United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: April 9, 2008

TO : Frederick Calatrello, Regional Director
Region 8

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Industrial Energy Systems, Inc. 530-6000
Cases 8-CA-37472 and 8-CA-37474 530-6001-2500
Roofers, Local 44 590-5001-5000
(Industrial Energy Systems, Inc.) 530-6067-4001-1750
Case 8-CB-10867 530-6067-6000-1200

This case involves the Employer's legal obligations stemming from a project labor agreement to which the Employer is not a signatory, but is an addendum to its construction contract with the general contractor, and required the Employer to "abide by the terms" of certain applicable unions' collective-bargaining agreements. Specifically, the Region submitted this case for advice as to whether the PLA created a Section 9(a) relationship between the Employer and the charging party unions such that the Employer's refusal to furnish information and its failure to hire through the hiring hall violated Section 8(a)(5).

We conclude that neither the language of the project labor agreement nor any other evidence demonstrates that the Employer agreed to enter into a collective-bargaining relationship with either of the charging party unions, and accordingly, there can be no basis for the 8(a)(5) charges.

FACTS

In the summer of 2007, MetroHealth System Board of Trustees ("Metrohealth") executed a project labor agreement (the "PLA") with 18 unions in the Cleveland Building and Construction Trades Council (the "BCTC"). The PLA included a union signatory clause and covered three major roofing projects to be performed at one of the hospitals in Metrohealth's healthcare system.

On September 5, 2007,[1] Industrial Energy Systems, Inc. (the "Employer"), a non-union roofing and siding contractor, entered into a construction contract with

[1] All dates are 2007 unless noted otherwise.

Metrohealth. The construction contract incorporated the PLA between Metrohealth and the BCTC as an addendum.

On September 25, Metrohealth executed an amended PLA with 16 of the 18 unions in the BCTC, including the Roofers Local Union No. 44 and the Operating Engineers Local 18. The amended PLA limited the worksite to one of the three roofing projects at the hospital known as the "Combined Hamann and Bell Greve/CT Roof Project." The only unions involved on this project were the Roofers, Operating Engineers, and Sheet Metal Workers. The relevant provisions of the amended PLA state:

> A. The scope of this Agreement will apply to all work done in connection with the construction of the project....Once work is complete in a specific area on the project, and accepted by [Metrohealth], the Agreement shall no longer be in effect for that specific area.
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> B. The conditions of this Agreement shall be binding upon all project contractors and their subcontractors (together referred to as "Employers"). [Metrohealth] shall require that all work be performed by Employers who are bound or agree to abide by the terms and conditions of a collective bargaining agreement with the appropriate craft union signatory to this Agreement....

The amended PLA retroactively became an addendum to the construction contract between the Employer and Metrohealth and replaced the earlier PLA. While paragraph B of the amended PLA references "collective bargaining agreements", none were included as exhibits or otherwise attached to the amended PLA. The amended PLA did not include a unit description or any recognition language. The Employer was not a signatory to either PLA.

On October 3, the Employer began work on the roofing project. On October 5, the Employer filed RM petitions naming the Roofers and Operating Engineers (hereafter collectively "the Unions"). The Employer's asserted basis for filing the RM petitions at the time was that the amended PLA, requiring it to "abide by" the terms of the Unions' collective-bargaining agreements, created an 8(f) contract and relationship with the unions.

On October 6, the Operating Engineers learned that one of the Employer's employees was operating a boom truck to perform work on the roofing project. The employee had not been referred through the hiring hall as required under the

Operating Engineers' collective-bargaining agreement with The Construction Employers Association.[2]

On October 8, the Roofers requested the Employer to provide it with the names, contact information, and job classifications of its employees working on the roofing project. The Employer initially agreed to provide the information, but later declined stating that it was not obligated to do so based on the Unions' shared position that the RM petitions should be dismissed because no collective-bargaining agreement existed between the Employer and the Unions.

On October 16, the Unions filed the instant 8(a)(5) charges, respectively, alleging that the Employer refused to provide information and failed to hire through the hiring hall. The RM petitions are blocked by these unfair labor practice charges.

The Unions and the Employer maintain differing views of the legal obligations stemming from the amended PLA. However, neither the Employer nor the Unions assert a collective-bargaining agreement or relationship exists between the Employer and the Unions. Generally, the Unions assert that although the Employer is not a signatory to the amended PLA, its construction contract with Metrohealth requires it to "abide by" the terms of the amended PLA. There is no provision in the Roofers' collective-bargaining agreement regarding information requests.[3] However, the Roofers assert that, as a third party beneficiary to the construction contract, it has the right to enforce the provisions of its collective-bargaining agreement (which is referenced by the PLA) and accordingly, in order to monitor the Employer's compliance with its collective-bargaining agreement it has the right to the information requested. The Operating Engineers likewise assert that the terms of the amended PLA obligate the Employer to "abide by" its collective-bargaining agreement which requires the Employer to utilize its hiring hall to obtain workers.

The Employer argues it has no statutory duty under Section 8(a)(5) to provide the information requested or to use the hiring hall because it does not have a collective-bargaining agreement with either of the Unions. The amended PLA, the Employer argues, merely requires it to "agree to abide by" the terms of the underlying applicable

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[2] Neither Metrohealth nor the Employer is a member of The Construction Employers Association.

[3] Neither Metrohealth nor the Employer are signatory to the Roofers' collective-bargaining agreement.

collective-bargaining agreements but does not make it a signatory to an agreement with either of the Unions. The Employer now maintains that its reason for filing the RM petitions was for the Region to make a determination that it does not have a collective-bargaining relationship with the Unions. In a subsequent position statement, the Employer argues the amended PLA was not a Section 8(f) agreement and has requested that the RM petitions be dismissed.

ACTION

We conclude that the 8(a)(5) charges should be dismissed, absent withdrawal, because the evidence is insufficient to demonstrate that the Employer agreed to bind itself to the Unions' respective collective-bargaining agreements. Accordingly, the Employer has no statutory obligation under Section 8(a)(5).[4]

In the construction industry, parties may create a bargaining relationship pursuant to either Section 9(a) or 8(f) of the Act.[5] However, in the absence of evidence to the contrary, the Board presumes that the parties intend their relationship to be governed by Section 8(f), rather than Section 9(a).[6] The parties involved here are all engaged in the construction industry. The Employer is a roofing and siding contractor, and the work on the roofing project falls under the jurisdiction of the Roofers, Operating Engineers, and Sheet Metal Workers unions. Accordingly, Section 8(f) is presumed to govern the parties.

An employer that is a party to a Section 8(f) agreement enters into a 9(a) relationship with the union for the term of the agreement. Accordingly, during the term of the 8(f) agreement, the employer agrees to

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[4] We agree with the Region that because there is no collective-bargaining agreement between the Employer and either of the Unions, there can be no applicable union security clause so the Beck charge filed in case 8-CB-10867 should also be dismissed.

[5] Reichenbach Ceiling & Partition Co., 337 NLRB 125, 126 (2001).

[6] Reichenbach Ceiling & Partition Co., 337 NLRB at 126, Hudson River Aggregates, Inc., 246 NLRB 192, 199 (1979), enfd. 639 F.2d 865 (2d Cir. 1981); Painters Local 1247 (Indio Paint), 156 NLRB 951, 957 (1966).

recognize the union as the exclusive bargaining representative of its employees and to be bound by the terms and conditions of that union's collective-bargaining agreement.[7]

A collective-bargaining agreement permitted by Section 8(f) is enforceable through Sections 8(a)(5) and 8(b)(3) of the Act.[8] Section 8(a)(5) states, "[i]t shall be an unfair labor practice for an employer...to refuse to bargain collectively with representatives of his employees subject to the provisions of section 9(a)." Thus, as is relevant here, an employer's duties that arise under Section 8(a)(5) include supplying the union with information requested to aid its efforts in monitoring compliance with its collective-bargaining agreement,[9] and adhering to the hiring hall procedures set forth in the union's collective-bargaining agreement. Section 8(a)(5) makes clear that the obligations of that section run solely to the bargaining representative. Thus, if the union is not the bargaining representative, the employer's statutory duties under Section 8(a)(5) are not triggered and it cannot be found to have violated the Act.

We conclude that neither the language of the PLA nor any other evidence demonstrates that the Employer agreed to be bound to the Unions' respective collective-bargaining agreements pursuant to either Section 8(f) or 9(a) of the Act. Accordingly, without the existence of a bargaining relationship created by virtue of an 8(f) agreement, or otherwise, the Employer had no statutory bargaining obligation under Section 8(a)(5) and cannot be said to have violated the Act.

The Employer and Metrohealth are signatories to a construction contract to which the amended PLA is an addendum. In turn, the PLA requires employers to "abide by" the terms of the underlying applicable collective-bargaining agreements. No collective-bargaining agreements are included as exhibits or otherwise attached to the amended PLA. The Unions and Metrohealth are signatories to the PLA; however, the Employer is not. Under these circumstances, while the Employer is bound to the terms of the PLA, the PLA's "abide by" language with regard to the

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[7] John Deklewa & Sons, 282 NLRB 1375, 1386 (1987), enfd. 843 F.2d 770 (3d Cir. 1988), cert. denied 488 U.S. 889 (1988).

[8] Id.

[9] W.B. Skinner, Inc., 283 NLRB 989, 990 (1987) citing NLRB v. Acme Industrial Co., 385 U.S. 432 (1967).

underlying collective-bargaining agreements is insufficient to bind the Employer as a signatory to any collective-bargaining agreement. Arguably, at most, the PLA requires the Employer to apply the terms of the collective-bargaining agreement to its employees working on the project, but it does not bind the Employer to recognize either of the Unions. The amended PLA does not include a unit description or recognition language of any kind to support the finding that the Employer agreed to recognize the Unions as 9(a) representatives of its employees.[10] Further, despite filing the instant 8(a)(5) charges, neither of the Unions maintain that there is a collective-bargaining agreement or relationship with the Employer. In sum, because there is insufficient evidence that the Employer agreed to enter into a collective-bargaining relationship with either of the Unions, its refusal to provide information and failure to use the hiring hall did not violate the Act.

Accordingly, the Region should dismiss the 8(a)(5) charges, absent withdrawal.

B.J.K.

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[10] Compare, Horizon Group of New England and Southern New Jersey Laborers Local Union No. 1153, 2005 WL 2346552, 22-CA-26318, JD(NY)-43-05 (ALJD dated Sept. 21, 2005) at 2 (PLA included provisions requiring benefit contributions, referrals for work, and supremacy clause and required employers to "agree to be bound by" attached collective-bargaining agreements, creating bargaining relationship between employer and union such that the employer violated 8(a)(1) and (5) by failing to apply the terms and conditions of the collective-bargaining agreement); Pro-Spec Painting, Inc., 2004 WL 1055127, 6-CA-33611, JD(NJ)-40-04 (ALJD dated May 6, 2004) at 9 (PLA, which included recognition clause, was collective-bargaining agreement and expressly controlled hiring on the subject project). Also compare Quality Building Contractors, 342 NLRB 429, 429 and 430 n.5 (2004)(8(f) employer required to provide information to union; parties' 8(f) agreement included a recognition clause).