

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

Advice Memorandum

DATE: December 27, 2004

TO : James J. McDermott, Regional Director
Region 31

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

SUBJECT: Stater Brothers Markets 518-4040-2500
Cases 31-CA-27009; 31-CB-11675 530-5770-2583
530-5770-3100
530-5791

This case was submitted for advice on whether "unusual circumstances" justify the Employer's withdrawal from a multiemployer unit after the parties had reached impasse, such that the Employer and the Unions could lawfully negotiate an unconditional single employer unit agreement; and, if the Employer's withdrawal was unlawful, whether the Employer also violated Section 8(a)(2) by bargaining and executing a collective bargaining agreement with the Unions for an inappropriate unit.

We conclude that the impasse did not constitute "unusual circumstances." Thus, the Employer violated Section 8(a)(5) by withdrawing from the multiemployer unit and by negotiating and executing a collective bargaining agreement with the Unions, and the Unions violated Section 8(b)(3) by negotiating and executing the agreement with the Employer. Because the Employer's bargaining and contract execution with the Unions constitute an independent Section 8(a)(5) violation, it is unnecessary to pursue a novel Section 8(a)(2) theory.¹

FACTS

A multiemployer association, ARCA,² and Local Union Nos. 409³ and 398 of the United Association of Journeymen

¹ The issue of the warrant for Section 10(j) relief has been referred to the Injunction Litigation Branch and will be addressed by separate memorandum.

² In 2002, the original multiemployer association, IRCA, dissolved, and the employer members joined a larger multiemployer association, ARCA.

³ In 1999, Local 364, a predecessor bargaining representative, and two other locals were merged into Local

and Apprentices of the Plumbing and Pipe Fitting Industry (UA) have been parties to successive collective bargaining agreements (Inland Agreements) covering employees performing air conditioning and new construction work in San Bernardino and Riverside counties. Stater Brothers Markets (the Employer) was a member of the multiemployer unit and signed the most recent Inland Agreement.

In 2003, the UA transferred bargaining authority over all service, maintenance, and refrigeration work in Southern California from each of the local unions to District Council 16. Unit employees retained their membership in the local unions and did not become members of District Council 16.

The most recent Inland Agreement expired in February 2003. The UA, however, directed the Locals to delay bargaining for a successor Inland Agreement until the UA had conducted a hearing on a jurisdictional dispute concerning the installation of new air conditioning systems. This dispute arose when District Council 16 sought to remove air conditioning new construction work from the Inland Agreement and to cover this work under a District Council 16 Master Labor Agreement. ARCA opposed the transfer. Nevertheless, in June 2003, the UA transferred jurisdiction of the air conditioning new construction to the District Council 16 Master Labor Agreement.

In July 2003, Locals 409 and 398, District Council 16 (collectively "the Unions"), and ARCA began negotiations for a successor Inland Agreement. By February 2004, the parties had reached impasse. The parties could not reach agreement on the transfer of jurisdiction of the air conditioning new construction work.⁴ After the impasse in multiemployer bargaining, the Employer and the Unions met alone in March 2004 and discussed the air conditioning new construction issue and how the issue did not affect the Employer. The Employer apparently does not perform this work.

The Unions and ARCA resumed bargaining during the summer of 2004. At their final bargaining session on

409 of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry.

⁴ While the exact nature of the Unions' demand regarding the jurisdictional issue is unclear, no party has contended that the Unions are attempting to change the scope of the bargaining unit or that the Unions' demand is otherwise unlawful.

August 17, ARCA asked the Unions if the transfer of new construction work was a mandate that had to be on the table. When the Unions responded affirmatively, negotiations broke down, and the parties agreed to have no further discussions until one of them changed position. No further bargaining has occurred.

Meanwhile, on August 13, 2004, the Employer notified ARCA that it was withdrawing from the multiemployer unit because the previous agreement had expired in early 2003, numerous bargaining sessions had been cancelled, and the parties were at impasse. ARCA, however, did not accept the Employer's attempted withdrawal.

On September 1, 2003, the Employer nevertheless executed a contract with District Council 16 covering the same employees who were covered under the Inland Agreement.⁵ The agreement does not reference ARCA, nor acknowledge that the Employer will be bound by an eventual contract between ARCA and the Unions, nor provide for early termination if ARCA and the Unions reach agreement.

On September 22, 2004, ARCA filed charges alleging that the Employer violated Section 8(a)(5) and (1) by withdrawing from ARCA and entering into a contract with District Council 16, and that the Unions violated Section 8(b)(3) by negotiating and entering into a collective-bargaining agreement with the Employer.

ACTION

We conclude that the Employer violated Section 8(a)(5) and (1) by withdrawing from the multiemployer unit and negotiating and executing a collective-bargaining agreement with the Unions, and that the Unions violated Section 8(b)(3) by negotiating and executing the agreement with the Employer. We further conclude that the Region should not pursue a Section 8(a)(2) violation.

Absent mutual consent or unusual circumstances, an employer violates Section 8(a)(5) by untimely withdrawing from multiemployer bargaining.⁶ In addition, the

⁵ Although not entirely clear, it appears that the Unions together negotiated the contract with ARCA, and that District Council 16 served in an agency capacity as bargaining representative. We therefore assume that Local 398 and 409 do not object to the actions that District Council 16 took on their behalf.

negotiation and/or execution by a member-employer and the union of a separate agreement that adversely impacts the integrity of the multiemployer unit or allows the employer or the union to escape the binding effect of multiemployer-union negotiations violates Section 8(a)(5) and 8(b)(3),⁷ in the absence of mutual consent or unusual circumstances.

The Supreme Court in Bonanno⁸ held that impasse does not constitute an "unusual circumstance" justifying an employer's untimely withdrawal from a multiemployer unit. Board law has repeatedly affirmed this principle.⁹ We find Bonanno controlling here. The parties were at impasse, and the Employer cited the impasse as the basis for its withdrawal.¹⁰ Thus, its withdrawal from multiemployer bargaining was not justified.

The charged parties' attempts to distinguish Bonanno are unavailing. First, they argue that, unlike here, the aggrieved party in Bonanno was the union. Both the union and the multiemployer association, however, have to consent to an untimely withdrawal from a multiemployer association.¹¹ Second, the charged parties argue that ARCA has stopped representing the Employer's interests and the multiemployer unit is essentially fragmented because the Employer is disinterested in the fundamental bargaining issue. An employer cannot, however, withdraw from a multiemployer unit solely because it is dissatisfied with

⁶ Teamsters Union Local No. 378, 243 NLRB 1086, 1086 fn. 1 (1979).

⁷ Charles D. Bonanno Linen Services, 454 U.S. 404, 414-15 (1982); Callier's Custom Kitchen, 243 NLRB 1114, 1118 (1979), enfd. 630 F.2d 595 (8th Cir. 1980); Teamsters Union Local No. 378, 243 NLRB at 1089-1090.

⁸ 454 U.S. at 412.

⁹ See Atlas Transit Mix, 323 NLRB 1144, 1148 (1997); El Cerrito Mill & Lumber Co., 316 NLRB 1005, 1006 (1995); see also Hi-Way Billboards, 206 NLRB 22, 22 (1973), enf. denied on other grounds 500 F.2d 181 (5th Cir 1974).

¹⁰ Any attempt by the Employer to now urge other reasons for its withdrawal would be unavailing. See Acme Wire Works, 229 NLRB 333, 336 (1977) (failure to advance asserted reason as basis of withdrawal at the time of withdrawal undercuts defense), enfd. 582 F.2d 153 (2d Cir. 1978).

¹¹ See Teamsters Union Local No. 378, 243 NLRB at 1086 fn. 1.

the way bargaining is progressing or because the multiemployer association's position is contrary to the employer's.¹² Permitting withdrawal "in such circumstances 'would herald the demise of multi-employer bargaining.'"¹³ Third, the parties argue that the impasse here was of "serious proportions." As in Bonanno,¹⁴ the parties here were at impasse for about six months. Impasse, in any case, "of any duration, standing alone" does not constitute an "unusual circumstance."¹⁵ Finally, the charged parties argue that the Employer faces greater economic risk than other ARCA members because it has collective-bargaining agreements with other unions. While "dire economic consequences" does constitute an "unusual circumstance," the Board has limited this defense to situations in which the Employer's existence as a viable business entity has ceased or is about to cease.¹⁶ The Employer clearly does not allege such dire consequences here. Thus, because neither the impasse nor other surrounding circumstances constitute "unusual circumstances," the Employer violated Section 8(a)(5) by withdrawing from multiemployer bargaining.¹⁷

Further, the Employer and the Unions entered into a separate, final contract that failed to consider the binding effect of multiemployer bargaining. By this conduct, the Employer and the Union separately and

¹² See Atlas Transit Mix, 323 NLRB at 1149.

¹³ See Atlas Transit Mix, 323 NLRB at 1149, citing Hi-Way Billboards, 206 NLRB at 23.

¹⁴ 454 U.S. at 407.

¹⁵ See El Cerrito, 316 NLRB at 1006.

¹⁶ Jaflo Inc., 327 NLRB 88, 90 (1998); see U.S. Lingerie Corp., 170 NLRB 750, 751 (1968) (bankruptcy); Spun-Jee Corp., 171 NLRB 557, 558 (1968) (imminent plant shutdown).

¹⁷ The Unions' reliance on Universal Enterprises, 291 NLRB 670, 671, 677 (1988) is also misplaced. There, a union reneged on its tentative agreement with a multiemployer association and coerced two individual employers into individually signing a more onerous agreement that had not been negotiated. The respondent employer then signed the onerous agreement "under protest." The Board determined that because "unusual circumstances" had fragmented and undermined the integrity of the multiemployer unit, the respondent employer was not bound by the agreement. No such "unusual circumstances" exist here.

additionally violated Sections 8(a)(5) and 8(b)(3) respectively.¹⁸

[FOIA Exemption 5

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Accordingly, the Region should issue complaint, absent settlement, alleging that the Employer violated Section 8(a)(5) and (1) by untimely withdrawing from the multiemployer unit and by negotiating and executing a contract with the Unions and that the Unions violated Section 8(b)(3) by negotiating and executing the contract with the Employer.¹⁹

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¹⁸ See Bonanno, 454 U.S. at 414-15; Joseph J. Callier, 243 NLRB at 1118.

¹⁹ [FOIA Exemption 5

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