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

Advice Memorandum

DATE: September 28, 2005

TO : Irving E. Gottschalk, Acting Regional Director
Region 30

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

SUBJECT: Teamsters Local 200
Case 30-CE-38-1

584-1250-5000
584-1275-6733-2500
584-1275-6733-5000
584-3740-1700
584-3750

This Section 8(e) case was submitted for advice as to whether a successorship provision in a collective-bargaining agreement is facially unlawful and whether the Union reaffirmed the provision within the 10(b) period.

We agree with the Region that the provision violates Section 8(e) to the extent it precludes the signatory employer from leasing out its operations unless the lessee applies the terms of the collective-bargaining agreement. The provision thus has a cease-doing-business object and is secondary in nature. Also, the Union reaffirmed and thus "entered into" the unlawful provision within the Section 10(b) period by filing a grievance and seeking arbitration.

FACTS

R. Fredrick Redi-Mix ("Employer") delivers building materials including sand, stone and masonry cements. Until March 17, 2005,[1] it also manufactured and delivered ready-mix concrete. Teamsters Local 200 ("Union") represents the Employer's truck drivers and warehouse employees. The Union and Employer have maintained collective-bargaining agreements for about 40 years.

The current collective-bargaining agreement ("Agreement")[2] contains the following successorship clause:

---

[1] All dates are in 2005 unless otherwise indicated.

[2] The Agreement covers June 1, 2003 to May 31, 2006.

Article 5

Transfer of Company Title or Interest

5.1 This Agreement shall be binding upon the parties hereto, their successors, administrators, executors and assignees. In the event an entire operation, or any part thereof, is sold, leased, transferred or taken away by sale, transfer, lease, assignment, receivership or bankruptcy proceeding, such operation shall continue to be subject to the terms and conditions of this Agreement for the life thereof. The Employer shall give notice of the existence of this Agreement to any purchaser, transferee, lessee, assignee, etc., of the operation covered by this Agreement, or any part thereof. Such notice shall be in writing, with a copy to the Union, not later than the effective date of sale. Nothing in this Agreement shall be construed to prevent the Employer from terminating all or part of his business, following prior notice to the Union.

5.2 Acquisition, Purchase, or Merger. When two (2) or more companies merge their operations, then the employees of the respective companies shall all be placed on one (1) seniority roster in order of the earliest date of hire....

In addition, Section 3.3 of the Agreement (titled "Work Assignments") prohibits the Employer from directing or requiring non-unit employees to perform bargaining unit work, but provides that "[t]his is not to interfere with bona fide unions." Section 3.3 also prohibits the Employer from entering into any "leasing device or subterfuge of any kind to avoid or evade the terms and conditions of this Agreement."

At a meeting on February 1, the Employer informed the Union that it was negotiating with several companies to sell the ready-mix portion of the business or lease its ready-mix facilities, because that portion of the business had been losing money for three fiscal years. If the negotiations failed, the Employer stated, it planned to close the ready-mix portion of the business. In a letter dated February 17, the Employer confirmed the content of the meeting and added that the ready-mix drivers would not lose their jobs, because they would all be absorbed into the building materials portion of the business.

At a meeting on March 7, the Employer told the Union that it planned to shut down the ready-mix portion of the business on March 19 and lease the ready-mix facilities to Alby Materials, Inc., effective April 1. Alby had been one of the Employer's non-union competitors in the ready-mix industry. When the Employer stated that negotiations with Sonag Ready-Mix, a Union signatory, had fallen through, the Union responded that things would be a lot easier if the deal had gone through with Sonag. In a letter dated March 8, the Employer confirmed the content of the meeting and added that Alby was aware of the Agreement, was not affiliated with any union, and had no plans to change how it operates. The letter also stated that the Employer had asked Alby to contact the Union regarding the Union's labor relations concerns.

On March 11, the Employer leased a portion of its facility and sold certain equipment to Alby.[3] The document ("Lease") governing both the facility-lease and equipment-sale restricts Alby's use of the leased premises to the operation of a ready-mix concrete plant in full compliance with the law.[4] The Lease also requires Alby to "vigorously operate its business in a reputable and first-class manner so as to not injure the reputation of the building and/or leased premises and shall maintain adequate equipment and staff to assure a successful operation of the leased premises."[5] Under the Lease, Alby will purchase from the Employer seven mixer trucks, one wheel loader, one semi-tractor, and two bulk cement trailers.[6]

In a letter to the Employer dated March 15, the Union requested effects bargaining regarding the decision to cease the ready-mix operation. The Union also stated that Article 5 of the Agreement required the Employer to advise Alby that the operation it assumes as part of any lease agreement will continue to be subject to the terms and

---

[3] The lease is effective April 1 through March 31, 2010.

[4] Lease, §4 ("Use of Leased Premises").

[5] Ibid.

[6] Lease, Exhibit I, §1. Following the sale, the Employer still owned ten mixer trucks, one semi-tractor, and one wheel loader. The Employer has made no final decision regarding its ten remaining mixer trucks, which it has idled. The Employer still uses its remaining semi-tractor and loader in the normal course of business.

conditions of the Agreement. The letter added that the Union looked forward to having Alby become a Union-signatory ready-mix employer.

On March 24, the Union filed a grievance with the Employer, alleging that it violated Article 5 and other unspecified provisions of the Agreement by entering into a lease agreement with Alby as a subterfuge to avoid the Agreement. The grievance requested that the Agreement be enforced, that employees and other affected parties be made whole, and that the Employer cease and desist from the Lease.

By letter dated April 13, the Union informed the Employer that it was engaged in a campaign to publicize to the community and others its contention that Alby paid substandard wages and benefits. The letter added that the Union intended to communicate its message by lawful means, including primary picketing at job sites where Alby is present and at the facility the Employer leased to Alby.

The Union and Employer met on May 2 to discuss the grievance. The Union informed the Employer that it violated Article 5 by leasing its facility to Alby. The Employer reiterated that the ready-mix portion of its business had been losing money; that no employee lost his job due to the lease with Alby; that Alby would have its own entry and exit gates, office space, break room, locker room, and warehouse space; and that Alby would maintain a separate identity. The Union and Employer agreed that they were deadlocked on the grievance and the Employer suggested they go directly to arbitration. By letter dated May 26, the Union agreed to go to arbitration. To date, the parties have received a list of arbitrators but neither party has struck arbitrators from the list.

The Union began picketing the Employer's premises on June 10, from 7 a.m. to 2:30 p.m. Neither the Employer nor the employees recall what the picket signs said on June 10. The Union also picketed on June 28, from 7:30 a.m. to 11:30 a.m. The June 28 picket signs stated that drivers employed by Alby are subject to substandard wages and benefits. The Employer asserts that the Union again picketed the facility on July 15, July 22, and July 29.

ACTION

We agree with the Region that Article 5 is facially unlawful to the extent it precludes the Employer from leasing out its operations unless the lessee applies the terms of the Agreement. The provision has a cease-doing-business object, because an employer leasing operations to

a lessee is generally considered a form of doing business within the meaning of Section 8(e). It has a secondary object because, like a union-signatory provision, it is not designed to protect primary bargaining unit interests, but rather to further the Union's organizational interests. Accordingly, complaint should issue, absent settlement, alleging that the Union violated Section 8(e) by filing a grievance and seeking arbitration within the 10(b) period to enforce a facially unlawful provision.

Section 8(e) makes it an unfair labor practice for a union and an employer to enter into any contract or agreement, express or implied, where the employer agrees to cease doing business with any other person. Section 8(e) does not ban all agreements with cease-doing-business objects, but rather prohibits only those agreements directed at neutral employers, tracking the distinction drawn between lawful primary and unlawful secondary activity.[7] The touchstone of Section 8(e) is whether the agreement addresses the labor relations of the contracting employer regarding its own employees or is "tactically calculated to satisfy union objectives elsewhere."[8]

The Board generally finds that Section 8(e) does not cover agreements restricting an employer's freedom to sell or transfer a business. Thus, the sale or transfer of an enterprise is not a business transaction, but rather a substitution of one entity for another, while the business continues without interruption.[9] In other words, only a relationship between separate employers that creates the

---

[7] National Woodwork Mfrs. Ass'n v. NLRB, 386 U.S. 612, 620, 623-639 (1967); Sheet Metal Workers Local 91 (Schebler Co.), 294 NLRB 766, 770 (1989), enfd. in part 905 F.2d 417 (D.C. Cir. 1990).

[8] National Woodwork Mfrs. Ass'n v. NLRB, 386 U.S. at 644-645. See also Retail Clerks Local Union 1288 (Nickel's Pay-Less Stores), 163 NLRB 817, 818-819 (1967), enfd. in pertinent part 390 F.2d 858, 861-62 (D.C. Cir. 1968).

[9] Operating Engineers Local 701 (Cascade Employers Assn.), 221 NLRB 751, 752 (1975); Machinists District 71 (Harris Truck & Trailer), 224 NLRB 100, 103 (1976); Teamsters Local 814 (Bader Bros.), 225 NLRB 609, 609 fn. 1 (1976); Mine Workers (Lone Star Steel), 231 NLRB 573, 574-75 (1977), enfd. in pertinent part 639 F.2d 545 (10th Cir. 1981), cert. denied 450 U.S. 911 (1981).

potential for enmeshing one in the other's disputes is considered "doing business."[10]

On the other hand, the Board generally finds leasing all or part of a business to be "doing business" under Section 8(e). Leasing operations is different from selling a business enterprise, at least when the employer retains an interest in the property and places conditions on its use in the terms of the lease.[11] Unlike a sale, there is a continuing business relationship between the employer and the lessee.[12] They are dependent business associates; each is capable of threatening termination of the relationship in order to force the other to accede to union demands.[13]

The secondary nature of union-signatory clauses, which require an employer to cease doing business with another company unless that company signs or applies a union contract, is also well established.[14] Thus, by requiring

---

[10] Amax Coal Co. v. NLRB, 614 F.2d 872, 885-86 (3d Cir. 1980), enfg. 238 NLRB 1538 (1978), revd. on other grounds 453 U.S. 322 (1981). In certain circumstances, however, selling capital assets is "doing business" under Section 8(e). Thus, when a particular type of transaction, although creating no continuing relationship, is likely to recur in the future, the union could pressure one employer not to engage in such transactions in order to achieve victory in a dispute with another employer. See National Maritime Union (Commerce Tankers), 196 NLRB 1100, 1100-1101 (1972), enfd. 486 F.2d 907 (2d Cir. 1973), cert. denied 416 U.S. 970 (1974) (sale of ship held "doing business," because such sales regularly occurred in the normal course of business in the maritime industry).

[11] See, e.g., Hotel & Restaurant Employees Local 531 (Verdugo Hills Bowl), 237 NLRB 1204, 1207 (1978), enfd. 623 F.2d 61 (9th Cir. 1980); Mine Workers Local 1854 (Amax Coal Co.), 238 NLRB at 1625.

[12] NLRB v. Hotel & Restaurant Employees Local 531 (Verdugo Hills Bowl), 623 F.2d at 66; Amax Coal Co. v. NLRB, 614 F.2d at 887.

[13] Ibid.

[14] Retail Clerks Local 1428 (Jones & Jones, Inc.), 155 NLRB 656, 660 (1965) (union-signatory clauses have been

the application of an entire contract, including noneconomic provisions, union-signatory clauses do not protect unit jobs but are directed at furthering general union objectives.[15]

Applying the above principles, Article 5 has a cease-doing-business object insofar as it restricts leasing, and its union-signatory requirement evinces a secondary object rather than a primary work-preservation object. The Board has consistently found similarly-worded successorship clauses to be facially unlawful.[16] Article 5 therefore violates Section 8(e).

"uniformly struck down as secondary and within the prohibitory terms of Section 8(e)"); Retail Clerks Local 1288 (Nickel's Pay-Less Stores), 163 NLRB at 819 ("Typical of such proscribed provisions are those which limit subcontracting to employers who recognize the union or who are signatory to a contract with it"); NLRB v. Teamsters Local 525 (Helmkamp Constr.), 773 F.2d 921, 924 (7th Cir. 1985) (union-signatory clauses are "presumptively invalid"); Orange Belt District Council of Painters No. 48 (Calhoun Drywall Co.) v. NLRB, 328 F.2d 534, 539 (D.C. Cir. 1964).

[15] Food and Commercial Workers Local 1442 (Ralph's Grocery), 271 NLRB 697, 697 (1984); Hotel & Restaurant Employees Local 531 (Verdugo Hills Bowl), 237 NLRB at 1206-1207. But see Liquid Carbonic, 277 NLRB 851, 851 (1985) (provision requiring employer to ensure that whoever takes over operation must apply employer's entire collective-bargaining agreement and hire its employees did not violate Section 8(e)).

[16] Chicago Dining Room Employees Local 42 (Clubmen, Inc.), 248 NLRB 604, 607 (1980) (unlawful clause stated that if "a portion of any Employer's facility is sold, leased..., such purchaser-lessee...shall as a condition precedent...execute this Agreement"); Teamsters Local 291 (Lone Star Industries), 291 NLRB 581, 583 (1988) (unlawful clause stated that contract "shall be binding upon the [parties'] ...successors, purchasers, lessees...."); Hotel & Restaurant Employees Local 274 (Sheraton University Hotel), 326 NLRB 1058, 1059 (1998) (unlawful clause stated that contract's terms "shall be applicable to and binding upon any successor,...lessee...of the Employer"); W. R. Mollohan, Inc., 333 NLRB 1339, 1340 (2001), enf. denied in

We recognize that in Harris Truck[17] and Bader Bros.,[18] the Board found successorship clauses restricting leasing, as well as selling a business, to be lawful on the grounds that they did not restrict "doing business." In those cases, however, the Board spoke only in terms of a sale or a purchase, and did not concern itself with the clauses' other terms that reached transactions other than sales. When explicitly faced with whether restrictions on leasing are within the scope of Section 8(e), the Board has consistently concluded that they are, distinguishing leasing from selling as detailed above.[19] In light of the more recent Board cases, the holdings of Harris Truck and Bader Bros. should be limited to contracts restricting the sale of an enterprise or portion of an enterprise.[20] Accordingly, Harris Truck and Bader Bros. do not preclude the issuance of a Section 8(e) complaint here.

The D.C. Circuit's decision in Painters Local 970 (W. R. Mollohan, Inc.) v. NLRB[21] does not require a different result. There, the successorship clause stated:

> In the event the Employer's business is, in whole or in part, sold, leased, transferred, or taken over by sale, transfer, lease, assignment, receivership, or bankruptcy proceedings, such business and operation

---

pertinent part 309 F.3d 1 (D.C. Cir. 2002) (unlawful clause stated that if "the Employer's business is, in whole or in part, sold, leased...or taken over by sale, lease...," then it "shall continue to be subject to" the contract).

[17] Machinists District 71 (Harris Truck & Trailer), 224 NLRB at 103.

[18] Teamsters Local 814 (Bader Bros.), 225 NLRB at 609 fn. 1.

[19] See, e.g., Hotel & Restaurant Employees Local 531 (Verdugo Hills Bowl), 237 NLRB at 1206-07, and cases cited in n.16, supra.

[20] See Hotel & Restaurant Employees (Ogden Services Corporation), Case 5-CE-88, Advice Memorandum dated May 13, 1993.

[21] 309 F.3d 1 (D.C. Cir. 2002), denying enf. in pertinent part 333 NLRB 1339 (2001).

> shall continue to be subject to the terms and conditions of this Agreement for the life thereof.
>
> It is understood by this provision that the parties hereto shall not use any leasing or other transfer device to a third party to evade this agreement.

The Board had concluded that the clause, insofar as it covered leases, violated 8(e) because it required the entire collective-bargaining agreement to apply regardless of whether the unit employees were retained.[22] The court disagreed; instead it found that the provision had a primary object because it was a "successorship clause, explicitly said to take effect only when 'the Employer's business is, in whole or in part,' transferred to another entity."[23] In finding a primary object, the court also referred to the clause's prohibition on leasing devices designed to evade the contract.[24]

The court did not explain its reasoning in detail. Its emphasis on the term "successorship," however, suggests that it may have read the clause as a term of art that incorporated the limitations of the successorship doctrine, that is, that an employer is not a successor unless a majority of the unit employees worked for the predecessor employer.[25] The court appears to have relied on this factor, as well as the reference to leasing devices designed to evade the agreement, in rejecting the applicability of the conventional union-signatory clause rationale for finding a secondary object.[26]

To the extent the court's decision in W. R. Mollohan can be read to validate all successorship clauses that

---

[22] 309 F.3d at 7.

[23] Ibid.

[24] Ibid.

[25] Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27, 46 & fn. 12 (1987); NLRB v. Burns Int'l Security Services, Inc., 406 U.S. 272, 278-279, 280 (1972).

[26] Although the court found the successorship provision to have a primary work-preservation object, it did not reject the Board's finding that leasing operations is "doing business" under Section 8(e).

require leased operations to go to union signatories, it is at odds with longstanding Board precedent.[27] But even if the court's analysis is correct, which we would question, the instant case can be distinguished on three grounds. First, unlike the provision in W. R. Mollohan, Article 5 here does not contain language limiting its application to leases aimed at evading the Agreement. Although Article 3 prohibits "leasing device[s] or subterfuge of any kind to avoid or evade" the Agreement, there is no indication it limits the meaning of Article 5.[28] Second, Article 5 is titled "Transfer of Company Title or Interest," not "Successorship." Assuming the D.C. Circuit views "successorship" as a term of art incorporating the requirements of Burns and Fall River Dyeing, Article 5

---

[27] Chicago Dining Room Employees Local 42 (Clubmen, Inc.), 248 NLRB at 607; Teamsters Local 291 (Lone Star Industries), 291 NLRB at 583; Hotel & Restaurant Employees Local 274 (Sheraton University Hotel), 326 NLRB at 1059; W. R. Mollohan, Inc., 333 NLRB at 1340. Further, the court's decision in W. R. Mollohan is distinguishable from Bader Bros. There, the successorship clause was found to have a primary work-preservation object because it "require[d] a purchaser of its operations...to assume the obligations of the...contract, which undeniably included the retention in the purchaser's employ of the unit employees of Bader Warehouses on the established seniority list." (225 NLRB at 614, emphasis added.) As discussed above, the Board in Bader Bros. did not concern itself with the clause's restrictions on leasing, and the successorship provisions in W. R. Mollohan and the instant case did not require lessees to hire unit employees.

[28] See Teamsters Local 291 (Lone Star Industries), 291 NLRB at 584 (rejecting contention that facially lawful provision precluding use of a "leasing device to a third party to evade" the contract validated a separate successorship provision requiring leased operations to go to union-signatory employers). See also Mine Workers Local 1854 (Amax Coal Co.), 238 NLRB at 1625-26 (second paragraph of "leasing-licensing out" provision, which contained union-signatory requirement, found secondary and unlawful, even though first paragraph of same provision contained language prohibiting employer from leasing out coal lands or facilities to avoid the contract; first paragraph did not contain language limiting second paragraph).

would certainly have a broader meaning. Third, unlike here, W. R. Mollohan involved an 8(f) agreement, and the anti-leasing language in the successorship clause arguably served the same function as union-signatory subcontracting clauses that are lawful under the construction industry proviso to Section 8(e).[29] Neither the Board nor the court in W. R. Mollohan addressed that issue, because it was not timely raised by the union.

Finally, the Union reaffirmed, and thus "entered into," the facially unlawful Article 5 within the 10(b) period by filing a grievance and seeking arbitration alleging that the Employer violated Article 5 by executing the Lease with Alby.[30] [*FOIA Exemptions 2 and 5*

.[31] [*FOIA Exemptions 2 and 5*

.]

B.J.K.

---

[29] See Donald Schriver, Inc. v. NLRB, 635 F.2d 859, 875 (D.C. Cir. 1980), cert. denied 451 U.S. 976 (1981) (in construction industry, secondary union-signatory clauses can serve legitimate work preservation interests).

[30] Carpenters (Novinger's), 337 NLRB 1030, 1030, 1035 (2002), enfd. 352 F.3d 831 (3d Cir. 2003); Teamsters Local 957 (Northwood Stone), 298 NLRB 395, 399 (1990), enfd. 934 F.2d 732 (6th Cir. 1991); Teamsters Local 467 (Mike Sullivan & Associates), 265 NLRB 1679, 1681 (1982), enfd. 723 F.2d 916 (9th Cir. 1983).

[31] [*FOIA Exemptions 2 and 5*
.]