

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

Advice Memorandum

DATE: February 25, 2004

TO : Earl L. Ledford, Acting Regional Director
Region 9

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

SUBJECT: United Steelworkers of America,
AFL-CIO-CLC and its Local 14693 332-2520-5050
(Skibeck P.L.C., Inc.) 536-2509-6200
Cases 9-CB-10982 and 9-CB-11007 554-8487

These cases were submitted for advice to determine whether the Charged Party Unions violated Sections 8(b)(3) and 8(b)(1)(A) of the Act by disclaiming interest in representing unit employees in a geographically unlimited certified bargaining unit only when those employees were working in the state of Ohio, where the Employer's work in Ohio was specifically included in its contract with the Unions, but where an arbitrator's ruling pursuant to a jurisdictional agreement between labor organizations ordered the Unions to disclaim Ohio work.

We conclude that the certified Local Union's disclaimer of representing the unit employees when they were employed in Ohio violated Section 8(b)(3) and 8(b)(1)(A) because such a "partial disclaimer" amounts to an unlawful unilateral change in the scope of the certified unit and, when made known to unit employees, restrains or coerces those employees in the exercise of their Section 7 rights.

FACTS

The Employer, a subsidiary of Puget Energy, is based in Randolph, New York and specializes in the construction of natural gas pipelines. The Employer has its own employee complement that it transfers from job to job.¹ Since 1996, the Employer has been a member of the Pennsylvania Heavy and Highway Contractors Association (Association) and has authorized the Association to represent it and conclude contracts on its behalf. Various locals of the Steelworkers represent Association members'

¹ Although the number of employees varies from time to time, depending on the jobs being performed by the Employer, there is no evidence the Employer hires a substantial number of employees directly from "the street."

employees, and the most recent collective-bargaining agreement between the Association and the Steelworkers International, on behalf of the locals, was effective by its terms from April 11, 2001 to December 31, 2003.² Under this agreement, Steelworkers Local 14693 (the Local) represents the Employer's employees. Section 6 of the contract provides that the agreement covers all heavy construction and highway work, including utility work, performed in the states of Pennsylvania, Ohio and New York.

In March, Cinergy³ awarded the Employer a pipeline construction job in Warren County, Ohio. That project was completed in late September. Prior to commencement of the project, several unions in the building trades (the Building Trades Unions) approached Cinergy to complain that the Employer was a non-union contractor. The project was delayed for about 3 weeks while Cinergy sought to ascertain the Employer's status. The Employer presented Cinergy with its membership in the Association, and asserted that by virtue of its membership, it was signatory to the Association's agreement with the Steelworkers which, as noted above, would cover the work in question.

On April 4, the Employer filed a petition in Case 3-RM-777 allegedly based on a demand for representation made by the Local. Region 3 conducted a mail ballot election on May 10. Of the 17 eligible voters, four voted and all cast votes in favor of the Local. On May 27, the Employer commenced work on the pipeline project using its own workforce. The Employer had 40 to 50 employees on the Cinergy job. They were all represented by the Local and most, if not all, were members of the Local.⁴ On May 29,

² That agreement by its terms is a Section 8(f) agreement. As noted below, Local 14693 was certified on May 29, 2003 as the 9(a) representative of the Employer's employees. It is not clear whether the parties have adopted the Association Agreement as their 9(a) collective bargaining agreement. All dates are in 2003 unless otherwise indicated.

³ Cinergy (Cincinnati Gas and Electric Co.) is a public utility providing gas and electric power to several counties in Ohio, Indiana and Kentucky.

⁴ The reason that only 17 employees were eligible to vote in 3-RM-777 was because the parties used the Steiny/Daniel eligibility formula. Steiny & Co., 308 NLRB 1323 (1992); Daniel Construction, 167 NLRB 1078 (1967).

two days after the Employer commenced work on the Cinergy project, Region 3 certified the Local as the collective-bargaining representative of all employees of the Employer, without geographic limitation.

In the meantime, the Operating Engineers, one of the Building Trades Unions that had approached Cinergy, apparently filed a protest with the Steelworkers International concerning the Steelworkers' representation of the Employer's employees in the state of Ohio. The Operating Engineer's claim was based on a "Harmony Agreement" between the Steelworkers International and the Building and Construction Trades Department of the AFL-CIO that sets forth the conditions under which the Steelworkers may organize or represent employees involved in the construction industry. Pursuant to the terms of that 1994 jurisdictional agreement, which was executed two years before the Employer became a member of the Association and signatory to its contract with the Steelworkers, the Steelworkers are restricted from organizing construction workers, except in the states of Pennsylvania, West Virginia and Kentucky.⁵ By letter dated April 30, 2003, the Steelworkers International advised the Operating Engineers that the Employer was party to the Association contract, pursuant to which it could perform pipeline work in the state of Pennsylvania, but that the Employer would be deemed an "unprotected contractor" under the Harmony Agreement in the state of Ohio. The Employer received a copy of the April 30 letter from Cinergy and it forms the basis for the charge filed in Case 9-CB-10982.⁶ Under the terms of the Harmony Agreement, the Building Trades Unions

⁵ These states comprised the geographic boundaries of the former Steelworkers District 50. The Harmony Agreement permits the Steelworkers to continue representation of construction employees who were under contract in other locations prior to 1994, in essence grandfathering a list of employers performing construction work under contract with the Steelworkers outside of the former District 50 boundaries. The Employer is not one of these employers. The Harmony Agreement also provides for binding arbitration to resolve disputes between the Steelworkers and the Building Trades.

⁶ In a subsequent June 20 letter the Steelworkers International Union advised the Building Trades that it does not represent the Employer's employees working in the State of Ohio, would not handle grievances or complaints on their behalf and would return any dues remitted for employees while employed in Ohio.

may picket or otherwise apply economic pressure to "unprotected" contractors.

On June 9, members of the Building Trades Unions began picketing the job site. This activity led to the filing of charges in Cases 9-CP-365 and 9-CC-1656, et al., submitted to Advice on June 20. The issue presented was whether three Building Trades Unions violated Sections 8(b)(7)(A) and 8(b)(4)(C) by engaging in recognitional picketing at a time when the Employer was signatory to the Association contract with the Steelworkers, and when the Local had recently been certified as the collective-bargaining representative of the Employer's employees in Case 3-RM-777. In claiming that they were privileged to picket the Employer for recognition, the Building Trades Unions relied on the "Harmony Agreement" and its provision that the Steelworkers would represent only employees in the states of Pennsylvania, West Virginia and Kentucky. By memorandum dated July 8, Advice authorized the Region to issue an 8(b)(4)(C) and 8(b)(7)(A) complaint and institute 10(1) proceedings, noting that the "Harmony Agreement," to which neither the Local nor the Employer were a party, would have no effect on the Local's certification which did not contain any geographic limitation. While the Steelworkers International had disclaimed interest in these employees vis-à-vis the Building Trades, the Local, the 9(a) representative, had at that point refused to disclaim representation of these employees and, therefore, the Local continued as the certified bargaining representative. Thus, Advice authorized issuance of the 8(b)(4)(C) and 8(b)(7)(A) complaint on the basis that the certified representative had made no disclaimer. We indicated in discussions with the Region that the impact of a "partial disclaimer" by the Local could be considered if, and when, it was raised.

With respect to the prior cases, the Region scheduled an expedited administrative hearing for August 11 and initiated Section 10(1) proceedings against the Operating Engineers since they would not cease picketing. Prior to the completion of the General Counsel's case in the administrative hearing, on August 11, the Employer received a letter, with a copy to the Region, signed by the president of the Local disclaiming any interest in representing employees at the Employer's Ohio jobsite.⁷ The letter was apparently the result of a proceeding under the

⁷ Thereafter, the respondent Building Trades Unions agreed to settle the administrative cases and the ALJ approved a unilateral settlement as to all three Unions.

Harmony Agreement in which an arbitrator found that the Steelworkers violated that Agreement by representing construction workers in Ohio. The August 11 letter from the Local, which constitutes a partial disclaimer of the certified unit, i.e., only when unit members work in Ohio, is the basis for the charge filed in Case 9-CB-11007.

As noted above, the Ohio work was completed near the end of September, and the Employer had no other work in Ohio at that time, nor does it currently have any work in Ohio. Thus, the Local's August 11th disclaimer was only operative for approximately six weeks. The Region has informed us that during that time period, there is no evidence that the Union ever failed to represent the employees or that it failed to meet or bargain with the Employer. The Region also found that a substantial number of employees knew of the Local's partial disclaimer.

ACTION

We conclude that the Local's partial disclaimer is invalid and violated Section 8(b)(3) because it was an attempt to unilaterally change the scope of the certified bargaining unit. We further conclude that such a partial disclaimer, made known to the unit employees whom the Local is obligated to represent, violated Section 8(b)(1)(A).

A certified section 9(a) representative violates Section 8(b)(3) when it refuses to meet and bargain collectively with an employer whose employees it represents. However, an exclusive bargaining agent may avoid this duty to bargain by unequivocally and in good faith disclaiming further interest in representing the unit.⁸ Moreover, a union may lawfully disclaim interest in representing a bargaining unit, even during the term of an existing collective bargaining agreement.⁹ However, it is

⁸ Chicago Truck Drivers Local 101 (Bake-Line Products), 329 NLRB 247, 248 (1999); see also IBEW Local 58 (Steinmetz Electrical Contractors Association, Inc.), 234 NLRB 633, 634-635 (1978) ("This Board cannot compel a union to represent employees it no longer desires to represent, and a refusal to bargain over such employees does not violate Section 8(b)(3) of the Act").

⁹ See American Sunroof Corporation - West Coast, Inc., 243 NLRB 1128, 1129 (1979). Cf. Steinmetz, supra; Joint Council of Teamsters No. 42 (Grinnell Fire Protection Systems Company, Inc.), 235 NLRB 1168, 1169 (1978), enf'd 615 F.2d 820 (9th Cir. 1980).

well established that a party may not unilaterally change the scope of an established collective-bargaining unit because the scope of a unit is a non-mandatory subject of bargaining.¹⁰ In that vein, the Board has recently affirmed the principle that for a disclaimer to be "unequivocal" and lawful it must be coextensive with the recognized or certified unit.¹¹

The Local, by its August 11th disclaimer, effectively refused to bargain with the Employer regarding the unit employees employed in Ohio. However, the contractual recognition clause specifically covers construction work performed in Ohio, and the Local is certified as the representative of unit employees without any geographic limitation. In these circumstances, neither the fact that there is no evidence that the Union actually failed to represent the employees while they were employed in Ohio, nor the fact that the Employer has completed the Ohio work and has no current plans to return to Ohio, are dispositive of whether the Union has violated the Act. Indeed, since the Employer is a contractor whose workforce follows it from job site to job site, this Employer may well have a future occasion to bid another job in Ohio. Should the Employer obtain that contract it should be entitled to rely on the Union's certification to determine its bargaining duties and rights. Thus, since the disclaimer unlawfully changes the scope of the unit prospectively it violates Section 8(b)(3) of the Act.¹² Further, because the Local was otherwise obligated by its recent certification to represent the unit employees wherever they were employed, its disclaimer, which became known to them, violates Section 8(b)(1)(A).¹³

¹⁰ Reichold Chemicals, Inc., 301 NLRB 1228 (1991); Boston Edison Co., 290 NLRB 549, 553 (1988).

¹¹ Teamsters Locals 3, 28, 37, 42 (Lanier Brugh Corp.), 339 NLRB No. 24, slip op. pp. 1, 10-12 (2003) (Board affirmed ALJD finding that joint representative violated Section 8(b)(1)(A) and 8(b)(3) by refusing to represent employees located in a discrete geographic segment of an historic sytemwide unit).

¹² Id. at pp. 1-2, 12.

¹³ See generally Grinnell Fire Protection Systems, 235 NLRB at 1169 (Board concluded that sister locals did not violate Section 8(b)(1)(A) where both lawfully disclaimed a unit,

Accordingly, the Region should issue complaint, absent settlement.

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leaving the unit employees unrepresented). In finding no "coercion" in these lawful disclaimers the Board stated, "Depriving the unit of the benefits of the collective-bargaining agreement by withdrawing as representative can be coercive as a matter of law only if the unit has a continuing right to those benefits." Here, of course, the unit employees in Ohio had a continuing legal right to representation and the Local had a corresponding duty pursuant its Board certification to supply that representation. The Union's partial withdrawal of that representation thus violates Section 8(b)(1)(A).