

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

Advice Memorandum

DATE: January 29, 2007

TO : D. Michael McConnell, Regional Director
Region 17

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

SUBJECT: Teamsters Local 41 (Penske Logistics) 133-8733
Case 17-CB-6227 548-6040-2500

This Section 8(b)(2) case, involving an Employer located in Kansas, a right-to-work state, was submitted for advice on whether the Union unlawfully demanded that the parties' union-security clause be applied to those unit employee drivers who start and end their delivery shifts in Missouri, an adjoining non-right-to-work state.

We conclude that Kansas' right-to-work law applies to all 100 unit employees because, even assuming that Missouri is the predominant job situs of the 18 drivers who start and end their shifts in that state, dividing the Employer's workplace in that manner is not reasonable or practical; employee driving routes are rebid semiannually and thus are not predictable, and 18 employees constitutes an insubstantial percentage of the 100 employee unit. The Union's demand violated Section 8(b)(2) because it attempted to cause the Employer to apply the union-security clause unlawfully. The Board has jurisdiction to remedy violations of the Act arising from an application of a union-security clause that is unlawful under Section 14(b).

FACTS

The Employer employs around 40 warehousemen and 62 drivers at its warehouse on Kansas Avenue in Kansas, a right-to-work state. The parties current bargaining agreement has a term from October 1, 2003 through September 30, 2007 and contains a union-security clause which the contract states is applicable "to the extent permitted by the law of any state." During the last four or five years, the Union unsuccessfully sought to enforce the union-security clause against drivers who started and ended their shifts in Missouri, a non-right-to-work state. In a September 18 2006, letter to the Employer, the Union demanded that employees not be allowed to bid on "Missouri jobs" unless they are Union members. The Union's letter further stated that if a Union member driver on a Missouri

job withdrew from the Union, the Employer must take that driver off that route or terminate him.

Drivers rebid for routes twice a year in April and October. On September 21, in response to the Union's demand, the Employer issued a memorandum to all drivers, stating in part:

Effective next bid in October:
All drivers that start and end in Missouri (Woodbridge, Delphi & Ford-Penske) will have to be an active Union member. Non Union members will not be allowed to bid on any jobs above. Non Union members will only be allowed to bid on jobs starting and ending in Kansas.

On October 11, the Union withdrew its demand and told the Employer that "any driver can bid on the Missouri Bids" but that drivers awarded those bids must comply with "the financial obligation of union membership" within 30 days. The following day, the Employer sent drivers the October bid sheet along with a new memorandum. That memorandum instructed drivers to disregard the Employer's prior memorandum and explicitly stated, "Drivers can bid anywhere they want (union or not) until further notice."

Where Drivers Operate, Start and End Shifts

The Employer has a long standing contract with General Motors (GM) to deliver parts to the GM yard which is located in Kansas. Ten Employer drivers perform only local driving around either Kansas Ave. or GM. Twelve drivers perform "city routes" to deliver parts directly from Kansas Ave to the GM yard. Local drivers and city route drivers thus both operate and start and end their shifts in Kansas.

Other Employer drivers pick up and deliver to the GM yard parts from six "sequencing centers" not owned by the Employer. Three GM sequencing centers are in Kansas; the ten drivers who deliver from these locations both operate and start and end their shifts in Kansas.

Three GM sequencing centers are in Missouri: St. Joseph, Delphi and Woodbridge. St. Joseph is operated during only a very small portion of a single driver's shift, amounting to such an incidental portion of the driver's work that the Employer does not list St. Joseph on the bid sheet. Delphi is operated by six drivers, all of whom start and end their shifts in Missouri. In driving between Delphi in Missouri to the GM yard in Kansas, the Delphi drivers apparently spend around half their driving time in each state. Woodbridge is operated by 18 drivers.

Eight of the Woodbridge drivers start and end their shifts in Missouri; ten Woodbridge start and end their shifts at the GM yard in Kansas. In driving between Woodbridge in Missouri and GM in Kansas, all 18 Woodbridge drivers spend around half their driving time in each state.

In April 2006, the Employer obtained a contract with the Warren St. sequencing center for the delivery of parts to a Ford plant. Warren St. and the Ford plant are both located in Missouri. The Warren-Ford shift is operated by four drivers who operate and start and ended their shifts in Missouri. However, the Employer has stated that beginning November 14, 2006, after the Union's demand, the four Warren-Ford drivers would begin and ended their shifts in Kansas. These four drivers would still operate the same routes which are entirely in Missouri.

In sum, if the Union's demanded application of union-security included the four Ford drivers who at that time started and ended their shifts in Missouri, the Union's demand applied to 18 drivers among the 100 unit employees. Those 18 employees consisted of the 4 Ford drivers and 14 GM drivers: all six Delphi drivers and the eight Woodbridge drivers who start and end their routes in Missouri.

ACTION

Kansas' right-to-work law applies to all unit employees because, even assuming that Missouri is the predominant job situs of the 18 employees who started and ended their shifts in that state, dividing the Employer's workplace in this manner is not reasonable or practical; driving routes are rebid semiannually and 18 employees constitutes an insubstantial percentage of the 100 employee unit. The Union's demand violated Section 8(b)(2) because it attempted to cause the Employer to apply the union-security clause unlawfully. The Board has jurisdiction to remedy violations of the Act arising from an application of a union-security clause that is unlawful under Section 14(b).

It is well settled that a union violates Section 8(b)(2) when it causes or attempts to cause an employer to assign work based upon union membership.¹ We therefore

¹ Int'l Union of Elevator Constructors, 214 NLRB 257, 261 (1974) (Union violated 8(b)(2) when it attempted to cause the employer to assign overtime work only to union members); Branch 3126 NALC (USPS), 330 NLRB 587 (2000) (Union violated 8(b)(2) when it caused the employer to not

conclude, in agreement with the Region, that the Union's initial demand on September 18, that the Employer assign Missouri routes only to full Union members, clearly violated Section 8(b)(2).

The Union in October withdrew that demand and instead demanded that the Employer require employees to comply with the financial obligations of membership within 30 days of being awarded a "Missouri job." The Union thus attempted to base the Missouri work assignment upon a lawful application of the parties' union-security clause. The Union's attempt failed and violated Section 8(b)(2) because we conclude that Kansas' right-to-work law applies to all unit employees; it is not reasonable or practical to divide the 18 "Missouri job" employees from the rest of the Employer's workforce.

In Oil, Chemical and Atomic Workers Int'l Union v. Mobil Oil,² the Supreme Court decided that the "predominant job situs" of employees will determine whether a state's right-to-work law applies to them. In adopting the job situs test, the Court emphasized the importance of predictability: "parties entering a collective-bargaining agreement will easily be able to determine in virtually all situations whether a union- or agency-shop provision is valid."³ The Court noted that the employee seamen in that case spent 90 percent of their work time on ships outside the state of Texas. The Court thus found that Texas was not their primary work situs and that Texas' right-to-work law was inapplicable.⁴ The Court did not appear to anticipate a situation where employees in the same unit work in different locations.

Following Mobil Oil, two district courts faced the situation, in the context of federal enclaves, of different

assign overtime work to an employee because he was not a union member).

² 426 U.S. 407, 414 (1976).

³ 426 U.S. at 419.

⁴ Id. at 420. See also National Football League Players Ass'n v. Pro-Football, 857 F. Supp. 71 (D.D.C. 1994) (Redskins players were subject to Virginia's right-to-work law, even though their games were played in Washington, D.C., because they spent the vast majority of their time practicing in Virginia) affd. 79 F.3d 1215 (D.C. Cir. 1996).

workforce locations for the employer's employees. In Vincent v. General Dynamics Corp.,⁵ the employer's plant in Texas, a right-to-work state, was located mostly within but partly outside a federal enclave. 24 percent of the land and two percent of the workforce (225 out of 10,890 employees) were located in Texas subject to Texas law; the overwhelming majority of the rest of the employees worked on the federal enclave.⁶ The district court declined to divide the workforce, holding that the plant constituted "one job situs" and was "not practically divisible along federal-state boundary lines into different labor-force areas . . . [therefore] the law of the federal enclave whereon the vast majority of employees work and the vast majority of facilities and building space are located should control the entire contract."⁷ However, the court indicated in dicta that the outcome may be different where there are reasonable, practical dividing lines between the employees in right-to-work and non-right-to-work jurisdictions, and a "substantial" number of employees work in each.⁸

A district court found practical dividing lines in Lord v. Local Union Local 2088, IBEW,⁹ where technical and plant employees of RCA Service Company worked in a single bargaining unit at three separate locations, Kennedy Space Center, Cape Canaveral Air Force Station, and Patrick Air Force Base. The court found Florida's right-to-work law applicable only to the Cape Canaveral facility¹⁰ and then considered whether the employees working at Patrick should also be subject to that law. The court found that the employees worked in three separate geographical locations amounting to three distinct job situses. The court thus

⁵ 427 F.Supp. 786, 796-97 (N.D.Tex. 1977).

⁶ Id. at 798-99.

⁷ Id. at 799. The court reasoned that when a job situs is "not practically divisible along federal-state boundary lines into different labor-force areas," it is more practical to have one rule apply.

⁸ Id. at 799, note 21.

⁹ 481 F.Supp. 419 (M.D.Fla. 1979), revd. on other grounds 646 F.2d 1057 (5th Cir. 1981).

¹⁰ Id. at 422.

found the union-security agreement could be enforced at one location but not the others.¹¹

An Alabama District court recently affirmed by an unpublished 11th Circuit decision also found a basis for dividing the employer's workforce.¹² In Professional Helicopter Pilots, the employer's 417 employees worked in three locations in Alabama: the Fort Rucker Main Post, Cairns Field, and Shell Field. 186 employees, around 45 percent of the workforce, worked on the Main Post where the Court assumed that Alabama's right-to-work law did not apply.¹³ The remaining 55 percent of employees worked on Cairns and Shell Fields where the Court found Alabama law applicable.¹⁴ The court rejected the union's argument that Oil, Chemical and Atomic Workers Int'l Union v. Mobil Oil, *supra*, required that the entire workforce have only one primary job situs, and found that the workforce involved "three distinct, practically divisible, labor force areas."¹⁵ The court thus held that Alabama's right-to-work law applied to two locations, Cairns and Shell Fields.

In Cenex,¹⁶ three employee-drivers, comprising 10 percent of a unit located in a non-right-to-work state, performed delivery work entirely within an adjoining right-to-work state. When the employer refused to apply the parties' union-security clause to those three employees, the union filed a Section 8(a)(5)-8(d) charge. We concluded that there was no "reasonable dividing line" for the employer's workforce. Finding a separate job situs was not "practical" because employee routes were subject to

¹¹ Id. at 428-29.

¹² Professional Helicopter Pilots Association, OPEIU Local 102 v. Lear Siegler Services, 326 F.Supp. 2d 1305 (M.D. Ala 2004) *affd.* 153 Fed Appx 630 (11th Cir. 2005) (not selected for publication in the Federal Reporter).

¹³ Id. at 1318, note 13

¹⁴ Id. at 1315-1318.

¹⁵ Id. at 1321, citing the court's dicta in Vincent.

¹⁶ Cenex Harvest States Cooperatives, Case 30-CA-15413, Advice Memorandum dated May 25, 2001.

change, and three employees did not comprise a "substantial" portion of the unit.¹⁷

We reach the same result here for essentially the same reasons. First, we assume, arguendo, that all 18 employees who start and end their shifts in Missouri have that state as their primary job status.¹⁸ We conclude that it is not reasonable or practical to divide these 18 employees from the Employer's workforce.

First, the Court in Oil, Chemical and Atomic Workers Int'l Union v. Mobil Oil relied heavily on the "predominant job situs" test because that standard would be predictable and useful to the parties. Since employees here rebid routes every six months, dividing the workforce along route starting and ending locations is neither stable nor predictable.¹⁹ In addition, 18 employees do not constitute a substantial portion of the unit of 100 employees.²⁰ Thus, we conclude, in agreement with the Region, that the Union's attempt to apply Missouri law to drivers who routes start

¹⁷ Id. at pp 4-5. We therefore found that the employer's failure to apply the contractual union-security clause violated Section 8(a)(5).

¹⁸ We note, however, that the 6 Delphi drivers and the 8 Woodbridge drivers who start and end their routes in Missouri operate routes in both Missouri and Kansas spending around half their driving time in each state. Since the Court in Oil, Chemical and Atomic Workers Int'l Union v. Mobil Oil used a predominant job situs test, examining where work is actually performed, the Union incorrectly relied upon where these employees happen to start and end their shifts to determine whether Missouri law applies. It is unnecessary to finally resolve this issue, however, because we reject the Union's claimed division of the Employer's workforce.

¹⁹ We note that the Employer appears to have recently required the four Ford drivers to begin and end their shifts in Kansas. This change further underscores why the Union's division of the Employer's workforce is neither reasonable nor predictable.

²⁰ Compare Cenex Harvest States Cooperatives, supra (10 percent not a substantial portion of the unit).

and end in Missouri amounted to an unlawful application of union-security.

Issuance of Section 8(b)(2) complaint, absent settlement, is warranted because the Board has asserted jurisdiction to remedy a violation of the Act arising from an application of union-security that was unlawful under Section 14(b).²¹ In Plumbers Local 141, the union during bargaining insisted upon a contract provision which would impose "representation fees" in right-to-work states. The Board found a Section 8(b)(3) violation on the ground that this provision was a non-mandatory subject of bargaining because Section 14(b) proscribed it.²² We also note that the Supreme Court in Schermerhorn(II)²³, commenting on the "problems of the accommodation of state and federal jurisdiction in the union-security field", stated that "picketing in order to get an employer to execute an agreement to hire all-union labor in violation of a state union security statute lies exclusively in the federal domain."²⁴ The Board thus has jurisdiction to find the Union's demand in violative of Section 8(b)(2).

Therefore, the Region should issue Section 8(b)(2) complaint, absent settlement.

B.J.K.

²¹ Plumbers Local 141, 252 NLRB 1299 (1980) enfd. 675 F.2d 1257 (D.C. Cir. 1982).

²² Id. at note 1. See also Stein Printing Co., 207 NLRB 17 (1973) (employer lawfully refused to sign bargaining agreement because it contained a union-security clause unlawful in that state under Section 14(b)).

²³ Retail Clerks Local 1625 v. Schermerhorn, 375 U.S. 96, 105 (1963).

²⁴ The Court cited Laborers v. Curry, 371 U.S. 542 (1963) which held that the State of Georgia was Garmon preempted from enjoining picketing of a construction site in arguable violation of Georgia's right-to-work law, because that picketing arguably violated the Act.