

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

Advice Memorandum

Date: June 4, 1999

To: Ralph R. Tremain, Regional Director
Region 14

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

Subject: Miller & Son Construction Co.
Case 14-CA-25182

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This Section 8(a)(2) and (5) case was submitted for advice on whether these allegations arising out of a jurisdictional work dispute should be dismissed under Brady-Hamilton/J.L. Allen,¹ which hold that Sections 8(b)(4)(D) and 10(k) are the Act's exclusive means for resolving disputes regarding work assignments.

FACTS

The Employer obtained a contract to perform mine reclamation work at two mines located in Marissa and Harrisburg, Illinois. On June 8, 1998, the Employer signed a Section 8(f) agreement with the UMW.² That agreement, although entered into on June 8, 1998, had an effective

¹ Brady-Hamilton Stevedore Co., 198 NLRB 147 (1972), petition for review denied sub nom. Operating Engineers Local 701 v. NLRB, 504 F.2d 1222 (9th Cir. 1974); J.L. Allen Co., 199 NLRB 675 (1972).

² The UMW has three "construction locals" within its District 12, which covers the Employer's geographic area, including Missouri, Indiana and Western Kentucky. It appears that the UMW intended to staff the Employer's construction projects with members from UMW construction Local 2117. Local 2117, like the other construction locals, does not have separate agreements with employers; instead, all use the national UMW agreement. The agreement signed by the Employer was a "me too" agreement referring to a multi-employer association agreement with the UMW.

term from February 11, 1995 through February 11, 1998, and also provided for termination by either party upon the furnishing of a 60 day written notice.³ The Employer furnished to the UMW initiation fees plus one month's dues for its current three employees.

The bulk of the Employer's "reclamation" work would involve covering up the old material with fill, attempting to bring the land back to its original appearance. Around June 10 or 11, the Employer advised the UMW that starting around June 17 on its Marissa job, the Employer would need two employees to operate bulldozers. The UMW agreed to supply these operators.

The following day, an Operating Engineers representative contacted the Employer and stated that the Operating Engineers had jurisdiction over mine reclamation work, that its members performed the type of work the Employer was about to perform, and that the Operating Engineers wanted an agreement with the Employer covering its project. The Employer responded that it already had a bargaining agreement with the UMW. The Operating Engineers representative replied that there were other contractors who belonged to both unions.⁴

The next day, June 12, the Employer entered into a Section 8(f) agreement with the Operating Engineers.⁵ The

³ All dates below refer to 1998. The agreement does not appear to be a "project agreement," but covers "all work relating to the development, expansion or alteration of coal mines . . . or where the Employer contracts to perform construction work at a coal mine or coal mine related facility (including idled or abandoned mines) . . ."

⁴ It is not clear whether this statement meant that the Operating Engineers would be willing to represent fewer than all the Employer's employees, i.e., whether the Operating Engineers were signaling acceptance of a composite crew.

⁵ This 8(f) agreement granted "sole and exclusive" representation rights for a unit of "Operating Engineer Equipment Operators, Operating Engineer Apprentices, Operating Engineer Foremen, Master Mechanics, Assistant Master Mechanics, Operating Engineer Mechanics, Operating Engineer Mechanic Trainees, Operating Engineer Engine Men, Operating Engineer Greasers and Operating Engineer Oilers

Employer immediately repudiated its 8(f) agreement with the UMW, and informed the referred UMW employees that it would no longer need their services. The Employer's Marissa reclamation project ran from June 15 through October 30, and was staffed by the owner and two employees, one of which the Employer asserts was a supervisor. During the Marissa project, the Operating Engineers referred three additional employees who worked for the entire project, and referred six other employees who worked only for varying periods of time. The Employer's Harrisburg reclamation project ran from July 23 through December 3 and was staffed by the Employer's Manager's father, two Operating Engineer referrals who worked for the entire project, and two Operating Engineer referrals who worked for only two to three weeks.⁶

The Region initially issued a Section 8(a)(2) and (5) complaint alleging that the Employer unlawfully repudiated its UMW 8(f) agreement and unlawfully entered into a conflicting 8(f) agreement with the Operating Engineers. However, the Operating Engineers and the Employer filed answers asserting that the case should be dismissed because it raises an issue of work jurisdiction.

ACTION

We agree with the Region that the complaint should be withdrawn and the charge dismissed, absent withdrawal.

The primary issue raised in this case is whether the Board's decision in John Deklewa & Sons⁷ changes the application of Brady-Hamilton and J.L. Allen, supra, in 8(f) situations. In Brady-Hamilton the Board, in a three-to-two decision, dismissed a Section 8(a)(3) complaint in the context of a jurisdictional dispute. The Employer had terminated members of the Operating Engineers when it changed the disputed work assignment to members of the Longshoremen's Union. The Operating Engineers filed a Section 8(b)(4)(D) charge against the Longshoremen and a Section 8(a)(3) charge against the employer. After the Board awarded the disputed work to the Operating Engineers in the Section 10(k) proceeding, it dismissed the Section

and firemen employed by the Employer within the territorial jurisdiction of the Union."

⁶ On August 21, the Operating Engineers filed an RC petition which currently is blocked by the instant charges.

⁷ 282 NLRB 1375 (1987), enf'd. sub nom. Iron Workers Local 3 v. NLRB, 843 F.2d 770 (3d Cir. 1988).

8(a)(3) complaint, holding that Section 8(a)(3) is not applicable where the actions of all parties are part and parcel of a bona fide jurisdictional dispute. 198 NLRB at 148.

In J.L. Allen the Board extended the Brady-Hamilton rationale in dismissing a Section 8(a)(3), 8(a)(5) and 8(b)(2) complaint in a jurisdictional dispute context. The employer in J.L. Allen acquiesced to pressure brought to bear upon it by a construction Trades Council to lay off members of the Laborers union who had already been hired to do unskilled work, and award all work, both skilled and unskilled, to members of the Trades Council unions. The ALJ stated that the Section 8(a)(5) allegation should be dismissed because that section "has no application to the construction industry," i.e., to Section 8(f) relationships. 199 NLRB at 679. The Board majority, citing Brady-Hamilton, stated that it did not adopt that rationale of the ALJ and held that the alleged 8(a)(5) violation in withdrawing recognition from the Laborers was "merely part and parcel of the bona fide jurisdictional dispute" and was so intertwined with the other conduct "that to find and remedy any such violation would conflict with the remedial scheme of Sections 8(b)(4)(D) and 10(k)." 199 NLRB at 676.

In Deklewa, *supra*, the Board revised its position regarding the interpretation and application of Section 8(f). Prior to Deklewa, either party to a prehire agreement could, for any reason, repudiate the agreement up until the time the union attained majority support, per Board decision, affirmed by the Supreme Court.⁸ In Deklewa, the Board held that a collective-bargaining agreement permitted by Section 8(f) shall be enforceable during its term through the mechanisms of Section 8(a)(5) and Section 8(b)(3) because of a presumption that the union during that term enjoys majority support equivalent to Section 9(a) status.⁹

Since post-Deklewa an 8(f) union enjoys 9(a) status during the term of the contract, arguably Barney Wilkerson

⁸ NLRB v. Iron Workers Local 103 (Higdon Contracting Co.), 434 U.S. 335, 97 LRRM 233 (1978).

⁹ Deklewa, 282 NLRB at 1377-1378.

and Oilfield Maintenance¹⁰ apply and the Board would normally find violative the extension of recognition to a second 8(f) representative. If the conflicting recognitions occur in the context of a jurisdictional dispute, however, Brady-Hamilton and J.L. Allen would arguably preclude the issuance of a Section 8(a)(5) complaint. Initially, we conclude that the competing claims of the UMW and then the Operating Engineers to the work constituted a jurisdictional dispute.¹¹ Thus, there was not merely a "core group" of Employer employees with a question of which union would represent them; rather, the UMW-referred employees were told not to report for work and the referred Operating Engineers took over the work.

Brady-Hamilton and J.L. Allen do not appear to have been cited in Board cases post-Deklewa. Hence, there is no clear indication as to whether Deklewa would affect in any manner the Board's application of Brady-Hamilton and J.L. Allen to dismiss Section 8(a)(5) allegations arising out of jurisdictional disputes in 8(f) construction industry situations, where most jurisdictional disputes arise. However, the Board's decisions in two pre-Deklewa cases suggest that it would apply J.L. Allen to dismiss the Section 8(a)(5) charge here since a jurisdictional dispute arguably exists.¹²

Thus, in Metromedia, Inc. - KMBC TV, 232 NLRB 486 (1977), enf'd 586 F.2d 1182 (8th Cir. 1978), the Board considered the effect of a technological invention, portable video cameras, or "mini-cams," on the assignment

¹⁰ Barney Wilkerson Constr. Co., 145 NLRB 704 (1963) (extending 8(f) recognition while rival union also claiming exclusive recognition); Oilfield Maintenance Co., 142 NLRB 1384 (1963) (extending 8(f) recognition while employees already accorded exclusive 9(a) representation by other union); Bell Energy Management Corp., 291 NLRB 168 (1988).

¹¹ See, e.g., Teamsters Local 639 (United Rigging), 296 NLRB 803, 805 n. 5 (1989).

¹² Advice has, on one occasion, applied J.L. Allen to a Section 8(f) situation post-Deklewa. See Allied Construction Employers Association, Case 30-CA-9694, Advice Memorandum dated January 29, 1988 (dismissing post-Deklewa Section 8(a)(5) charge involving an employer which signed conflicting Section 8(f) agreements; matter presented a jurisdictional dispute amenable to resolution through a Section 10(k) hearing).

of work between members of two unions, IATSE and IBEW. The employer proposed that the mini-cam work be assigned to IATSE, which had been recently certified in a unit of the employer's cameramen. Before a contract with IATSE was reached, the employer signed a new contract with IBEW giving their engineers the mini-cam work. This case, although pre-Deklewa, did not arise in the construction industry, so the relationships and contracts at issue were 9(a). The Administrative Law Judge, relying primarily on J.L. Allen, recommended dismissal of the complaint, finding that the employer had bargained in good faith with IATSE, the union which was not assigned the mini-cam work, and that a Section 10(k) proceeding was appropriate to resolve the dispute between the two unions. The Board reversed the ALJ's decision, distinguishing J.L. Allen, finding that the facts of the case did not present a traditional jurisdictional dispute because the Employer was actively engaged in bargaining with IATSE concerning the operating of mini-cams when it unilaterally assigned the work to the IBEW unit and announced it would transfer some camera operators from the IATSE unit to the IBEW unit, in violation of Sections 8(a)(5) and (1). 232 NLRB at 488.

In Stockton Steel Fabricators, 271 NLRB 524 (1984), the employer had Section 9(a) contracts with the Teamsters and the Ironworkers. Both of these units included forklift drivers. The Employer withdrew recognition from the Teamsters forklift drivers and placed the Teamsters forklift drivers in the Ironworkers unit, which resulted in losses to them of pay and benefits. The Administrative Law Judge found that the employer violated Sections 8(a)(5), (3) and (1) by withdrawing recognition from the Teamsters and refusing to bargain with them, after distinguishing Brady-Hamilton because he found no jurisdictional dispute because there was no conduct violative of Section 8(b)(4)(D). 271 NLRB at 532. The Board affirmed the ALJ's decision.

Both Metromedia and Stockton Steel are significant because it appears that the Board assumed that J.L. Allen/Brady-Hamilton applied to possible Section 8(a)(5) violations even in a Section 9(a) relationship. [FOIA Exemptions 2 & 5

FOIA Exemptions 2 & 5.]
Therefore, the complaint should be withdrawn and the charge should be dismissed, absent withdrawal.¹³

B.J.K.

¹³ We agree with the Region that the existence of a Section 8(a)(2) allegation should not affect the application of the Brady-Hamilton/J.L. Allen doctrine to the instant case. Although the Board has not specifically addressed its application to a Section 8(a)(2) charge, the charge here is as much a "part and parcel" of the jurisdictional dispute as was the dismissed 8(a)(5) charge in J.L. Allen.