subsequent contract. Respondent has also filled out and submitted all the reports that are required to accompany the fund contributions and the dues remittances. These reports include an acknowledgement that they are being submitted pursuant to a collective bargaining agreement.

25 The CLT and E funds conduct periodic audits of signatory contractors. These are conducted either by employees of the trust fund or Deboer and Associates, a public accounting firm. On August 16, 2010 Deboer audited Respondent's payroll records and found that Respondent owed the trust funds \$2,612.14. Respondent remitted this amount to the trust fund. G.C. Exh. 66 Deboer conducted another audit in late 2013, finding Respondent \$83,000 in arrears, G.C. Exh. 67.

35 On March 25, 2014, the Trustees of the Health and Welfare Fund, the Trustees of the Pension Fund and Local 571 filed a complaint against Respondent under the Labor Management Relations Act. The specifics of the complaint, Resp. Exh. 2 and Respondent's Answer, Resp. Exh. 3 are important is assessing Respondent's argument that the instant action is barred by Section 10(b) of the Act.

40 Attached to and referenced in the complaint was the 2004-06 Heavy Highway Agreement, the last collective bargaining agreement that Respondent executed. The complaint in paragraph 9, alleged that Respondent refused to allow the Trustees to conduct required audits of the company payroll records. The complaint asks the court to order Anderson to allow a complete audit of company of payroll records and to pay amounts due the trusts and the Union plus costs and attorneys' fees.

45 Respondent's Answer filed on May 16, 2014, stated that it reported hours and made employer contributions to the Welfare Plan and the Pension Plan. It otherwise denied the allegations of complaint paragraph 9. The Second Affirmative Defense in the Answer stated that the collective bargaining agreement upon which the action was based terminated on April 30,

⁴ CLT & E is actually two trusts, one for health and welfare, the other for pensions.

2006. The Third Affirmative Defense was that Anderson was not a party to the Trust Agreements and was not bound by them. Nevertheless, Respondent continued to make payments to the CLT & E funds, the training funds and to remit union dues in amounts required by the 2012-2014 and 2014-2018 Heavy Highway Agreements.⁵

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The depositions of Virgil and Virginia Anderson and the filing of the charges giving rise to this matter

10 On May 20, 2015, Virgil and Virginia Anderson gave depositions in the aforementioned lawsuit. Both denied that they had any collective bargaining agreements with the Union and stated that they were making payments to the union funds and remitting union dues pursuant to some unspecified and unwritten agreement with their employees. There is no evidence of such an agreement between Respondent and its employees.

15 After giving these depositions, Respondent ceased making payments to the funds and ceased remitting dues for several months, between May and November 2015. When Respondent resumed making these payments and remittances, the Union and Trust Funds initially rejected them because they were not accompanied by signed reports. Respondent then signed the reports and resubmitted them. The payments were then accepted.⁶

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Analysis

The Section 10(b) issue

25 Respondent contends that the complaint is time barred because the Union was on notice that it was withdrawing recognition as of May 2014 when it filed its Answer to the Union's District Court complaint. I reject this contention.

30 The 6-month limitations period in Section 10(b) begins to run only when a party has clear and unequivocal notice of a violation of the Act. Anderson's conduct in this case was ambiguous and thus failed to give the Union the requisite notice. One could construe the May 2014 Answer and repudiation of all collective bargaining agreements with the Union as withdrawal of recognition. However, Anderson continued to make all the requisite payments and remittances to the Union and the Trust Funds until May 2015. Thus, I find that the Union did not have clear and unequivocal notice of the Anderson's withdrawal of recognition and repudiation of its collective bargaining obligations until May 2015. Thus, the Union's July 16, 2015 unfair labor practice charge is not barred by Section 10(b), *CAB Associates*, 340 NLRB 1391, 1392 (2003).

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⁵ The lawsuit under the Labor Management Relations Act is still pending.

⁶ The CLT & E trust funds wrote to Respondent in June 2015, stating it could not accept contributions from a company claiming to be a nonsignatory contractor. The trust and the Unions subsequently accepted contributions and remittances due from Respondent. I assume they did so on the theory that Respondent is a signatory contractor, regardless of what the Andersons stated in their depositions. Neither the trusts, the Union nor Respondent have been entirely consistent in this matter.

Respondent violated Section 8(a)(5) and (1) in withdrawing recognition from the Union and repudiating its collective bargaining obligations

5 In the construction industry, there is a rebuttable presumption that the relationship
between an employer and its unions is governed by Section 8(f) of the Act. However, a
construction union may acquire the status of the majority bargaining representative under Section
9(a) of the Act through agreement between the union and an employer.⁷ For a construction union
10 to acquire 9(a) status, there must be a written agreement that the union requested recognition as
the majority representative, that the employer recognized the union as the majority
representative, and the employer's recognition was based on the union's having shown, or
having offered to show, an evidentiary basis of its majority support, *Staunton Fuel and Material*,
335 NLRB 717 (2001). The May 1996 9A-9C Recognition Agreement between Respondent and
Local 571 satisfies this requirement. Thus, Local 571 is the collective bargaining representative
15 of a unit of Anderson's employees pursuant to Section 9(a). As a result Anderson is not
privileged to withdraw recognition from the Union without a showing that the Union has lost the
support of a majority of its employees, *Levitz Furniture Co. of the Pacific*, 333 NLRB 717
(2001). Respondent has made no attempt to meet the *Levitz* burden. Thus, its attempt to
withdraw recognition from the Union violates Section 8(a)(5) and (1) of the Act.

20 *Respondent is bound by the 2014-2018 Heavy Highway Agreement*

Respondent has not signed a collective bargaining agreement with the Union since 2004.
However, it has adopted the terms of all subsequent Heavy Highway Agreements, including the
25 2014-2018 Agreement, by its conduct, *Asbestos Workers Local 84 (DST Insulation, Inc.)*, 351
NLRB 19 (2007). For example, for 9 months after the effective date of the 2014-2018
agreement, Respondent abided by all its terms.

30 *Respondent violated Section 8(a)(5) and (1) by repudiating the terms and conditions of the 2014-
2018 collective bargaining agreement.*

An employer acts in derogation of its bargaining obligation under Section 8(c) of the Act,
and thereby violates Section 8(a)(5) of the Act, when, during the life of a collective-bargaining
agreement, it unilaterally modifies or otherwise repudiates terms and conditions of employment
35 contained in the agreement, *Morelli Construction Company*, 240 NLRB 1190 (1979). Thus, by
refusing to make the payments required by the 2014-2018 Heavy Highway Agreement, and
stating that it is not bound by that agreement, Respondent violated Section 8(a)(5).

⁷ The distinction between a union's representative status under Section 8(f) and under Section 9(a) is significant because an 8(f) relationship may be terminated by either the union or the employer upon the expiration of their collective-bargaining agreement. *John Deklewa & Sons*, 282 NLRB 1375, 1386-1387 (1987), enfd. sub nom. *Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1988). By contrast, a 9(a) relationship (and the associated obligation to bargain) continues after contract expiration, unless and until the union is shown to have lost majority support. *Levitz Furniture Co.*, 333 NLRB 717 (2001). Similarly, an 8(f) contract does not bar a representation petition under Section 9, while a contract made with a 9(a) representative does bar such a petition. *Deklewa*, supra at 1387.

REMEDY

5 Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

10 Backpay, if owed, shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁸

ORDER

15 The Respondent, Anderson Excavating Company, Omaha, Nebraska, its officers, agents, successors, and assigns, shall

20 1. Cease and desist from

25 (a) Unilaterally refusing to make fringe benefit fund payments and dues remittances provided for in collective bargaining agreements with International Operating Engineers Local 571 to which Respondent is or has been bound, including the 2014-2018 Heavy Highway Agreement.

(b) In any manner withdrawing recognition from Local 571 as the collective bargaining representative of a unit of its employees without a showing of a loss of majority support.

30 (c) In any manner repudiating collective bargaining agreements with Local 571 to which it is bound.

35 (d) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

40 (a) Make bargaining unit employees whole for Respondent's unlawful failure to make all fringe benefit contributions and dues remittances required by its contracts with the Union.

(b) Compensate employees for any adverse tax consequences resulting from its failure to make all fringe benefit contributions and dues remittances required by its contracts with the Union.

⁸ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(c) Remit to the Union all benefit fund contributions that have not been made under Respondent's contractual obligations to the Union.

5 (d) Remit to the Union any dues that has not been remitted pursuant to Respondent's contractual obligations to the Union.

10 (e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

15 (f) Within 14 days after service by the Region, post at its Omaha, Nebraska facility copies of the attached notice marked "Appendix."⁹ Copies of the notice, on forms provided by the Regional Director for Region 14, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 20, 2015.

20 (g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., August 19, 2016

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Arthur J. Amchan
Administrative Law Judge

⁹ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT unilaterally refuse to make fringe benefit fund payments and dues remittances provided for in collective bargaining agreements with International Operating Engineers Local 571 to which we are or have been bound, including the 2014-2018 Heavy Highway Agreement.

WE WILL NOT withdraw recognition of International Operating Engineers Local 571 as the collective bargaining representative of a unit of our employees absent proof that the Union has lost the support of a majority of the employees in the unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make bargaining unit employees whole for our unlawful failure to make all fringe benefit contributions and dues remittances required by our contracts with the Union, including the 2014-2018 Heavy Highway Agreement.

WE WILL comply with the obligations under the collective bargaining agreements with Local 571 to which we are bound, including the 2014-2018 Heavy Highway Agreement.

ANDERSON EXCAVATING COMPANY

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under

the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.
1222 Spruce Street, Room 8.302, Saint Louis, MO 63103-2829
(314) 539-7770, Hours: 8 a.m. to 4:30 p.m.

The Administrative Law Judge's decision can be found at www.nlr.gov/case/14-CA-156092 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.



THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (314) 539-7780.