

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,) CASE NO: 17-2516
)
Petitioner,)
)
v)
)
ANDERSON EXCAVATING CO.,)
)
Respondent,)

PETITION REQUESTING A REHEARING EN BANC

COMES NOW the Respondent, and pursuant to Federal Rule of Appellate Procedure 40 and 8th Circuit Rule 40A and hereby submits the following Petition for Rehearing en banc or alternative request for rehearing by the panel (as Local Rule 40A(b) provides that every petition for rehearing en banc will automatically be deemed to include a petition for rehearing by the panel).

1. In support of its request for rehearing, Respondent Anderson Excavating Co. states that the court overlooked a point of law regarding the effect of a repudiation of Collective Bargaining Agreement, and, particularly ignored 8th Circuit Court of Appeals precedent on the issue, which was ignored for citation to authorities from the 6th Circuit and NLRB.
2. The issue presented by this request for rehearing is whether there was a misapplication of the law and ignoring of past precedent on the applicable 6 month statute of limitations.
3. The original charge against Anderson Excavating was filed on July 16, 2015 by the Union asserting that Anderson violated the NLRA by denying it was bound by any CBA with the Union. (App. 8-9). Anderson argues this charge was beyond the 6 month statute of limitation imposed by 29 U.S.C. §160 (also known as a §10(b) defense)

4. This Court correctly observed the mandate of the 8th Circuit established in *NLRB v. Jerry Durham Drywall*, 974 F.2d 1000, 1003 (8th Cir. 1992) that a party asserting a violation of the NLRA must pursue its rights in a timely manner, **but** this Court’s Opinion ignores the language utilized by the *Jerry Durham Drywall* Court:

“The National Labor Relations Act requires that a party, wishing to assert the existence of a violation of the Act, pursue its right in a timely manner. To achieve its purpose of providing minimum protection in the labor relations field, and at the same time prevent employers from having to defend themselves from stale, outdated claims, Congress provided a relatively short six-month limitations period with respect to unfair labor practice charges. *Id.* Where a section 8(a)(5) charge alleges that a party is refusing to abide by a collective bargaining agreement, the Board has held **that the section 10(b) statute of limitations begins to run where there has been an unequivocal expression by one of the parties to repudiate the asserted contract.**” (emphasis supplied).

5. The July 16, 2015 Charge filed by the Union asserted a violation of Section 8(a)(5), just as is referenced in the *Jerry Durham Drywall* case. (App. Pages 8-9).
6. The Panel ignored the 8th Circuit precedent which indicated that the statute begins to run where there has been an unequivocal expression to repudiate the contract. *NLRB v. Jerry Durham Drywall*, 974 F.2d 1000, 1003 (8th Cir. 1992)
7. The 8th Circuit past precedent did not say one could look at subsequent acts and attempt to interpret those to create ambiguity to a prior repudiation.
8. The question for the panel in this case mandated by the language of Section 10(b), and for the ALJ in the proceeding below, which was ignored by both, was whether “there has been

an unequivocal expression by one of the parties to repudiate the asserted contract” reflected in the conduct of the prior 2014 litigation between the Union and Anderson Excavating concerning the CBA and its enforceability, more than a year preceding the filing of the Union’s charge.

9. Respondent respectfully submits that this was the question that 8th Circuit precedent required to be answered and it was ignored.
10. Any fair reading of the undisputed evidence compels the conclusion that Anderson “unequivocally expressed” its intention not to be bound by the CBA more than a year before the charge was filed with the NLRB.
11. First, the Union literally sued Anderson in United States District Court in March 2014 alleging that not only was Anderson not making the payments required by the CBA but that it was refusing access to auditors to conduct an audit to determine if there was compliance with the CBA. (App. 86-91). *See* Paragraph 9 of Union Complaint against Anderson in the United States District Court for the District of Nebraska.
12. In defense to the Union’s suit that it was violating obligations imposed by the CBA, Anderson unequivocally asserted in its Answer filed in May 2014 that the Collective Bargaining Agreement had terminated and was no longer a valid agreement. (App. 93) *See* First Affirmative Defense.
13. When the parties agreed upon the issues to be addressed in the 2014 litigation, as reflected in the joint Rule 26 Report submitted to the District Court – more than a year before the Union’s NLRB charge - Anderson asserted unequivocally that “the Collective Bargaining Agreement is not a valid contract”. (App. 97).

14. What could be a more “unequivocal expression by one of the parties to repudiate the asserted contract” than to say it “is not a valid contract”, that the contract is “expired”, that the party “is not bound” by it, and that the party does not have to comply with it?
15. Although the panel cited to the decision of *NLRB v. Seedorff Masonry, Inc.*, 812 F.3d 1158, 1167 (8th Cir. 2016), it ignored the past principal recognized in that case when that Court observed “ If there was repudiation by conduct before March 2012, the Board would have been compelled to dismiss the General Counsel's complaint. See St. Barnabas Med. Ctr., 343 N.L.R.B. 1125, 1127 (2004) (“[I]f the repudiation occurred outside the 10(b) period, **all subsequent failures . . . to honor the terms of the [CBA] are deemed consequences of the initial repudiation** for which the union may not recover.”).(emphasis supplied).
16. The panel asserts that the May 2014 Answer and the June 2014 Rule 26(f) report showed a withdrawal of its recognition of the Union. (*See* Opinion at page 13). That admitted unequivocal withdrawal, which was based upon the expressed declaration that there was no enforceable CBA, amounts to an “an unequivocal expression by one of the parties to repudiate the asserted contract”, especially given that such party had been sued for not complying with the contract and was literally defending the suit arguing there was no enforceable CBA. (All of which occurred a year before the charge was filed).
17. The panel gets its wrong when it says ceasing to make payments in 2016 was the unequivocal repudiation, because that was merely a subsequent failure . . . to honor the terms of the [CBA] which under the case law is simply to be deemed a consequence of the initial repudiation (using the words of the 8th Circuit in *NLRB v. Seedorff Masonry, Inc.*, 812 F.3d 1158, 1167 (8th Cir. 2016)).

18. The reality is had the Union's attorney bothered to seek to conduct depositions of the principals of Anderson Excavating prior to May 2015, he would have heard to the same rationale as to why payments were being made – namely, that Anderson Excavating was not bound by any CBA, but that any payments remitted were done on behalf of Union employees pursuant to an agreement to make payment on their behalf. The fact that the panel may not have liked or appreciated the deposition answers given by Anderson Excavating's principals, does not change the fact that such was Anderson's explanation of its position and why it believed it was not bound by the CBA, just as it has unequivocally expressed more than a year before the Union filed its NLRB charge. Indeed, the only reason the statements were made in the deposition was BECAUSE THERE WAS PENDING LITIGATION WHEREIN ANDERSON EXCAVATING WAS ASSERTING IT WAS NOT BOUND BY ANY CBA. How could it get any clearer that the clock had begun to run?

19. The deposition questions of the Union counsel taken in May of 2015 reflect that the Union already knew and understood Anderson Excavating's position to be that there was no agreement. A page 27, beginning at line 23, of Virgil Anderson's testimony there is the following question and answer:

“Q. Okay. **In** the answers to interrogatories and the response -- or **the answer to the complaint, the position has been that there is no contract between Anderson and Local 571, are you aware of that?**

A. There probably is not.” (App. 39).(emphasis supplied).

Virgil Anderson thereafter reiterated multiple times there was no contract with the Union. (App. 44). Virginia Anderson relayed the same position to the Union's counsel (App. 63, depo page 12, line 21 to page 13, line 9).

20. The Union's counsel certainly knew that Anderson was asserting there was no enforceable CBA, and he knew that such position dated back to at least its "Answer", a year before the Union charge was ever filed.
21. The net effect of the decision of the panel is inconsistent with the underlying premise of a short statute of limitations and a need for a complaining party to take prompt action.
22. The underlying concept brought by a charge is the issue of whether "a party is refusing to abide by a collective bargaining agreement" (quoting *NLRB v. Jerry Durham Drywall*).
23. Did the Union have clear and unambiguous grounds to bring such as charge after Anderson Excavating filed its Answer in May 2014 to the Union's March 2014 lawsuit alleging a failure to pay and allow auditing required by the CBA? The answer to that question is an unequivocal: yes. That obvious answer compels the conclusion that the clock began to run at that time. Filing a charge a year later, is too late and beyond the intentionally short six (6) month statute of limitation.
24. Certainly, if the question is whether there were clear and unambiguous grounds to bring a charge that Anderson was refusing to abide by the collective bargaining unit when it filed the June 2014 Rule 26 Report, with Union's counsel, affirming Anderson's position that the CBA was "expired", "unenforceable" and that Anderson was "not bound" by it; the answer to that question must be an unequivocal: yes. Again, this common sense view compels the conclusion that the clock began to run when that Report was filed in June 2014, more than a year before the Union filed its charge with the NLRB.

25. The panel's decision is wrong, inconsistent with past precedent, and it opens a pandora's box of allowing any litigant to attempt to avoid an otherwise clear statute of limitations bar arguing that there was some conduct that somehow created some ambiguity as to the commencement of the clock. This principle could be extended well beyond NLRB disputes.
26. The panel's decision ignores the plain language of the statute that it was obligated to enforce in favor of clearly distinguishable cases. The statute says there is a 6 month limitation to bring a charge from the unfair labor practice. Specifically, 29 United States Code § 160 (b) provides in relevant part: "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..."
27. What is the "unfair labor practice"? The unfair labor practice the ALJ found was Anderson's failure to recognize the CBA which the Union alleged was applicable to Anderson. When did Anderson clearly state it was not recognizing it was bound by the CBA?: certainly no later than May 16, 2014 when it declared in an Answer filed in response to a Union lawsuit in the United States District Court for the District of Nebraska declaring that it was not bound by any CBA and that the CBA had expired. (A year before the Charge with the NLRB).
28. If declaring in writing that one is not bound by a CBA and filing that declaration twice in the United States District Court is not sufficient to put someone on notice that one is declaring an "expression....to repudiate the asserted contract", what is sufficient?

WHEREFORE, Respondent prays that the it be granted rehearing.

Respectfully submitted,

ANDERSON EXCAVATING CO.

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CERTIFICATE OF SERVICE

I hereby certify that on June 13, 2019 a true and correct copy of the foregoing instrument was served via electronic filing and/or sent by first class United States mail, postage prepaid, to the following:

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CERTIFICATE OF COMPLIANCE

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