

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

Advice Memorandum

DATE: October 26, 2006

TO : Victoria E. Aguayo, Regional Director
Region 21

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

SUBJECT: DuPont Powder Coatings, Inc. 177-1650-0100
Case 21-CA-37063 420-9000
440-5033-6020
506-6050-6210-0000
524-5073-5550-0000
530-6067-6001-3755
530-8023-6800
530-8054-7000-0000
530-8090-4100-0000

Following further investigation, this case was resubmitted for advice as to whether the Employer violated Section 8(a)(5) by its unilateral decision to permanently replace unit employees with temporary agency employees.

We conclude that the Employer's permanent replacement of unit employees with temporary agency employees violated Section 8(a)(5) because the Employer thereby unlawfully transferred work out of the unit. We specifically conclude that (1) the Employer is a joint employer of the non-unit temporary agency employees and, therefore, the Employer's permanent use of those employees to perform unit work effectively constituted a permanent transfer of work to non-unit employees; (2) the Employer had no contractual right to permanently transfer unit work to jointly employed employees under either a clear and unmistakable waiver analysis or a contract interpretation analysis; and (3) the unit had not become a stable, permanent one-person unit because the Employer continued to employ two employees to perform unit work.

I. The Joint Employer Issue

We agree with the Region that the Employer and the temporary agency it utilizes (Labor Ready) share or co-determine matters governing the Labor Ready-supplied employees' ("joint employees") essential terms and conditions of employment.¹ Although Labor Ready solely determines the joint employees' wages, makes available

¹ NLRB v. Browning-Ferris Industries, 691 F.2d 117, 1123, (3rd Cir. 1982).

health care benefits, and does the hiring and firing, the Employer exerts complete supervisory control over the joint employees, directs their day-to-day work activities including the setting of their hours, and assigns the work they perform. Additionally, the two employers share the responsibility for the safety training of these employees.² Finally, the Employer does not actually hire, fire, or discipline these employees but, if the Employer is not satisfied with an employee's work, it can direct Labor Ready not to dispatch the person to its facility.³ Under the circumstances, the Employer and Labor Ready jointly employ the temporary agency employees that perform the bargaining unit work for the Employer.

II. Unilateral Transfer of Work

The Employer's jointly employed employees are non-unit employees under Oakwood Care Center.⁴ Therefore, when the

² See Continental Winding Co., 305 NLRB 122, 123, 135 (1991) (joint employers found where supplier employer initially hired the employees and set and paid their wages and benefits, and user employer supervised them on day-to-day basis and shared discipline authority); Sun-Maid Growers, 239 NLRB 346, 350-351 (1978), enfd. 618 F.2d 56 (9th Cir. 1980) ("[t]he fact that Respondent may not have exercised the full panoply of powers over the [employees] that an employer can exercise does not, of itself, serve to render it any the less a joint employer So long as Respondent possessed 'an area of effective control over labor relations,' it was an employer) (citation omitted). See also Floyd Epperson, 202 NLRB 23, 23 (1973), enfd. 491 F.2d 1390 (6th Cir. 1974) (joint employer where supplier hires and sets wage rates, but where user establishes drivers' schedules, changes assignments, indirectly affects discipline and, to some extent, wages; and generally supervises).

³ Salem Electric, 331 NLRB 1575, 1577 (2000) (joint employer found where user employer provided day-to-day oversight and direction of work and where, if an employee's work was unsatisfactory, user would request that supplier remove the employee from the worksite and refer another in his place). See also Capitol EMI Music, 311 NLRB 997, 1017 (1993) (user could effectively fire any supplied worker by simply requesting that the supplier remove the employee from its operations).

⁴ 343 NLRB No. 76 (2004) (combined units of solely and jointly employed employees are multi-employer units and are statutorily permissible only with the parties' consent). Here, there is no evidence that either Labor Ready or the

Employer permanently transferred all unit work to the joint temporary employees without bargaining, the Employer unilaterally and permanently transferred work out of the unit.⁵ We reject the Employer's contention that its arrangement with Labor Ready constituted subcontracting, and that the contractual management rights clause permits unilateral subcontracting, for the reasons set forth below.

III. The Contractual Privilege Issue

We agree with the Region, that the Employer did not have a contractual right to permanently transfer work out of the unit.

A. Clear and Unmistakable Analysis

Under the Board's clear and unmistakable waiver standard, the contract did not waive the Union's right to bargain over a permanent transfer of unit work to jointly employed employees. The parties' contract only grants the Employer the right to determine the size and composition of the workforce, and the right to subcontract part or all of its operations. There is no language in the contract specifically addressing the permanent transfer of unit work to jointly employed employees or permanent replacement of unit employees. Although the contract contains a zipper clause, there is nothing in the parties' bargaining history that indicates that, during the parties' negotiations, they fully discussed the issue of permanent unit work transfer or permanent unit employee replacement involving jointly employed employees.⁶ Thus, the language in the contract is

Employer consented to the inclusion of the temporary employees in the unit.

⁵ See, St. George Warehouse, 341 NLRB 904, 904-905 (2004) (employer violated Section 8(a)(5) when it stopped hiring permanent employees and started hiring temporary nonunit employees to do unit work without bargaining); Storall Mfg. Co., 275 NLRB 200, 239 (1985) (unilateral change from past practice of using unit employees to do night shift work to using temporary nonunit employees was unlawful transfer of work). The Board has also found a violation where employers transferred unit work to supervisors without giving notice and opportunity to bargain, see Regal Cinemas, 334 NLRB 304, 304 (2001), citing Land O' Lakes, 299 NLRB 982, 986 (1990); Hampton House, 317 NLRB 1005 (1995).

⁶ Johnston-Bateman Co., 295 NLRB 180, 186 (1989) (drug testing program was not even mentioned during contract

not sufficient to constitute a clear and unmistakable waiver.⁷

B. Contract Coverage Analysis

It is the General Counsel's position that in unilateral implementation cases involving an employer's claim of contractual privilege, the Board should modify its current "clear and unmistakable" waiver standard in favor of interpreting the parties' agreement at issue.⁸ In so doing, the Board should take into account all relevant factors, including: (1) the wording of the proffered sections of the agreement(s) at issue, regardless of whether the language is general, specific, or ambiguous in some other way; (2) the parties' past practices; (3) the relevant bargaining history; and (4) any other provisions in the collective-bargaining agreement or in other bilateral arrangements that may shed light on the parties' agreement concerning the change at issue.

We conclude that under the General Counsel's analysis, the Employer did not have a contractual right to unilaterally transfer all unit work to joint agency employees. As to the wording of the management rights clause, the language specifically grants the Employer the right to determine the size and composition of its workforce, and to "subcontract" all or any part of its operations. Neither the management rights clause, nor any other provision of the contract, grants the Employer the right to permanently transfer all unit work to jointly employed employees. Concerning past practice, the Employer has used temporary employees to replace unit employees only for temporary workforce depletions due to medical leave, vacations and other short-term absences. The Employer has never permanently replaced unit employees with jointly employed temporary employees in the past. Moreover, neither the Union nor the Employer has any bargaining notes reflecting any discussions between the parties about the

negotiations, so it could not have been "consciously explored" and the right to bargain waived).

⁷ Metropolitan Edison Co. v. NLRB, 460 U.S. 693, 708 (1983) (Court agreed that Board should not infer from general contractual provision a waiver of statutory protected right unless explicitly stated).

⁸ The General Counsel's position is more fully discussed in Stanford Hospital & Clinics and Lucile Packard Children's Hospital, Case 32-CA-21170, Advice Memorandum dated October 14, 2005.

Employer's right to permanently transfer work from the unit employees to its jointly employed employees. Finally, there are no additional provisions in the contract that shed any light on whether the parties intended to allow the Employer unilaterally to move work permanently from the unit employees to joint employees.

We conclude that the Employer's past practice of using temporary employees only during short-term absences, together with the above contract language, are insufficient to find that the parties intended to grant the Employer the right to permanently transfer all unit work to jointly employed employees. Therefore, under the General Counsel's contract interpretation analysis, the Employer violated Section 8(a)(5) when it permanently transferred all unit work to its jointly employed employees.

In reaching our conclusion, we necessarily reject the Employer's argument that it had a right to unilaterally replace the unit employees, because its contractual arrangement with Labor Ready amounted to "subcontracting" under the management rights provision. The term "subcontract" in labor relations refers to the replacement of an employer's own employees with the employees of another, removing the "subcontracting" employer from employment.⁹ The Employer has adduced no evidence showing that the parties intended this term unusually to also include the use of employees whom it jointly employs with another entity.¹⁰

The Employer also cites Continental Winding Co., 305 NLRB 122 (1991), and International Paper, 319 NLRB 1253 (1995), in support of its argument that it was "subcontracting" with Labor Ready. However, these cases are clearly distinguishable because neither involved an asserted contractual privilege to subcontract.

In Continental Winding, the parties had no contract when the employer began replacing unit employees who quit or were terminated for cause with temporary, jointly employed employees, rather than temporary workers from an on-call roster it maintained. The Board held that this unilateral change in the employer's method of obtaining

⁹ See, e.g., Fibreboard Paper Products Corp. V. NLRB, 379 U.S. 205, 215 (1964).

¹⁰ American Telephone Co., 309 NLRB 925, 927 (1992) (in constructing provision of bargaining contract, careful consideration must be given to extrinsic evidence; bargaining history failed to establish that agreement permitted employer to subcontract unit work unilaterally).

additional employees violated Section 8(a)(5), and that the employer was not exempted from its bargaining obligation under First National Maintenance¹¹ since its decision was made for discriminatory motives. 305 NLRB at 124-25. The Board apparently characterized this unilateral change in obtaining new employees as "subcontracting" because the General Counsel used this term as its alternative theory to the principal argument that the temporary employees are part of the unit, an argument rejected by the Board. Id. at 323. The General Counsel likely made the alternative argument should the Board find no joint employer status, since a joint employer cannot subcontract work, as this term is properly understood, to its own employees. In any event, there is no bargaining history or past practice indicating that the parties intended the management rights provision's reference to "subcontracting" to mean the strained construction that the Employer takes from Continental Winding, or intended to grant the Employer the right to permanently transfer unit work to jointly employed employees.

In International Paper, the employer permanently subcontracted out work after temporarily subcontracting the work out during a lawful lockout between contracts. The Board held that the conduct of permanently subcontracting out the work was inherently destructive of the employees' rights and, therefore, also violated Section 8(a)(5) by unilaterally engaging in that conduct. 319 NLRB at 1275. The subcontractors there were not joint employers and the Board had no opportunity to consider whether the employer had a contractual right to subcontract. We also note that in neither case cited by the Employer did the Board use a contract analysis.

IV. The One-Person Unit Defense

The Employer asserts that it had no duty to bargain with the Union after September 19, 2005, because one of the two unit employees (Davis) retired, reducing the unit to a single employee. A stable one-person unit arises where either the bargaining unit over time has been confined to one or no employees,¹² or the unit currently has one or no employees and the employer can show that such will be the condition in the future.¹³ The focus in these cases is on

¹¹ 452 U.S. 666, 687-688 (1981).

¹² See, e.g., Stack Electric, 290 NLRB 575, 577-578 (1988).

¹³ See, e.g., Crescendo Broadcasting, 217 NLRB 697, 697 (1975).

whether the one-employee unit is a temporary or permanent situation.¹⁴ The burden is on the employer to prove that a reduction in unit size to one person is permanent.¹⁵

Here, the Employer has consistently utilized two unit employees since 1990 to perform its warehouse operations. We reject the argument that after Davis retired, the Employer's replacement of Davis with a jointly employed agency employee reduced the unit to only one employee. We have already concluded above that the Employer unlawfully transferred the unit work Davis had performed to a nonunit joint employee. Therefore, that work legally remains in the unit and the Employer continued to employ a two-person unit after Davis retired.

The cases cited by the Employer are clearly distinguishable. In Searls Refrigeration Co., 297 NLRB 133, 135 (1989), one of the two employees was a supervisor, and when he left the shop, the employer continued to operate with just the one employee. In D & B Masonry, 275 NLRB 1403, 1408-1410 (1985), the employer currently employed only one unit employee and there was no expectation of any other employee returning to the unit. In Haas Garage Door Co., two of the three employees were found to be independent contractors, leaving only one unit employee. In contrast, the Employer here had always employed two unit employees in the past and, as discussed above, legally continues to do so. Therefore, we conclude that the Employer has not carried its burden and has not shown the existence of a stable one-person unit.

Accordingly, the Region should issue complaint, absent settlement, alleging that the Employer violated Section 8(a)(5) when it made the unilateral decision to permanently

¹⁴ Compare Fish Engineering & Construction, 308 NLRB 836 (1992) (election appropriate where employer finishing work in area had bid on future projects) with Davey McKee Corp., 308 NLRB 839 (1992) (election petition dismissed where employer was completing project and had not bid on other projects in area). See also McDaniel Electric, 313 NLRB 126, 127 (1993).

¹⁵ See Crispo Cake Cone Co., 190 NLRB 352, 354 (1971), *enfd.* 464 F.2d 233 (8th Cir. 1972).

replace unit employees with jointly employed temporary agency employees.

B.J.K.