United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3419

SECRETARY OF LABOR, Complainant, v. TRI-STATE STEEL CONSTRUCTION, INC., AND NATIONAL ENGINEERING & CONTRACTING COMPANY, Respondents.	: : : : : : : : : : : :	OSHRC DOCKET NOS. 89-2611 & 89-2705

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission ("the Commission") pursuant to section 10 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* ("the Act"). After my decision on the merits in these two consolidated cases, and a subsequent Commission decision dismissing Respondents' Fourth Amendment claims and vacating one citation item, Respondents filed a joint application for legal fees and expenses.[1] The application of Tri-State Steel Construction, Inc. ("Tri-State") is pursuant to the Equal Access to Justice Act ("EAJA"), 5 U.S.C. § 504, or, alternatively, Rule 11 of the Federal Rules of Civil Procedure ("Rule 11") and Commission Rule 2200.32 ("Rule 32") while the application of National Engineering and Contracting Company ("NEC") is pursuant solely to Rules 11 and 32. The Secretary opposes the application, and the parties have briefed this matter extensively.

Background

The work site in this case was a rehabilitation project involving three interstate highways that converge in Cincinnati, Ohio. The general contractor for the project contracted with NEC to perform all but the deck overlay of the bridge reconstruction, and NEC subcontracted the steel erection part

[1]The D.C. Circuit upheld the Commission's dismissal of Respondents' Fourth Amendment claims. *See Tri-State Steel Constr., Inc. v. OSHRC*, 26 F.3d 173 (D.C. Cir. 1994).

of the job to Tri-State, a wholly-owned subsidiary of NEC; NEC was responsible for removing the roadway pavement and the existing guardrails on the bridges, while Tri-State was responsible for repairing or replacing the bridge end dams and expansion joints. The inspection occurred after a complaint was filed with the Occupational Safety and Health Administration ("OSHA") alleging that the traffic control plan in use was hazardous for the bridge rehabilitation workers. OSHA inspected this condition, which was resolved four days later, and then decided to expand the inspection to the entire project; however, because the general contractor as well as NEC and Tri-State objected, OSHA obtained an inspection warrant. The inspection resulted in the issuance of two citations, with a total of seven items, to Tri-State, and the issuance of three citations, with a total of twelve items, to NEC, and Respondents seek their legal expenses as to the items on which they prevailed; specifically, Tri-State seeks its expenses relating to two items vacated at the hearing and three items withdrawn by the Secretary pending review by the Commission, while NEC seeks its expenses relating to four items vacated at the hearing, two items withdrawn by the Secretary pending the Commission's review, and one item vacated by the Commission.

Whether Tri-State Qualifies for an EAJA Award

The Commission's EAJA eligibility provisions, which are the same as those in the EAJA, appear in Commission Rule 2204.105 and disqualify from consideration any business with more than 500 employees and a net worth of over $7,000,000.00. NEC does not qualify for an award under the EAJA. However, Tri-State has submitted a net worth statement as required by Commission Rules 2204.201 and 2204.202 in the form of an affidavit of William Bunner, the litigation director for NEC and Tri-State, which establishes that the company has under 500 employees and a net worth of less than $7,000,000.00. Tri-State therefore meets the EAJA's eligibility requirements unless the Secretary can demonstrate that there are special circumstances making an award in this case unjust. *See* Commission Rule 2204.106(b). The Secretary contends that the assets of NEC and Tri-State should be aggregated due to the relationship between the two companies and that an award to Tri-State in this case would be unjust.

The parties agree that in promulgating its EAJA provisions the Commission declined to adopt a *per se* rule of aggregation of assets and opted for a case-by-case approach when a subsidiary of a large company applies for an EAJA award. The parties also agree that the real-party-in-interest

doctrine is appropriate for determining whether the assets of a subsidiary should be aggregated with those of the parent company. This doctrine was adopted by the Commission in its decision in *Nitro Elec. Co.*, 16 BNA OSHC 1596, 1993-95 CCH OSHD ¶ 30,335 (No. 92-3090, 1994). Although this decision was issued after the parties submitted their briefs, it is intervening Commission precedent on the issue presented in this case. It also cites to some of the same cases cited by the parties and contains the following guidelines to determine whether aggregation of assets is appropriate:[2]

1. Which company did the United States bring suit against?
2. Which company has the United States had dealings with?
3. Is the company a wholly-owned subsidiary?
4. Are the companies autonomous and independent?
5. Do the companies have the same president and do they occupy the same offices?
6. Does the principal corporation perform various administrative, accounting, insurance, and auditing functions for the subsidiary corporation?
7. Does the attorney for the principal corporation represent the subsidiary?
8. Who pays the attorney's fees?

It is clear OSHA cited both NEC and Tri-State in this matter and that Tri-State is a wholly-owned subsidiary of NEC. As to items 4 through 6, Respondents have submitted affidavits of Ted Sheppard, Tri-State's president, and John DeLuca, a vice-president of both companies, which state that Tri-State is a separate corporate entity from NEC.[3] According to the affidavits, NEC performs earth moving and excavation and concrete construction and placement, while Tri-State performs steel erection and related work with an emphasis on bridge construction and rehabilitation. NEC employs engineers, carpenters, plumbers, laborers and pipe fitters, while Tri-State employs iron workers. NEC does not use Tri-State exclusively for its projects requiring structural steel and related work, and Tri-State does work for other contractors, including competitors of NEC. The companies share the same office space but pay their own overhead costs, and each has its own accounting system and bank accounts. The companies also share a group insurance policy; however, Tri-State reimburses NEC

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[2]*See Unification Church v. I.N.S.*, 762 F.2d 1077 (D.C. Cir. 1985), and *U.S.A. v. Lakeshore Terminal and Pipeline Co.*, 639 F. Supp. 958 (E.D. Mich. 1986). *See also Brock v. Gretna Machine and Ironworks, Inc.*, No. 82-1507 (E.D. La. 1989) (available on WESTLAW), also cited by the Commission, which first articulated the specific guidelines set out above.

[3]At the time of the inspection, Ken Gillen was Tri-State's president. *See* Exh. A to Secretary's Answer, Interr. 3.

each year for the insurance expenses attributable to it. Tri-State also maintains its own vehicles and equipment and reimburses NEC for the substantial use of any of its equipment.

The Secretary does not dispute the foregoing, but notes that besides sharing the same office space, the same insurance policy and a vice-president the companies also shared the same safety program and the same safety and loss control director. He also notes that the top-level supervisors at the subject site were shared by the companies and that in a meeting addressing traffic control held a week before the inspection which was attended by representatives of the general contractor, the Ohio Department of Transportation and NEC, no one present was listed as a Tri-State representative although the shared supervisors were there. Finally, the Secretary notes that NEC and Tri-State were essentially considered one and the same at the site, and that while the condition triggering the initial inspection related to Tri-State's employees it was NEC that sought a stay of the expanded OSHA inspection. The Secretary contends that the interrelation of the companies and the availability of NEC's litigation resources to Tri-State make an EAJA award in this case unjust.

As the Secretary notes, NEC and Tri-State shared the same safety program and the same safety and loss control director at the time of the inspection; William Bunner, currently the litigation director, was employed by NEC but served as the safety and loss control director of both companies. (Tr. 580-81; 595-601; Exh. A to Secretary's Answer, Interr. 3). The companies also shared the top three supervisors at the subject site. Harry Taylor, the project superintendent, Scott Febus, the assistant superintendent, and Jerry Hilbert, the project engineer, were employed by NEC but served as supervisors for both NEC and Tri-State at the site, and Taylor was the immediate supervisor of Robert Hunter, Tri-State's general foreman and the highest-level employee of Tri-State at the site; Taylor, Febus and Hilbert were among the NEC representatives at the above-noted meeting, and, as the Secretary points out, none of the attendees were shown as Tri-State representatives.[4] (Tr. 89-95; 144; C-6; Exh. A to Secretary's Answer, Interr. 5, 13, 14). As the Secretary also points out, the general contractor's project superintendent and a Tri-State ironworker both testified to the effect that Tri-State and NEC were considered basically the same entity at the site. (Tr. 44-45; 690-92).

[4]Hunter, and not the shared supervisors, had the authority to hire, fire and discipline Tri-State employees. (Tr. 142-44; 158-60; Exh. A to Secretary's Answer, Interr. 13, 14).

In regard to the stay sought by NEC, Respondents assert that OSHA initially went to the site to inspect NEC. The actual employee complaint is not in the record. However, R-1, the OSHA complaint form that was attached to OSHA's warrant application and to NEC's motion requesting a stay, mentions only the name of the general contractor as the employer but clearly identifies the area where Tri-State employees were working when OSHA arrived. Further, while NEC's motion states its employees were working in that area when the complaint was filed, which was the same day of OSHA's initial arrival, it is apparent NEC's work in that area was concluded and that only Tri-State employees were there then. *See Tri-State Steel Constr.*, 15 BNA OSHC 1903, 1904-07, 1991-93 CCH OSHD ¶ 29,852, pp. 40,727-30 (Nos. 89-2611 & 89-2705, 1992). Respondents' assertion is also undermined by the statements in their briefs, that is, the post-hearing brief and the brief to the Commission, that it was Tri-State's employees who were exposed to the hazard of vehicular traffic passing through the subject area and that the complaint was filed by the union business agent of Tri-State's ironworkers. *See* Respondents' briefs, pp. 3-6 and 1-2, respectively.

Based on the foregoing, I conclude the interrelation of the companies and the availability of NEC's litigation resources to Tri-State make an EAJA award in this case inappropriate. Besides sharing office space, insurance, and a vice-president with NEC, Tri-State had the use of NEC's safety officer and safety program. Tri-State also had the use of NEC's supervisory personnel at the site, and the authority of those individuals with respect to Tri-State's affairs, as indicated above, suggests a level of involvement on the part of NEC such that Tri-State, under the circumstances of this case, was not a separate entity for purposes of an EAJA award. This finding is supported by the fact that NEC alone sought a stay of the expanded OSHA inspection, even though OSHA up to that point had focused only on Tri-State and Tri-State would clearly have benefited from the stay, by the similarity of a number of the citation items issued to Tri-State and NEC, and by the fact that the attorney representing the companies throughout these proceedings, including their appeal to the D.C. Circuit, is the same individual who has represented NEC in previous OSHA cases.[5] This finding is also supported by the Commission's above-noted decision in *Nitro Elec. Co.*, wherein it was held that the parent company's relationship with Nitro, and particularly its availability to advance funds to mount

[5]Over half of the standards in the citations issued to Tri-State are also contained in the citations issued to NEC.

a legal defense, even though Nitro had paid its own legal expenses, were the determining factors precluding Nitro's eligibility for fees under the EAJA.[6] Tri-State's application for legal fees and expenses pursuant to the EAJA is accordingly denied.

Whether Rule 11 Applies to Commission Proceedings

As noted above, Respondents have also requested their legal fees and expenses pursuant to Rules 11 and 32. Rule 11 of the Federal Rules of Civil Procedure provides for sanctions, including reasonable attorney fees, when a party has signed a pleading or other paper that the signer could have known, after reasonable inquiry, was not well grounded in fact and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law. Commission Rule 32 is a condensed version of Rule 11 containing essentially this same language. However, for purposes of this case, Rule 32 has one significant difference. While Rule 11 expressly provides for attorney fees, Rule 32 does not; instead, it states that violators of Rule 32 "shall be subject to the sanctions set forth in § 2200.41 or § 2200.104," which provide only for sanctions such as entering a decision against a defaulting party, striking pleadings or documents, and excluding attorneys or other representatives from proceedings or suspending or barring them from practice before the Commission for misbehavior. Respondents nonetheless urge that the attorney fee provision of Rule 11 applies to Commission proceedings because of Rule 32's silence on the issue and because of Commission Rule 2200.2(b), which states that "[i]n the absence of a specific provision, procedure shall be in accordance with the Federal Rules of Civil Procedure." The Secretary, on the other hand, contends that Rule 11 does not apply to Commission proceedings.

Although there are no Commission decisions on this issue, the Secretary cites, *inter alia*, to a decision of the Mine Safety and Health Review Commission ("MSHRC") in support of his position. *See Rushton Mining Co.*, 1987-90 CCH OSHD ¶ 28,530 (Nos. 85-253-R & 86-1, 1989).[7] The Secretary notes that MSHRC concluded in its decision that "the EAJA is presently the *exclusive* remedy provided by Congress to prevailing litigants who seek reimbursement of their litigation

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[6]The affidavits submitted by Respondents do not mention whether Tri-State paid its own legal fees in this case.

[7]MSHRC issued another decision with the same holding on December 20, 1989. *See Beaver Creek Coal Co.*, 1987-90 CCH OSHD ¶ 28,778 (No. 88-145-R, 1989).

expenses from the Secretary in Commission contest and civil penalty proceedings." *Id*. at p. 37,867. The Secretary further notes the decision in *Rushton* was based on the doctrine of sovereign immunity, which precludes attorney fees and costs from being taxed against an agency of the United States without Congressional authorization. Finally, the Secretary notes that MSHRC found that the EAJA is a clear expression of Congress' waiver of sovereign immunity for the purpose of compensating eligible parties for the costs of litigation and that in setting the size and dollar eligibility limits in the EAJA Congress determined that sovereign immunity was not waived with respect to entities with a size or net worth above those limits. *Id*. at pp. 37,867-68. The Secretary also cites to *BFW Constr. Co.*, 16 BNA OSHC 1065, 1991-93 CCH OSHD ¶ 29,917 (No. 91-1214), a Commission administrative law judge decision denying an application for attorney fees pursuant to Rule 11 based on the *Rushton* decision and a Commission decision issued before the enactment of the EAJA holding it was without authority to assess costs against any party. *See John W. McGowan*, 5 BNA OSHC 2028, 2029, 1977-78 CCH OSHD ¶ 26,268, p. 26, 811 (No. 76-1308, 1977, *aff'd sub nom. McGowan v. Marshall*, 604 F.2d 885 (5th Cir. 1979). In view of these decisions, I conclude the Rule 11 provision for attorney fees does not apply to Commission proceedings. Respondents' application for attorney fees pursuant to Rule 11 is therefore denied.

Irving Sommer
Chief Judge

Date: