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

Advice Memorandum

DATE: September 15, 2000

TO : Paul Eggert, Regional Director
Region 19

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice 506-6090-1900
512-5006-5010

SUBJECT: Marpac Construction, Inc. 524-0133-6200

Case 19-CA-26799

This case was submitted for advice on whether a general contractor: (a) violated Section 8(a)(1) of the Act when, as a condition of a unionized subcontractor obtaining a construction contract, it (1) demanded that the Union agree not to organize employees of a nonunion subcontractor; (2) demanded that the Union agree that the employees employed by the unionized subcontractor would not discuss unionization with employees of a nonunion subcontractor working on the same site; and (3) threatened to refuse to award the contract to the unionized subcontractor if the Union failed to agree to its conditions; and (b) violated Section 8(a)(3) and (1) of the Act when it refused to award the contract when the Union did not acquiesce to its demands.

FACTS

Marpac Construction, Inc. (Marpac or the Employer) is the general contractor on a Seattle construction project consisting of a large grocery store, smaller retail stores, and apartments. In about December 1998, R. Martin Electric, Inc. (RME), an electrical contractor, which employed an average of 14 electricians, submitted a design/build bid to Marpac for the commercial construction. Another contractor, Rob's Electric (Rob's), submitted a bid for the residential work. Rick Martin was the owner and president of RME, and Rob Perasso, of Rob's. Both subcontractors were nonunion at the time of the bid submissions. In June 1999, Marpac asked RME to proceed with the store's electrical design.

In about August 1999, RME, anticipating the need for more employees for the Marpac job, began negotiating with IBEW Local 46 (the Union) for a collective-bargaining agreement, in part to obtain referrals from the Union's

hiring hall. Perasso, Rob's owner, upon hearing of the negotiations between RME and the Union, informed Martin that RME's status as a union contractor would present problems. Perasso was opposed to union electricians working on the same site with his nonunion electricians. To underscore this opposition, Marpac's construction manager, Herman Setijono, separately informed Martin of Perasso's opposition to union electricians on the site. Following these contacts, in early to mid September, Martin mentioned to the Union's organizer, Greg Boyd, that becoming a union signatory might pose problems for the Marpac project because of the close working relationship on the site with a nonunion contractor.

On about October 1, 1999, RME entered into a written agreement with the Union. Shortly thereafter, at a meeting with Union representatives and the RME journeymen and apprentices, Martin jokingly stated to Boyd, the union organizer, in the presence of some employees, that the affiliation with the Union probably would cost RME the Marpac work. When Boyd asked Martin what he meant, Martin said that Marpac was leery of having RME on the project with Rob's nonunion employees. An employee then asked Martin what he meant, because he was to work at the Marpac job. Martin told the employee not to worry because he was having discussions with Marpac.

In mid October, Perasso and Setijono each again called Martin. They each stated that Rob's had a problem with RME's union contractor status because they feared the Union would target Rob's electricians.

In early November, Setijono and one of Marpac's owners, Donald Mar, asked Martin if the Union would agree to refrain from organizing on the site. Martin declined to speak for the Union, but referred them to Union Organizer Boyd. Mar later notified Martin that he was seeking a written agreement from the Union not to organize the site.

On November 12, Mar sent a copy to Martin of a note Mar had faxed that day to a regional association of independent grocers. In that note, Mar stated that Marpac had asked "R. Martin to ask the electrical union to state in writing that they or their members will not harass, make organizing attempts or picket the project." Mar further stated that if RME could not obtain the Union's cooperation, Marpac would "need to seek out other qualified electrical contractors." That same day, Mar faxed a letter to Boyd stating that Marpac had selected RME to be the electrical subcontractor for the commercial work, and that Marpac "would very much like to keep our subcontractor team intact . . . ." He further stated that because of RME's

"change of status to a signatory contractor," Rob's was "concerned about having both union and nonunion electrical contractors on the same site," and therefore, Marpac had told both RME and Rob's that Marpac would seek the Union's "written promise not to attempt to organize, leaflet or picket the job site."

A few days later, Union Organizer Boyd met with Setijono and asked what the Union needed to do to ensure that RME continued on the project. Setijono told him that the Union had to comply with the terms of Mar's November 12 letter to Boyd. When Boyd asked whether RME would lose the job if the Union did not agree, Setijono replied, "it's leaning that way." When Boyd asked whether Marpac was asking RME's employees to stay away from and not speak to Rob's employees, Setijono responded that that was exactly what Marpac wanted. Setijono agreed to put Marpac's requirements in writing for Boyd.

On November 19, Marpac faxed a proposed memorandum of understanding between Marpac and the Union to the Union for its signature. Under that draft agreement, the Union was to agree that, "whereas RME, a union contractor, and Rob's Electric, a nonunion contractor, had both been awarded contracts," RME and its employees would "respect" Rob's "labor affiliation[]." Further, Marpac's proposal asked that, subject to RME "being awarded a subcontract," the Union would agree: (1) "not to engage in organizing activities against non-union electricians employed at [the] job site;" (2) "not to leaflet or picket [the] job site for the duration of the project;" and (3) "not to follow or contact non-union electricians on [the] job site for the duration of the project."

In response, the Union that same day refused to sign the agreement. The Union explained that to do so would violate a stated goal of the Union's constitution, to organize all electrical workers, and would undermine the Union's efforts to train members to educate unrepresented employees about representational rights. Marpac never responded.

On about November 29, Martin asked that Marpac inform him no later than December 3 whether it was going to award RME the subcontract. Martin referred to the written agreement with the Union having been a prerequisite to RME's obtaining the contract and the Union's refusal to sign it. Martin received no response. Next, Martin learned that Marpac had asked three nonunion contractors to use Martin's electrical designs to prepare bids. Martin wrote to Marpac stating he assumed RME would not be allowed to

work because others were being asked for bids. Marpac did not respond.[1]

Some of RME's employees were aware that Rob's did not want RME's employees organizing employees on the site, and therefore were not surprised when Marpac canceled the subcontract. It had been rumored for weeks that the Union's organizing was a problem.

ACTION

We conclude that: (1) Marpac did not violate Section 8(a)(1) when it demanded that the Union agree to forgo organizing or contacting Rob's employees; (2) Marpac violated 8(1) when it demanded that the Union agree to a prohibition on RME employees discussing unionization with Rob's employees; (3) Marpac violated Section 8(a)(1) when it threatened to cancel RME's subcontract if the Union did not agree to Marpac's terms; and (4) Marpac did not violate 8(a)(3) and (1) when it withdrew, or refused to offer, the subcontract to RME.

Section 8(a)(1) allegations

(1) Marpac's demand that the Union agree to cease or forgo any efforts to organize the Rob's Electric employees does not unduly restrict Section 7 rights and therefore does not violate Section 8(a)(1).

An agreement that provides that a union will not seek to organize or represent particular units of employees is binding, so long as that agreement is express and limited in duration.[2] In finding such an agreement "a permissible limitation on the employees' right to choose a collective-bargaining representative," the Board noted that "the exercise of the right of given employees to choose any representative they desire is never literally unrestricted."[3] Although such a provision may decrease employee options for union representation, it does not

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[1] As the Region notes, it is unclear whether Marpac withdrew the commercial contract award offer from RME, or refused to award it, although the result is the same.

[2] Lexington Health Care Group, 328 NLRB No. 124 (June 30, 1999), slip op. at 2-3 (citing Briggs Indiana Corp., 63 NLRB 1270 (1945)).

[3] Lexington Health Care Group, slip op. at 2.

cause complete disenfranchisement when other unions are free to organize the employees. If the Union here agreed to such a restriction, the restriction would not foreclose other unions from attempting to organize the Rob's Electric employees or from filing a representation petition.

Although we have found no case where the Board has considered whether a request for this type of "minor limitation" on organizing[4] is unlawful, we conclude that because the agreement itself is not "an undue encroachment on rights guaranteed by Section 7,"[5] and the Board will enforce such a contract, an employer's request that a union agree to enter into one does not violate the Act. Accordingly, the Region should dismiss this allegation, absent withdrawal. This issue is distinct from, as discussed below, the questions whether it is unlawful for the Employer to demand that the Union agree to waive the employees' right to discuss unionization or to threaten not to award the contract.

(2) Marpac did violate 8(1) when it demanded that the Union agree to a prohibition on RME employees discussing unionization with Rob's employees at any time or place. As the Region states, Marpac proposed a limitation not just on the Union's right to organize the Rob's employees, but also a limitation on the RME employees discussing unionization with other employees. Thus, as shown by Mar's November 12 letter, Setijono's conversation with Boyd, and Marpac's failure to respond to the Union's statement that it could not agree to Marpac's demand because it would have required the members not to organize, Marpac was demanding not just that the Union forgo organizing, but that the Union agree to bar employees' independent actions to organize Rob's employees on the site or elsewhere.

An overbroad no-solicitation, no-distribution rule, as a significant impairment of employees' exercise of their Section 7 rights, is unlawful.[6] Unlike a union waiver of its right to organize certain employees, a union agreement to waive employees' right to solicit other employees would not serve as a defense for the employer or render the rule

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[4] Id. at 2, n.7.

[5] Allis-Chalmers Mfg. Co., 179 NLRB 1, 3 (1969).

[6] See Republic Aviation Corp., 324 U.S. 793, 804 (1945); Our Way, Inc., 268 NLRB 394 (1983).

lawful.[7] Thus, it would be unlawful for Marpac to impose such a rule, even with Union agreement.

Marpac does not escape liability because it sought to impose the rule on the RME employees, not its own, because an employer violates Section 8(a)(1) when it interferes with the Section 7 rights of any employees, including the employees of another employer, such as those of RME.[8] And the RME employees have the Section 7 right to work to better the conditions of other employees.[9] This is especially true where Marpac was attempting to interfere with the right of RME employees, who would lawfully be on the jobsite in the course of their employment, to solicit the Rob's employees.[10] Thus, Marpac could not lawfully demand that the Union agree to the abrogation of the RME employees' Section 7 rights.

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[7] NLRB v. Magnavox Co., 415 U.S. 322 (1974); The Mead Corp., 331 NLRB No. 66, slip op. at 3 (June 28, 2000)("a union may not waive the rights of employees to engage in activities by which employees may seek to change their bargaining representative, to opt for no bargaining representative, or to seek to retain their present bargaining representative")(citing NLRB v.Magnavox). See also Universal Fuels, 298 NLRB 254, 255 (1990)(union cannot waive in collective bargaining employees' rights to discuss pay or benefits).

[8] See BE & K Constr. Co., 329 NLRB No. 68, slip op at 9 (Sept. 30, 1999)("the employees whose concerted activities may be protected under Section 7 are defined by Section 2(3) to include any employees, not just those of any particular employer")(citing Eastex, Inc. v. NLRB, 437 US 556, 564 (1978)).

[9] Eastex, Inc. v. NLRB, 437 US 556, 564 (1978).

[10] See generally Gayfers Dep't Store, 324 NLRB 1246, 1249-1251 (1997)(store violates Section 8(a)(1) when it threatens subcontractor's employees working on store's premises with arrest for distributing handbills on company property in nonsales areas, during nonworking time); Fabric Services, 190 NLRB 540, 542 (1971)(company violates Section 8(a)(1) by refusing to allow another employer's employee to wear union insignia while working in the company's plant).

Marpac also cannot escape liability because it pressed the demand for the unlawful waiver on the Union, not directly on the employees. Although it is unclear whether the employees here were aware of the specific demand in the proposed agreement, the evidence shows that employees were aware of Rob's opposition to having RME's employees on the site with the nonunion employees because of the prospect of the employees organizing. Under all the circumstances, it is likely that the employees knew about Marpac's actions and would feel coerced by Marpac's demand.[11]

In sum, because it would be unlawful for Marpac to maintain an overbroad rule, it is also an unlawful interference with statutory rights to demand that the Union agree to it.[12] Accordingly, Marpac violated Section 8(a)(1) when it demanded the Union's agreement to this provision.

(3) Marpac violated Section 8(a)(1) when it threatened to refuse to award RME the subcontract if the Union did not agree that neither it nor the employees would attempt to organize Rob's employees regardless of whether the refusal itself is unlawful.[13] Just as an employer may not

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[11] See H.R. McBride Constr. Co., 122 NLRB 1634, 1635 (1959), enf'd 274 F.2d 124 (10th Cir. 1960)(community's small size meant that employees were likely to be aware of employer attacks on nonemployee union representative). See also L.C. Fulenwider, case 27-CA-10164, Advice Memorandum dated November 23, 1987 (company's antiunion threats to contractor violated Section 8(a)(1) because it could be anticipated that employees would hear about the threats (citing H.R. McBride Constr.).

[12] See, e.g., Retlaw Broadcasting Co., 310 NLRB 984, 991 (1993) (8(a)(1) violation to condition reinstatement on employee's waiver of Section 7 rights to union representation), enf'd 53 F.3d 1002 (9th Cir. 1995); Lear Siegler, Inc., 293 NLRB 446, 448 (1989)(Section 8(a)(1) violation to threaten to discipline employees for exercise of Section 7 rights that are not waived); Dews Constr. Corp., 231 NLRB 182, 188 (1977), enf'd mem. 578 F.2d 1374 (3d Cir. 1978) (8(a)(1) violation to condition rehire on employee's waiver of statutory rights).

[13] See International Shipping Association, 297 NLRB 1059, 1068 (1990)(threat by employer to terminate contract violative); Computer Assocs., 324 NLRB 285 (1997)(Board

interfere with employee statutory rights by threatening to close, even though the closing is privileged, so too Marpac could not interfere with employee rights by threatening to refuse to award the work to RME.[14]

The threat was likely to restrain and coerce RME employees because of the dramatic effect Marpac's withdrawal or cancellation of the contract would have on RME employees' jobs. And evidence shows that RME employees were aware of Marpac's threat. First, Martin, at the meeting with Boyd and the employees, informed some that becoming a union signatory might lead to losing the work. Also, some RME employees knew about Rob's opposition to their working on the same site with Rob's nonunion employees. Finally, rumors were reported in the small RME unit of about 14 employees that Marpac was going to withdraw or cancel the contract because of the RME employees' union support, and the RME employees were not surprised when Marpac did not award the contract to RME. As one employee stated, they had been hearing for weeks that their organizing presented problems.[15] In sum, the threat to withdraw or refuse to offer the contract violated Section 8(a)(1), although the actual refusal, as discussed below, did not violate the Act.

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upholds ALJ's finding that threat to terminate contract violated Section 8(a)(1), although the actual termination, absent finding of joint employer status, did not violate Section 8(a)(3)). See also L.C. Fulenwider, Case 27-CA-10164, Advice Memorandum dated November 23, 1987, p.3. See generally Island Creek Coal Co., 279 NLRB 858, 858 n.2, 864-865 (1986)(8(a)(1) violation for an independent contractor to convey to its employee a coal mine operator's threat to revoke contractual arrangement with contractor, resulting in loss of jobs, because of employee's protected union activities, although actual loss of work not an 8(a)(3) violation).

[14] See Textile Workers v. Darlington Mfg., 380 U.S. 263, 274 n.20 (1965) ("Nothing we have said in this opinion would justify an employer's interfering with employee organizational activities by threatening to close his plant, as distinguished from announcing a decision to close already reached by the board of directors or other management authority empowered to make such a decision").

[15] See cases cited in n.11, supra.

Section 8(a)(3) and (1) allegations

Marpac did not violate 8(a)(3) and (1) when it withdrew or refused to offer the subcontract to RME after the Union refused to agree to the Marpac restrictions.

It is well settled that, absent circumstances not present here, an employer may terminate its business relationship with another employer, even if it does so for discriminatory reasons, without violating Section 8(a)(1) and (3).[16]

In Computer Associates Int'l, 324 NLRB 285 (1997), the Board restated the principles set forth in Malbaff. In that case, Computer, a software manufacturer, built a facility and entered into a subcontract with Cushman & Wakefield, a real estate management company, whereby Cushman agreed to provide building engineers for the Computer facility. A union represented the Cushman engineers. Five days after the union lost a representation election among Computer's employees, Computer terminated its contract with Cushman, resulting in the discharge of the Cushman engineers. Computer hired other engineers, none of whom belonged to a union.[17]

The Board held that, absent a finding that Computer was a joint employer of the Cushman engineers, Computer's action was privileged by Malbaff, the language of Section 8(a)(3), and the legislative policies under Section 8(b) "protecting the autonomy of employers in their selection of independent contractors with whom to do business."[18] The Board further noted that there was no finding that Computer had "sought to pressure, direct, instruct, order, or

[16] Plumbers Local 447 (Malbaff Landscape Constr.), 172 NLRB 128 (1968)(employer does not unlawfully discriminate against employees, within the meaning of Section 8(a)(3), by ceasing to do business with another employer, even if motivated by the union activity of the latter's employees, because Section 8(a)(3) protects employees, not employers, from discrimination). See also Edward Carey, Trustees of UMW, 201 NLRB 368, 369 (1973). Cf. Whitewood Maintenance Co., 292 NLRB 1159, 1164 (1989)(joint employers violated Section 8(a)(3)), enf'd sub nom. Texas World Service Co. v. NLRB, 928 F.2d 1426 (5th Cir. 1991).

[17] Computer Assocs., 324 NLRB at 291-293.

[18] Computer Assocs., 324 NLRB at 286.

persuade . . . Cushman to terminate or replace the union-represented employees with nonunion employees," as the employers did in the cases upon which the ALJ relied in finding a violation.[19]

The instant case is governed by Computer Associates and Malbaff. Although Marpac conditioned the contract on the Union's agreement to forgo organizing Rob's employees and to waive RME employees' rights to discuss unionization, Marpac did not direct RME to discharge or otherwise cause the termination of the union-represented employees. Neither was Marpac the employer of the RME employees.[20] Under Malbaff and Computer Associates, Marpac's decision not to award the contract to RME, although it was based on union considerations and although it caused RME's Union-represented employees to lose work, did not violate Section 8(a)(3) and (1). Marpac was privileged to exercise its right to terminate its business relationship with RME, even if ill motivated.

We further conclude that Marpac did not independently violate Section 8(a)(1) by its decision to refuse to award the contract, as distinguished from the threat to do so, discussed above. The Board, in holding that an employer's decision to cease doing business with another employer because the other employer's employees engaged in Section 7 activities does not violate the Act, has struck a balance

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[19] Id., 324 NLRB at 286-287 (distinguishing Esmark, Inc., 315 NLRB 763 (1994)(holding company violated Section 8(a)(3) through sham closing of subsidiary's two plants and revocation of collective-bargaining agreements covering the plants); Dews Constr. Corp., 231 NLRB 182, 182 n.4 (1977), enf'd mem. 578 F.2d 1374 (3d Cir. 1977)(general contractor violated Section 8(a)(3) by causing its subcontractor to discharge an employee for union activities); Georgia-Pacific Corp., 221 NLRB 982, 986 (1975)(company violated Section 8(a)(3) by instructing construction contractor to discharge and refuse to hire strikers from another plant of its parent corporation)).

[20] There is no allegation that Malbaff is not applicable because Marpac and RME are joint or single employers. See, e.g., Computer Assocs., 324 NLRB at 287 (Board remands to ALJ to determine whether Computer and Cushman were joint employers, citing Whitewood Maintenance Co., 292 NLRB at 1164-66 & n.24). See also The Painting Co., 330 NLRB No. 136, slip op. at 9 (March 23, 3000).

between the employees' exercise of their statutory rights and the employer's right to decide with whom it does business.[21]

Accordingly, the Region should issue complaint, absent settlement, alleging that Marpac violated 8(1) when it demanded that the Union agree to a waiver of the RME employees' right to discuss unionization with Rob's

[21] See generally Textile Workers v. Darlington Mfg., 380 U.S. at 274 n.20 (Court recognized the "possibility that [its] holding [that decision to close is lawful] may result in some deterrent effect on organizational activities independent of that arising from the closing itself" but saw "no practical way of eliminating this possible consequence of [its] holding short of allowing the Board to order an employer who chooses so to gamble with his employees not to carry out his announced intention to close").

employees; and when it threatened to cancel RME's subcontract if the Union did not agree to Marpac's terms. Other allegations should be dismissed, absent withdrawal.

B.J.K.