

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

Advice Memorandum

DATE: September 1, 2009

TO : Dorothy L. Moore-Duncan, Regional Director
Region 4

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

SUBJECT: Metropolitan Regional Council
of Carpenters (EDIS Company),
Case 4-CE-126

584-2588
584-3740-1700
584-3740-5900
584-5000
584-5042

The Region submitted this case for advice as to whether the Union violated Section 8(e) by seeking and obtaining an arbitration award that applies the Union's contractual work preservation and subcontracting clauses to a related entity of the signatory employer, thus restricting the non-signatory's ability to subcontract on-site construction work to nonunion contractors.

We conclude that the arbitral award obtained by the Union did not create an unlawful Section 8(e) agreement. The Region should therefore dismiss the charge, absent withdrawal.

FACTS

DiSabatino is a general construction contractor in Delaware and is the union arm of a double-breasted operation wholly owned by Crystal Holdings. Of this operation, Charging Party EDIS Company operates as the nonunion general contractor. EDIS does not operate with its own employees but instead subcontracts its construction work. DiSabatino, on the other hand, employs its own employees and had a bargaining relationship with the Delaware State Regional Council of Carpenters through its membership in the Delaware Contractors' Association (DCA). The contract between the DCA and the Delaware Carpenters had a work preservation clause that required commonly controlled entities of signatory employers to be bound by the contract. However, this work preservation clause specifically exempted DiSabatino.

In 2001, EDIS contracted to perform work in southeastern Pennsylvania within the geographical territory

of the Philadelphia Metropolitan Regional Council of Carpenters (Union). EDIS initially subcontracted that work to a nonunion subcontractor but, when confronted with Union pickets, agreed to instead assign some of the work to DiSabatino's unionized workforce. In order to perform the work, DiSabatino became party to the contract between the Union and the General Building Contractors' Association (GBCA). The GBCA contract was effective until April 30, 2004 and included a work-preservation clause, which stated:

If the contractor performs on-site construction work of the type covered by this Agreement, under its own name or the name of another as a corporation, company, partnership, or other business entity including a joint venture, where the contractor through its officers, directors, partners or owners exercises directly or indirectly management control, the terms of this Agreement shall be applicable to such work.

Unlike the work-preservation clause contained in the DCA contract, the GBCA contract did not exempt DiSabatino from its application. The GBCA contract also contained a subcontracting clause which restricted subcontracting to Union contractors:

The Employer agrees that he will not subcontract any work which is covered by this Agreement that is to be done at the site of any job to which this Agreement is applicable, except to a contractor bound by the terms of this Agreement.

In September 2001, the Delaware Council and the Union merged at the direction of the Carpenters' International Union. After the merger, the Union asked the GBCA to agree to expand application of the parties' contract to Delaware and Maryland. In December 2001, the GBCA notified its employer members that it was negotiating that issue with the Union. Although DiSabatino objected to the geographical expansion of the GBCA contract into Delaware and Maryland, it did not formally withdraw from the GBCA at that time.

Subsequently, in March 2002, the GBCA agreed to the geographical expansion of its contract with the Union. The agreement specifically stated that the DCA contract would apply to work covered by that agreement until the DCA contract's expiration in 2003. In September 2002, DiSabatino formally withdrew the GBCA's authorization to bargain on its behalf. The next month, DiSabatino also withdrew the DCA's authority to bargain on its behalf and eventually notified the Delaware Carpenters that it would not renew the DCA contract when it expired in April of that

year. In response, the Delaware Carpenters filed a representation petition and were certified to represent DiSabatino's carpenters employed at jobsites in Delaware. Shortly thereafter, DiSabatino laid off its regular crew of carpenters and effectively ceased performing work.¹ DiSabatino offered foremen the option of transferring to Crystal where they would no longer be covered by a Union contract; 21 carpenters elected to transfer to Crystal where they performed the same work as they had with DiSabatino. The Union thereafter filed a grievance alleging that Crystal, DiSabatino, and EDIS are commonly controlled and are thus all subject to the work preservation clause in the GBCA contract.

The parties began arbitrating the Union's grievance in 2003. At that time, the arbitrator decided that DiSabatino was bound by the GBCA contract in Delaware through its expiration in April 2004 because DiSabatino had failed to timely withdraw the GBCA's bargaining authority. After this initial decision by the arbitrator, the parties engaged in an extended period of discovery, going to the issue of whether DiSabatino, EDIS and Crystal were commonly controlled, within the meaning of the work preservation clause. In response to a Union subpoena of relevant documents, DiSabatino stipulated that the three companies were commonly controlled. That stipulation, it averred "obviates much of [the] dispute." In a subsequent brief to the arbitrator, DiSabatino characterized its stipulation of common control as a stipulation that it had the "power to control the assignment of work by EDIS and Crystal to their own employees." When the arbitration resumed in 2007, the parties each produced evidence detailing the on-site construction work performed by EDIS and Crystal allegedly covered by the Union's contract with DiSabatino.

The arbitrator issued a final award in May 2009, in which he found that DiSabatino was bound by the DCA contract until its expiration in 2003, after which it was bound by the GBCA contract until that contract's expiration in 2004. The arbitrator also held that Crystal and EDIS were bound by the GBCA contract because of DiSabatino's stipulation that the three entities are commonly controlled. As a result, the arbitrator held that EDIS had violated the contract's subcontracting clause by subcontracting on-site construction work to nonunion contractors. The arbitrator held DiSabatino, EDIS, and

¹ The Carpenters have not alleged that the layoff was unlawful. DiSabatino has not actively performed construction work since 2003.

Crystal jointly and severally liable to the Union for that breach of contract.

EDIS asserts that the arbitrator created an unlawful Section 8(e) agreement by holding that EDIS was bound by the GBCA contract via that contract's work preservation clause. Specifically, EDIS argues that DiSabatino's stipulation that it controls EDIS and Crystal vis-à-vis their own employees is not dispositive because DiSabatino did not control the subcontractors retained by EDIS and therefore could not control the subcontractors' assignment of the work performed.

ACTION

We agree with the Region that the arbitrator's award did not create an unlawful Section 8(e) agreement. The Region should therefore dismiss the charge, absent withdrawal.

Section 8(e) makes it an unfair labor practice for a union and an employer to agree that the employer will cease doing business with another person or employer. Despite Section 8(e)'s broad language, the Board has ruled that work preservation clauses are lawful even though they have an incidental effect of limiting those with whom the signatory employer may do business.² The Supreme Court held in NLRB v. International Longshoremen's Association (ILA I) that a work preservation agreement is lawful if it meets two requirements: (1) the agreement must have as its objective the preservation of work traditionally performed by employees in the unit; and (2) the contracting employer must have the power to assign the work in question (the right of control test).³

To be lawful, the agreement's objective must be the preservation of unit work and address the labor relations of the contracting employer with his own employees.⁴ An agreement violates Section 8(e) if it is instead aimed at satisfying union objectives beyond the primary workplace.⁵

² Associated General Contractors, 280 NLRB 698, 701 (1986).

³ NLRB v. Longshoremen ILA, 447 U.S. 490, 504 (1980).

⁴ National Woodwork Mfrs. Ass'n v. NLRB, 386 U.S. 612, 644-45 (1967).

⁵ Id. at 645.

The purpose of the CBGA work preservation clause was to preserve the work performed by the employees covered by the agreement. A contractual provision has a valid work preservation objective when it requires a signatory employer that performs work covered by the contract, under its own or another identity, to do so pursuant to the contractual terms.⁶ The clause also provided for the signatory's requisite degree of control over related entities. In this regard, the clause provided for application of the CBGA to an entity over which DiSabatino exercises "direct[] or indirect[] management control." The Board has found virtually identical clauses facially valid under Section 8(e), explaining that this language "reasonably means that the signatory employer must have the right or the power effectively to control the assignment of the work of [the other] entity's employees."⁷ Indeed, EDIS and its related companies do not contest the facial validity of the GBCA work preservation clause. Accordingly, we find that the CBGA contract's work-preservation clause is not unlawful on its face.

We also agree that, given DiSabatino's stipulation that it controls assignments of work by EDIS and Crystal, the arbitrator appropriately could conclude that the application of the GBCA contract to all three entities falls within the Manganaro framework.

We reject EDIS' claim that it should not be bound to the no subcontracting clause because DiSabatino did not control the subcontractors' assignment of work.⁸ The

⁶ See Painters District Council 15 (Manganaro Corp., Maryland), 321 NLRB 158, 165-66 (1996) (a valid work preservation clause seeks to "ensure that a contractor cannot siphon off traditional unit work to a nonunion shop in order to avoid its collective-bargaining agreement with the union" by requiring a contractor who performs work through another entity to apply the contractual terms).

⁷ See, e.g., Carpenters (Manufacturing Woodworkers Ass'n), 326 NLRB 321, 323, 325 (1998) (valid work-preservation clause applied to related entities over which signatory exercised significant degree of direct or indirect ownership, management, or control); Manganaro Corp., 321 NLRB at 161-65 (same).

⁸ The GBCA contract's subcontracting clause appropriately pertains to only on-site construction work and none of the three employer entities contest their status as construction employers within the meaning of the Section

arbitrator's holding that EDIS's act of subcontracting work did not divest it of the ability to control that work, is consistent with longstanding Board law. An employer has the right to control work where "it possess[es] the authority to assign the [work] in question as it s[ees] fit."⁹ Notably, an employer cannot divest itself of control over work by taking an "active role in seeking" a "subcontract which it kn[ows] would cause it to breach its collective-bargaining contract."¹⁰ Indeed, the Board has long held that the decision to subcontract work is "a direct reflection of [the employer's] right to control this work."¹¹ Indeed, EDIS exhibited its control over the work when it initially assigned work to DiSabatino in 2001 to stop the Union's picketing of EDIS's use of nonunion contractors.

EDIS's further argument that the GBCA work preservation clause does not apply to it because there is no evidence that DiSabatino diverted work from itself to EDIS's subcontractors, is also meritless. The arbitrator specifically considered and rejected this argument. We agree. Inherent in DiSabatino's stipulation that it controls EDIS is its acknowledgement that it decided how covered work would be performed, e.g., by DiSabatino's unionized workforce or through EDIS's use of nonunion subcontractors.

In light of the above, we conclude that the arbitrator's award, which holds that EDIS was obligated to comply with the GBCA contract and violated that contract by subcontracting covered work to nonunion contractors, does not create an unlawful Section 8(e) agreement.¹²

8(e) construction industry proviso. The clause is thus privileged by the proviso.

⁹ Plumbers & Steamfitters Local 342 (Conduit Fabricators), 225 NLRB 1364, 1364 (1976).

¹⁰ Painters District Council No. 20 (Uni-Coat), 185 NLRB 930, 932 (1970).

¹¹ Conduit Fabricators, 225 NLRB at 1364 & n.4, citing Local 438 United Pipefitters (George Koch Sons), 201 NLRB 59 (1973), *enfd.* 490 F.2d 323 (4th Cir. 1973).

¹² Compare Elevator Constructors (Long Elevator), 289 NLRB 1095, 1095 (1988), *enfd.* 902 F.2d 1297 (8th Cir. 1990) (union's pursuit of grievance was coercive and had an illegal objective where union's construction of its

Accordingly, the Region should dismiss the charge, absent withdrawal.

B.J.K.

contract in arbitration would necessarily result in a Section 8(e) violation).