

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

Advice Memorandum

DATE: September 18, 2006

TO : Alvin P. Blyer, Regional Director
Region 29

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

SUBJECT: Woodworks Construction Co., Inc., and 524-0117-3700
F&M Drywall Tapers, Inc., 524-0133-1200
Case 29-CA-27331 524-0133-6250
400 East Corp., 524-5017-4200
Case 29-CA-27474 524-5065
F&M Taping, Inc., and 530-4825-6700
400 East Corp., 530-6001-2500
Case 29-CA-27715 625-4417-7000

The Region resubmitted¹ these Section 8(a)(2), (3), and (5) cases, which relate to litigation presently pending before the United States Court of Appeals for the Second Circuit, for advice as to whether the general contractor lawfully terminated its subcontractor, and whether a subsidiary the general contractor subsequently created was a Burns² successor obligated to recognize and bargain with the union that represented the subcontractor's employees.

We conclude that the general contractor lawfully terminated its subcontractor, and that the Region should therefore dismiss the Section 8(a)(3) charge in Case 29-CA-27331, absent withdrawal. [FOIA Exemption 5

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FACTS

Woodworks Construction Co., Inc. (Woodworks) is a drywall and carpentry contractor. Woodworks, which typically subcontracts its drywall taping work, hired F&M

¹ The Region originally submitted Cases 29-CA-27331 and 29-CA-27474 for advice on March 31, 2006. On July 17, 2006 Advice returned them to the Region for further investigation and legal analysis. On May 31, 2006, the charge in Case 29-CA-27715 was filed, and the Region included these charge allegations in its resubmission.

² NLRB v. Burns Security Services, 406 U.S. 272 (1972).

Drywall Tapers, Inc. (F&M) to perform such work on a project in midtown Manhattan.

In July 2005,³ F&M voluntarily recognized Carpenters Local 52 (Local 52) and signed a collective-bargaining agreement effective through January 31, 2006. On September 12 Local 52 filed an election petition⁴ seeking certification.⁵ Local 52 lost the election held on September 29, but timely filed meritorious objections and prevailed in a rerun election conducted on December 14. F&M, in turn, timely filed objections to that election and on May 16, 2006 the Board issued a Decision, Order, and Direction of Third Election. The Region has not scheduled this election, however, pending resolution of the instant charges.

Woodworks is among the defendants named in a June 8, 2005 lawsuit that Drywall Tapers & Pointers of Greater New York, Local 1974 (Local 1974), filed in United States District Court for the Eastern District of New York. The district court issued a consent injunction on December 19 awarding all drywall taping work in New York City to Local 1974.⁶ Local 52 appealed the district court's order, which is currently pending before the Second Circuit.

The investigation revealed that F&M foreman and Local 52 Member Luis Moncada was told by Woodworks foreman Edward Chenicek that a court order had stripped Local 52 of jurisdiction over drywall taping work and awarded it to Local 1974, and that if he and his fellow drywall finishers were to continue work they would have to go under Local 1974. Moncada replied that he would have to speak with his supervisor, F&M's president Freddie Mendoza. When Moncada reached Mendoza, Mendoza told him that F&M could not continue at the job site because of unspecified problems. Moncada, after speaking with Mendoza, informed his co-

³ All dates are 2005 unless otherwise noted.

⁴ Case 29-RC-11235.

⁵ See General Box Co., 82 NLRB 678 (1949) (voluntarily recognized union can seek certification through a Board election).

⁶ Drywall Tapers & Pointers of Greater New York, et al. v. Bovis Lend Lease Interiors, et al., 05-CV-2746 (JG) (E.D.N.Y. Dec. 19, 2005) (unpublished amended consent injunction).

workers of the situation. Thereafter, Moncada and two others decided to resign from Local 52 and join Local 1974.⁷

F&M ceased working at the jobsite on December 19. All of F&M's approximately 15 employees working at the jobsite ultimately joined Local 1974 and briefly worked on Woodworks' payroll before 400 East was incorporated, at which time each became a 400 East employee. Woodworks admits that it terminated F&M's subcontract and that it created 400 East, which granted Section 8(f) recognition to Local 1974 in order for it to perform drywall taping work in accordance with the terms of the district court's consent injunction. Woodworks denies, however, that it ever directed F&M to terminate any of F&M's Local 52-represented workforce.

Local 52 alleges in Case 29-CA-27331 that Woodworks terminated F&M's employees on or about December 16 in violation of Section 8(a)(3). Local 52 alleges in Case 29-CA-27474 that 400 East, as F&M's successor, has refused to recognize and bargain with Local 52 in violation of Section 8(a)(5). Local 52 alleges in Case 29-CA-27715 that 400 East and F&M constitute single-, joint-, or co-employers, or alter egos, and violated Section 8(a)(2), (3), and (5) by recognizing Local 1974, forcing employees in the F&M bargaining unit to join Local 1974, and refusing to recognize or bargain with Local 52.

ACTION

We conclude that Woodworks lawfully terminated its subcontract with F&M and the charge in Case 29-CA-27331 should therefore be dismissed, absent withdrawal. [FOIA Exemption 5

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Case 29-CA-27331

It is well settled that an employer does not violate Section 8(a)(3) by ceasing to do business with another employer because of the union or non-union activity of the latter's employees.⁸ As the Board has explained, to hold

⁷ Moncada resigned from Local 52 on December 20 and joined Local 1974 on December 21. He presently works for 400 East on the subject jobsite.

⁸ See Computer Associates Int'l, Inc., 324 NLRB 285, 286 (1997), reconsidered after remand on other issues, 332 NLRB 1166 (2000), enf. denied in part on other grounds, 282 F.3d

otherwise would be inconsistent both with Section 8(a)(3)'s language, which prohibits discrimination against employees, but not against employers, and with the legislative policies underlying Section 8(b), which are aimed at protecting an employer's autonomy when selecting independent contractors with which to do business.⁹ Thus, an employer does not unlawfully encourage union membership by substituting a unionized contractor for a non-union contractor, nor does it discourage union membership by the reverse conduct, regardless of whether the contractor's employees' union status motivates the employer's decision.¹⁰ However, it is equally well established that an employer violates the Act when it directs, instructs, or orders another employer with which it has business dealings to discharge, layoff, transfer, or otherwise affect the working conditions of the latter's employees because of their union activities.¹¹ Thus, in Dews Construction, the Board found that the employer unlawfully caused its subcontractor to lay off one of its employees because he had attended a union meeting.¹²

Applying these principles here, we conclude that Woodworks lawfully terminated its subcontract with F&M. The investigation revealed that F&M's employees were advised that Woodworks had terminated F&M as a result of the consent injunction. There is insufficient evidence that Chenicek ever told Moncada to remove employees from the job. Rather, the investigation revealed that Moncada never removed any employees from the job, and that no one directed him or any other Local 52 drywall finishers to leave the jobsite or informed them that they had been laid off or terminated. Instead, after speaking with Mendoza, Moncada informed his co-workers of the situation, after which he and two co-workers decided to resign from Local 52 and join Local 1974. Moncada did not influence or know what his fellow F&M employees decided in this regard, and he went home shortly after apprising his co-workers of the consent injunction's ramifications. Accordingly, we

849 (D.C. Cir. 2002), quoting Plumbers Local 447 (Malbaff Landscape Construction), 172 NLRB 128, 129 (1968).

⁹ Computer Associates, 324 NLRB at 286.

¹⁰ Ibid.

¹¹ See Dews Construction Corp., 231 NLRB 182, 182 n.4 (1977), enfd. 578 F.2d 1374 (3d Cir. 1978) (Table), and cases cited.

¹² Id. at 182-183.

Case 29-CA-27331, et al.

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conclude that the evidence does not support the violation
alleged in Case 29-CA-27331.

Cases 29-CA-27474 and 29-CA-27715

[*FOIA Exemption 5*

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B.J.K.