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

Advice Memorandum

DATE: Januay 24, 2007

TO : Joseph Barker, Regional Director
Region 13

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

SUBJECT: Service Employees International Union Local No. 1
(The Wackenhut Corporation)
Case 13-CE-127

This Section 8(e) case was submitted for advice on whether SEIU and the Building Owners and Managers Association (BOMA), a multiemployer association, enforced or applied within the Section 10(b) period two provisions in the subcontracting clause in their bargaining agreement, and if so whether those provisions violate 8(e) because they are union signatory provisions, or unlawfully secondary as applying to work that is not fairly claimable.

We conclude that both provisions were reaffirmed within the 10(b) period. We also conclude that although we find the "all standards" provision to be ambiguous and thus not an unlawful union signatory restriction on its face, we conclude that this provision is secondary and not a work preservation provision because it applies to work that is not fairly claimable. We further conclude that the other provision, the "BOMA contract applies" provision, requiring union signatory subcontractors to apply the BOMA/SEIU agreement where it conflicts with their own SEIU agreement, is arguably unlawful on its face. However, there is no evidence that it was applied in a secondary manner. Thus, the clause does not have a cease doing business effect on the parties because of a counterpart provision in the SEIU Downtown Agreement which the Charging Party is a signatory.

FACTS

BOMA, a national association of building owners and managers, acts as a multi-employer bargaining association representing 176 member employers in Chicago. The current BOMA/SEIU agreement governing security employees employed by BOMA members was executed in June 2004 outside of the 10(b) period and is effective through April 29, 2007. Article XXIII, "Subcontracting," contains two provisions restricting subcontracting as follows:

> With respect to any subcontractor that does not have a collective-bargaining agreement with the Union, the

> Employer shall require that said contractor will meet all of the standards of this agreement. ["all standards" provision]
>
> In the event that the Employer subcontracts to a security contractor which is a party to a collective-bargaining agreement with the Union, the terms and conditions of this Agreement shall be the only terms and conditions applicable to said contractor and its employees working in the Employer's building notwithstanding the particular terms and conditions contained in any collective-bargaining agreement between the Union and such security contractor. ["BOMA contract applies" provision]

Charging Party Wackenhut performs security services in Chicago and is signatory to the SEIU Downtown Agreement. The Downtown Agreement, governing security officers employed to work in non-BOMA buildings in Chicago's central business area, covers the same time period and contains essentially the same terms and conditions as the BOMA/SEIU agreement. The Downtown Agreement also provides:

> If there is any conflict between the BOMA/SEIU Local 1 Security Collective-Bargaining Agreement and this Agreement in BOMA Security Signatory Buildings, the parties to this Agreement agree that the BOMA/SEIU Local 1 Security Collective-Bargaining Agreement shall govern and agree to be bound by the terms and conditions of the BOMA/SEIU Local 1 Security Collective-Bargaining Agreement.

This provision is counterpart to the BOMA/SEIU agreement "BOMA contract applies" provision. The BOMA provision requires SEIU signatory subcontractors to apply the BOMA/SEIU contract when they work in a BOMA building. The Downtown Agreement provision requires SEIU signatory subcontractors to apply the BOMA/SEIU contract whenever it conflicts with their own contract. The "BOMA contract applies" provision thus does not have any secondary impact, i.e., union signatory contractors to which it applies have already agreed to follow the BOMA contract when it conflicts with their contract.

ACTION

We conclude that both provisions were reaffirmed within the 10(b) period. We further conclude that although the "all standards" provision is ambiguous and thus not an unlawful union signatory restriction on its face it is secondary and not a work preservation provision because it applies to work that is not fairly claimable. We also

conclude that although the "BOMA contract applies" provision which requires union signatory subcontractors to apply the BOMA/SEIU agreement where it conflicts with their own SEIU agreement is arguably unlawful on its face there is no evidence that it was applied in a secondary manner. Thus, it does not have a cease doing business effect on the parties because of a counterpart provision in the SEIU Downtown Agreement.

I. Reaffirmation of the BOMA Subcontracting Provisions

The unilateral enforcement or application within the 10(b) period of a contract provision that violates 8(e) on its face is a "reaffirmation" sufficient to constitute an "entering into" in violation of Section 8(e).[1] We conclude, in agreement with the Region, that both provisions of the subcontracting clause were unilaterally applied or enforced by BOMA within 10(b) and thus can be attacked if they are unlawful on their face.

On September 13, 2006,[2] Wackenhut's general manager, Richard Flies, attended a BOMA labor informational meeting in Chicago. During the meeting, BOMA's labor committee vice chairperson, Marcia Rubenstein, and a BOMA labor committee member, George Conopetsis, presented various issues relating to the BOMA/SEIU agreement. Conopetsis discussed the grievance procedure and stated that BOMA members were required to terminate subcontractors that did not abide by the terms of a grievance outcome. BOMA's attorney, Richard Marcus, iterated that BOMA building managers had to be involved in any grievance involving a subcontractor.

Following the meeting, Flies asked Rubenstein if there were any specific qualifications for security guards in the BOMA/SEIU agreement. Rubenstein answered that some of the qualifications were contained in the agreement and that others were derived from Illinois law. Flies asked if Wackenhut employees who were members of the Security, Police, Fire Protection Association could work in BOMA buildings, and if they could attend the training discussed

---

[1] See, e.g., Time Warner Cable of NYC, 344 NLRB No. 36 (2005); Dan McKinney Co., 137 NLRB 649, 653-57 (1967). Where a contract provision is not unlawful on its face, unilateral application of that provision in an unlawful, secondary manner is not sufficient to violate 8(e). See, e.g., Teamsters Local 166 (Shank/Balfour Beatty), 327 NLRB 449, 454, note 5 (1999).

[2] All dates hereafter 2006 unless otherwise noted.

at the meeting. Rubenstein informed Flies that security personnel working in the buildings had to be members of SEIU and that they could not attend the training unless they were members of SEIU.

Participants at the September 13 meeting also received the "BOMA/Chicago Labor Relations Manual" which contained the BOMA/SEIU agreement and explanations of its various provisions. Concerning Article XXIII Subcontracting, the BOMA Manual explains:

> If subcontractor is not a party to an agreement with the Union, building shall require contractor to meet all of the standards of the BOMA/Chicago-SEIU, Local 1 Security Agreement.
>
> If subcontractor is party to an agreement with the Union, the BOMA/Chicago-SEIU, Local 1 Security Agreement terms and conditions govern.

The BOMA Manual also explains the effect of a subcontractor's refusal to comply with the BOMA/SEIU Agreement in a section titled "Effect of Subcontractor's Breach of Obligations":

> Grievances alleging a subcontractor's non-performance are to be processed under the BOMA/Chicago-SEIU, Local 1 Security Agreement grievance procedure (See Grievance Procedure). If the grievance is ultimately upheld and the subcontractor refuses to implement the remedy imposed, the building must terminate its contract within 60 days of written notice by the Union.

In addition to the above evidence, Wackenhut became involved with a grievance filed on September 27, involving one of its employees assigned to work in a BOMA managed building. On October 5, Wackenhut was required to settle that grievance under the terms of the BOMA/SEIU Agreement because the employee worked in a BOMA building.

The Region also uncovered evidence within the 10(b) period of requests for proposals for security services circulated by two BOMA member employers. The request for proposals from one BOMA employer set forth among its requirements that the subcontractor's employees must be members of SEIU Local 1, and that holiday rates of pay would be directly tied to the BOMA/SEIU Agreement. The request from the other BOMA employer stated only that the subcontractor must abide by all the standards of the BOMA agreement.

Based upon all of the above, we conclude that both the "all standards" provision and the "BOMA contract applies" provision were unilaterally reaffirmed by BOMA and/or BOMA member signatories within the 10(b) period. BOMA representatives at the September 13 meeting explained the BOMA/SEIU agreement by referring to required union membership for subcontractor employees. BOMA's Manual reproduced as well as explained both provisions. The BOMA member's circulation of requests for proposals also applied the "all standards" and "BOMA contract applies" provisions. Since these applications or reaffirmations involved only BOMA or BOMA employers, and SEIU was in no way involved, they violate 8(e) only if these provisions are unlawful on their face.

II. Facial Validity of the Contractual Provisions

The Board has developed rules of construction for determining the facial validity of a contract clause under Section 8(e). If a clause's meaning is clear, the Board will determine its validity without regard to any extrinsic evidence.[3] If a clause is ambiguous, the Board will not presume it is unlawful; rather, it will consider extrinsic evidence to determine whether the clause was intended to be administered in a lawful or unlawful manner.[4] Finally, where an ambiguous clause is not clearly unlawful on its face, the Board will interpret it to require no more than what is allowed by law.[5]

A subcontracting clause is a lawful "union standards" provision designed for the primary purpose of removing the economic incentive to subcontract unit work if it requires subcontractors to comply with "the equivalent of union wages hours and the like",[6] i.e., the economic provisions of the union contract.[7] In contrast, a subcontracting clause

---

[3] J.K. Barker Trucking Co., 181 NLRB at 517.

[4] See Teamsters Local 982 (J.K. Barker Trucking Co.), 181 NLRB 515, 517 (1970), affd. 450 F.2d 1322 (D.C. Cir. 1971); Ets-Hokin Corp., 154 NLRB 839, 841 (1965), enfd. 405 F.2d 159 (9th Cir. 1968), cert. denied 395 U.S. 921 (1969).

[5] Id.; Ets-Hokin Corp., 154 NLRB at 841.

[6] Teamsters Local 386 (Construction Materials Trucking, Inc.), 198 NLRB 1038, 1038-39 (1972).

[7] Id. See also Painters Orange Belt Dist Council (Painting Contractors), 277 NLRB 1470, 1475 (1986)("A union standards subcontracting clause is primary only if it is limited to a

requiring "compliance with the terms of the Agreement" is a secondary union-signatory subcontracting clause.[8]

A. The "all standards" provision as a union-signatory clause

Wackenhut alleges that the "all standards" provision is tantamount to a union signatory clause because it requires subcontractors to meet "all of the standards" and not just the economic standards of the BOMA/SEIU agreement. BOMA and SEIU assert that the provision seeks to apply only economic standards and is facially lawful.

We note that in the "BOMA contract applies" provision, the parties clearly required subcontractors to abide by all of the BOMA/SEIU contract, and not just its economic standards, using language explicitly setting forth that requirement. In light of the language in that provision, the "all of the standards" language in this provision presumably means something less than abiding by the entire BOMA/SEIU contract. Given this different language and the parties' disagreement over its meaning, we conclude that the "all of the standards" phrase standing alone is ambiguous. We therefore turn to examine extrinsic evidence to determine its meaning.

First, at the BOMA meeting on September 13, a BOMA representative's informing Wackenhut that its employees had to be members of the Union in order to receive training and to work in one of the buildings arguably shows a union signatory requirement. However, this statement was made only to Wackenhut who is signatory to the Downtown Agreement and Wackenhut's employees under that agreement are required to be members of the Union when they work in downtown Chicago in a BOMA building. Second, Wackenhut was required on October 6 to apply the terms of the BOMA/SEIU agreement in resolving a grievance. However, as a signatory to the Downtown Agreement, Wackenhut agreed to the BOMA/SEIU procedure when Wackenhut worked in a BOMA building. The above evidence thus does not clearly show that this otherwise ambiguous provision is a facially unlawful union signatory clause.

---

requirement that subcontractors observe the equivalent of union wages, hours, etc.").

[8] IBEW Local 437 (Dimeo Constr. Co.), 180 NLRB 420, 420 (1969). See also Teamsters Local 277 (J&J Farms Creamery), 355 NLRB 1031, 1031 (2001).

The requests for proposals from the two BOMA members do not resolve the ambiguity in this provision. While one request imposes a union membership requirement on subcontractor employees, the other request merely iterates the "all of the standards" language. We therefore conclude that the "all standards" provision is ambiguous and not unlawful on its face because this language is susceptible to two interpretations: union standards and union signatory.

B. The "all standards" provision as not applying to fairly claimable work

Wackenhut alleges that the clause is unlawful because the security services work that the clause seeks to preserve is not fairly claimable work.[9] In this case, the appropriate unit to determine whether security guard work is fairly claimable unit work is the BOMA multiemployer bargaining unit, not the units of individual employer BOMA members.

Although the Board has not stated *in haec verba* that an 8(e) work preservation analysis applies to fairly claimable multiemployer unit work as well as single employer unit work, this principle is implicit in many Board decisions involving multiemployer bargaining units. Board and court cases suggest that where work has been customarily and regularly performed by employees in a multiemployer bargaining unit, it is fairly claimable unit work regardless of whether employees of individual employers in the unit perform any of the work at all.[10]

---

[9] See e.g., Bldg. Material & Construction Teamsters No. 216 (Bigge Drayage Co.), 198 NLRB 1046, 1047 (1972) (union attempts to apply subcontracting clauses on non-signatory who performed work were violative of 8(e) since signatory employers had never engaged in that type of work; See also Local 814, Teamsters (Santini Brothers), 208 NLRB 184, 198-99 (1974) (union violated Section 8(e) by demanding long distance hauling work covered by the contract, which was not fairly claimable where signatory used to perform but had totally contracted out five years earlier).

[10] See W. A. Boyle, United Mine Workers, 179 NLRB 479, 483-84 (1969) (appropriate unit to determine whether work is fairly claimable is multiemployer bargaining unit, not units of individual employers or of nationwide group of all employers signatory to the same agreement); Sheet Metal Workers Local 162 (Associated Pipe), 207 NLRB 741, 749-50 (1973) (Board must consider work history of employers in multiemployer unit collectively rather than individually). Accord: Sheet Metal Workers Local 98 (Ajax Co.), 174 NLRB

In NLRB v. Sheet Metal Workers Local 28 (Mechanical Contractors' Assn.),[11] the work at issue in the restrictive clause in a union contract with two multiemployer associations apparently had been performed by substantial numbers of employees in the multiemployer units. The court found that "every indication points to the conclusion that Local 28 was seeking to preserve for its own members, who were employees of the employers belonging to the two Associations, the work... which had traditionally been done in Association shops" and therefore, applying National Woodwork, the union's pressure directed at Association members was not "'secondary' pressure... against any other employer who was not a 'primary' employer." 380 F.2d at 831.

Thus, a contract clause restricting subcontracting in a multiemployer unit has a primary work preservation object if a majority of the work in question has traditionally been performed by employees in the multiemployer bargaining unit, even if the employees of a particular employer member of that unit have never performed that work. We note that in Associated Pipe, the ALJ suggested an additional ground for finding work to be fairly claimable in a multiemployer unit: a majority of the work was subcontracted to employers observing union standards.[12]

The Region's initial investigation disclosed that currently, where security services are performed in BOMA buildings, the vast majority of those services are performed by subcontractors. Only a small minority of BOMA members perform security services with their own employees.[13] The Region provided both BOMA and SEIU the

---

104, 110 (1969), enfd. 433 F.2d 1189, 1194-95 (D.C. Cir. 1970) (analysis as a whole tracks multiemployer unit rather than individual employer unit).

[11] 380 F.2d 827, 830-31 (2d Cir. 1967), denying enf. to 156 NLRB 804 (1966) on 10(b) grounds (Board had found clause to be facially invalid).

[12] Sheet Metal Workers Local 162 (Associated Pipe), 207 NLRB at 749 ("[I]t must be shown that at least a majority of the commercial round pipe needs have been met by having the contractors regularly assign the fabrication to their own employees, or regularly purchase the disputed items from employers paying the construction local scale.").

[13] According to BOMA, 176 BOMA members utilize over 1600 security personnel in their buildings. 1321 of these security officers were employed by contractors; only 307

opportunity to provide additional evidence that would show that, this work is fairly claimable under the test suggested in Associated Pipe: a majority of security service work had been performed by BOMA members in the past, and had been subcontracted out over time to contractors observing union standards. Neither BOMA nor SEIU provided additional evidence on this point.

We conclude, based on the work history of BOMA members, that the "all standards" provision in the BOMA/SEIU agreement is not a lawful work preservation clause. A majority of the security work currently is not performed by BOMA unit employees, and there is no evidence that it had been so performed but had been subcontracted to outside contractors who observed union standards. Since the "all standards" provision thus does not have a lawful work preservation objective, it violates Section 8(e).

C. The "BOMA contract applies" provision

This provision restricts the doing of business with SEIU signatory subcontractors because it requires those subcontractors to follow the entire BOMA/SEIU agreement where it conflicts with their own SEIU agreement. Since this subcontracting restriction has no primary work preservation object, it also arguably violates 8(e) on its face. However, this provision does not have any secondary impact because of the counterpart provision in the Downtown Agreement. Wackenhut and all other SEIU signatories which the "BOMA agreement applies" provision has application have themselves already agreed to apply the BOMA/SEIU contract rather than their own SEIU contract. The "BOMA agreement applies" provision thus does not have any cease doing business effect. Thus, even though this provision arguably violates 8(e) on its face, its application has been primary.

Accordingly, the Region should issue complaint, absent settlement, alleging that SEIU and BOMA violated Section 8(e) when they enforced within the Section 10(b) period the "all standards" provision in the subcontracting clause in

---

were directly employed. The evidence broken down by building indicates that 126 buildings use contract security personnel for a total of 1250 employees, while 29 buildings directly employed security personnel for a total of only 282 employees. 10 buildings indicate that they employed both: 25 directly employed security officers and 71 contracted security officers. 11 building indicated they employed neither building nor contract security officers.

their bargaining agreement because it is unlawfully secondary as applying to work that is not fairly claimable.

B.J.K.