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

Advice Memorandum

DATE: February 26, 2007

TO : Stephen Glasser, Regional Director
Region 7

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

SUBJECT: Guardsmark LLC
Case 7-CA-49745

Plant Protection Association National
Case 7-CB-15318

530-6050-7000
536-2563
536-2563-7500
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These cases were submitted for advice on several issues pertaining to the validity of an application-of-contract clause contained in the parties' collective-bargaining agreement that would apply to employees who would remain outside the existing unit. The issues involved include whether the Employer violated Section 8(a)(5) by refusing to honor the clause and apply the terms and conditions of the existing Agreement to a newly certified unit,[1] and conversely, whether the Union violated Section 8(b)(3) by attempting to apply the Agreement to the certified unit; and whether the Union violated Section 8(b)(1)(A) by declaring to unrepresented employees during an organizing campaign at another unit that the application of contract clause authorized the Union to impose the terms and conditions of the Agreement at that new unit if employees selected the Union.

We conclude that the Employer violated Sections 8(a)(5) and 8(d) by refusing to honor the application-of-contract clause and apply the terms and conditions of the existing Agreement to the newly certified Ford Land unit, and conversely, that the Union did not violate Section

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[1] The Region also requested advice in Case 7-CA-49745 regarding whether it should issue a motion for summary judgment alleging that the Employer unlawfully refused to bargain with the Union over that newly certified unit. By email of January 23, 2007, Advice authorized the Region to proceed with the motion for summary judgment on the ground that the Employer was estopped from raising issues regarding the application of contract clause for the first time in the test of certification proceeding. See Visiting Nurse Health System, Inc., 319 NLRB 899 (1995).

8(b)(3) by attempting to apply the Agreement to that unit. We further conclude that the Union did not violate Section 8(b)(1)(A) by declaring to unrepresented employees during the election campaign at another unit that the application-of-contract clause authorized the Union to impose the terms and conditions of the Agreement if employees selected the Union.

FACTS

The Union represents plant protection officers. Since the 1940's, Ford Motor Co. and the Union had a collective-bargaining relationship covering the plant protection officers employed in individual units at various Ford facilities throughout North America. In the late 1970's, Ford and the Union negotiated an agreement covering all the facilities represented by the Union. The facilities remained individual bargaining units, covered under one national agreement. In 1988, the parties agreed to include the following language in their national collective-bargaining agreement:

> If it shall be determined by National Labor Relations Board certification that the Union is the exclusive collective bargaining representative for any unit of Company employees not covered by this Agreement (including a unit of Employees in a new Company location), this Agreement shall extend automatically to such new unit.

The last collective-bargaining agreement between Ford and the Union was effective from October 5, 2001 to April 30, 2005.

In late 2004, Ford began the process of subcontracting its plant protection work. Guardsmark ("the Employer") was awarded the contract to provide the plant protection work at Ford's unionized and non-unionized North American facilities.[2] Upon implementation of the subcontracting agreement, Guardsmark recognized the Union as the exclusive collective-bargaining representative of its plant protection officers employed at the approximately 23 Ford facilities previously covered under the Union's collective-bargaining agreement with Ford. In late June 2005, the Union and the Employer reached agreement (the Agreement) on

[2] On June 19, 2006, the Region issued a complaint in Case 7-CA-48345 alleging that Ford failed to bargain with the Union regarding its decision, and the effects of its decision, to subcontract the work. That case closed on February 14, 2007 pursuant to a non-Board settlement.

a national collective-bargaining agreement covering the 23 facilities. As under the Ford agreement, each facility covered by the collective-bargaining agreement remained a separate bargaining unit with the parties negotiating separate local agreements covering local issues at each facility.

The Agreement between the Employer and the Union contains the same language quoted above from the Ford-Union collective-bargaining agreement providing automatic extension to any newly certified unit (the application-of-contract clause). The evidence indicates that the parties did not discuss this clause during negotiations.

The Agreement also provides that qualified unit employees who are laid off from their facility receive preference over other applicants for positions at other sites covered by the Agreement,[3] and that employees may transfer to positions at other facilities covered by the Agreement.[4]

Soon after the parties entered the Agreement, the Union won elections in units in Woodhaven, Michigan and Michigan Proving Grounds. Pursuant to the application-of-contract clause, the Employer extended the Agreement to those facilities.

The Ford Land unit

On March 21, 2006,[5] the Union filed a petition for an election to represent the Employer's plant protection employees at the Ford Land facility in Dearborn, Michigan. A hearing was held on April 5, at which the Employer argued that the Union was not certifiable under Section 9(b)(3) because it admitted to membership a classification of nonguards. The Region rejected the Employer's argument and issued a Decision and Direction of Election. By order of May 25, the Board denied the Employer's Request for Review and on May 26, the Union won the election. On June 20, the Board issued a Supplemental Decision on Objections to the Election and Certification of Representative. On July 28, the Board denied the Employer's Request for Review of Certification, which was based on the same arguments it had raised in its initial unit objections.

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[3] Appendix B, p. 41.

[4] Appendix B, p. 47.

[5] Herein all dates are 2006.

By email of July 7, the Union wrote the Employer that it had tried repeatedly to meet and discuss grievances, that the Employer was refusing to meet, and that the Union intended to file a grievance demanding that the Employer apply the Agreement to the Ford Land unit. The Union then filed a grievance and the Employer refused to process it. By letter of August 11, the Employer informed the Union that it intended to test the certification of the unit. On August 25, the Union filed a charge in Case 7-CA-49745 alleging that the Employer refused to bargain. On October 11, the Union filed additional charges alleging that the Employer made unlawful unilateral changes to the unit (Case 7-CA-49871) and failed to apply the terms and conditions of the Agreement to the certified unit (Case 7-CA-49872).[6]

The Livonia unit

On September 15, the Union lost an election to represent the Employer's plant protection employees at Ford's facility in Livonia, Michigan. During the course of the campaign, the Union posted on its website a page with "contract highlights." The page contained a link to an electronic version of the parties' Agreement, with the following explanatory paragraph:

> The [Union] negotiated a collective bargaining agreement with Guardsmark, LLC, which covers all Guardsmark locations. If a new location votes to be represented by the [Union], they will automatically receive the benefit and protection of the agreement.

Also during the course of the campaign, the Union sent a letter to the Livonia employees indicating that if a new unit of employees voted to be represented by the Union, the Agreement with Guardsmark would apply automatically to that unit.

Action

We conclude that the application-of-contract clause is a mandatory subject of bargaining because it vitally affects the interests of the currently represented unit employees. As such, we conclude that the Employer violated Sections 8(a)(5) and 8(d) by refusing to honor the application-of-contract clause and apply the terms and conditions of the existing Agreement to the newly certified Ford Land unit, and conversely, that the Union did not violate 8(b)(3) by attempting to apply the Agreement there. We further conclude that the Union did not violate Section

[6] [*FOIA Exemptions* 2 and 5
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8(b)(1)(A) by declaring to unrepresented employees at the Livonia unit that the application-of-contract clause authorized the Union to impose the terms and conditions of the Agreement if employees selected the Union.

A. The Validity of Application-of-Contract Clauses

Parties in an existing bargaining relationship may lawfully include in their collective-bargaining agreement a provision that applies to employees *outside* the unit if that provision is a mandatory subject of bargaining for the unit employees.[7] In "each case the question is not whether the third-party concern is antagonistic to or compatible with the interests of bargaining-unit employees, but whether it vitally affects the 'terms and conditions' of their employment."[8] The Board applies this principle to the negotiation of after-acquired clauses in parties' collective-bargaining agreements, "whereby the employer agrees to recognize the union as the representative of, and apply the collective-bargaining agreement to, employees in [facilities] acquired after the execution of the contract."[9]

The Board's method for determining whether an after-acquired clause "vitally affects" the existing unit's terms and conditions of employment depends on the relation of the existing unit to the newly acquired facility. Where an after-acquired clause applies to employees who would become part of the existing unit upon a showing of majority, the clause is automatically deemed to "vitally affect" the terms of employment of the existing unit and thus be a mandatory subject.[10] Thus, in Houston Div. of Kroger Co., the employer violated Section 8(a)(5) by breaching a contract clause that would have added additional stores to the bargaining unit and applied the contract to those stores if the union obtained a showing of majority status

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[7] See Allied Chemical Workers v. Pittsburgh Plate Glass Company, 404 U.S. 157, 178-179 (1971).

[8] Id. at 179.

[9] See Pall Biomedical Products Corp., 331 NLRB 1674, 1675 (2000), enf. den. on other grounds 275 F.3d 116 (D.C. Cir. 2002).

[10] Pall Biomedical Products Corp., 331 NLRB at 1676; Houston Division of Kroger Co., 219 NLRB 388, 389 (1975). See generally Allied Chemical Workers v. Pittsburgh Plate Glass Co., 404 U.S. at 179; Local 24 of Intern. Broth. Of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO v. Oliver, 358 U.S. 283, 294 (1959).

at those facilities.[11] The Board subsequently held that the Kroger decision implicitly found that such after-acquired clauses, which contemplate the absorption of employees into an existing multi-location unit, are mandatory subjects of bargaining.[12]

Where an after-acquired clause applies to employees who would remain *outside* the existing unit upon a showing of majority, the Board analyzes whether the clause serves bargaining unit interests such that it "vitally affects" existing unit employees' terms and conditions of employment.[13] Applying this test, the Board has consistently concluded that application-of-contract clauses on behalf of employees who would not become part of the bargaining unit are mandatory subjects of bargaining because they serve bargaining unit interests by protecting the jobs, wages, benefits, and work standards of the existing unit.

In Lone Star Steel Co., the Board found an application-of-contract clause, extending the National Bituminous Coal Agreement to new employees who would not become part of the existing unit, to be a mandatory subject of bargaining. Thus, the union's strike in support of its demand to include the multi-location bargaining clause did not violate 8(b)(3). The Board specifically rejected the notion that the distinction between Lone Star (which extended the contract to employees outside the unit) and Kroger (which absorbed new employees into the existing unit) "deal[t] a fatal blow" to the clause.[14] Rather, the Board found it "clear that this clause serves to protect the jobs and work standards of bargaining unit employees . . . by removing economic incentives which might otherwise encourage [the employer] to transfer such work to other

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[11] The Board interpreted the clause as a waiver of the employer's right to demand an election. 219 NLRB at 388-89. See also Retail Clerks, Local 870 (White Front Stores, Inc.), 192 NLRB 240 (1971).

[12] Pall Biomedical Products Corp., 331 NLRB at 1675; United Mine Workers of America (Lone Star Steel Co.), 231 NLRB 573, 576 (1977), enf. den. on other grounds 639 F.2d 545 (10th Cir. 1980), cert. den. 450 U.S. 911 (1981).

[13] See Pall Biomedical Products Corp., 331 NLRB at 1676; Lone Star Steel Co., 231 NLRB at 576.

[14] Ibid.

mines under its control."[15] In so doing, the Board also overturned the ALJ's conclusion that the clause did not vitally affect terms and conditions because it was overly broad and went beyond protecting unit work and standards.[16] Thus, the Board concluded that "[t]he fact that the union could have sought other specific provisions addressed solely to the protection of unit employees in a manner which would remove economic incentives to the development of other mining facilities at the expense of the [unit employees], . . . [did] not render the subject matter of *this* clause any less vital to the employees' interests" (emphasis supplied).[17]

In Amax Coal Co.,[18] the Board again concluded that an application-of-contract clause in the parties' collective-bargaining agreement applying to new operations outside the scope of the existing unit vitally affected the bargaining unit employees.[19] The Board, citing Lone Star Steel Co., reasoned that the clause "merely seek[s] to preserve the employment opportunities of the employees in the existing unit by ensuring that the employees of any other operation put into production by the [employer] during the term of the proposed agreement, for whom the Union has obtained bargaining rights, will receive the same wages and benefits as the employees" at the existing unit.[20] Thus, it was "manifest" that the clause had a "vital effect" on the terms and conditions of employees at the existing unit.[21]

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[15] Id. at 573, 576.

[16] Id. at 576, 582.

[17] Id. at 576.

[18] 238 NLRB 1583, 1590 (1978), enf. den. in rel. part, 614 F.2d 872 (3rd Cir. 1980).

[19] The application-of-contract clause covered all sub-bituminous mining facilities put into production by the employer during the term of the agreement.

[20] 238 NLRB at 1590.

[21] Ibid. See also RCA Victor Division, 107 NLRB 993, 995 (1954) (election barred where employer was party to national agreement providing that the agreement was to apply to any new unit for which the contracting international union or one of its locals was recognized). And see Eltra Corp., 205 NLRB 1035, 1039-1040 (1973) (Board affirms without comment ALJ's conclusion that application of contract was not enforceable because the terms were

In Promenade Garage Corp.,[22] the Board held that an employer violated Section 8(a)(5) by failing to implement in a new unit an additional stores clause providing for application of contract upon proof of majority. The clause was contained in a collective-bargaining agreement between the employer's multi-employer association and the union. The Board affirmed without comment the ALJ's conclusion that "it is well settled that 'additional store clauses' are valid in situations where the employees affected are not denied their right to have a say in the selection of their bargaining representative."[23]

More recently, in Pall Biomedical Products Corp., the Board held that a letter of agreement that extended recognition (but did not apply the entire contract) to new units in the same geographic area "vitally affect[ed]" existing employees because the agreement protected against the erosion of the existing unit's terms and conditions of employment and addressed employee concerns that work would be transferred out of the bargaining unit.[24] The Board found insignificant the fact that unlike in Kroger, the employees would constitute a separate bargaining unit because the union still "would be in a position to protect the interests of the existing unit employees by achieving recognition" and "negotiating terms and conditions of employment similar to those enjoyed by the [existing unit]."[25]

In sum, application-of-contract clauses on behalf of employees in other locations who will not become part of the existing bargaining unit are mandatory subjects of bargaining because they serve unit interests: they preserve existing unit terms and conditions by providing new employees the same wages and benefits[26] and protect existing

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ambiguous; ALJ explains in dicta that the clause would be mandatory subject of bargaining if the parties had clearly included it in their collective-bargaining agreement).

[22] MJS Garage Management Corp. d/b/a Promenade Garage Corp., 314 NLRB 172, 182-183 (1994).

[23] Id. at 182.

[24] 331 NLRB at 1676-1677. Thus, the employer violated 8(a)(5) by repudiating the letter of agreement.

[25] Id. at 1677.

[26] See Amax Coal Co., 238 NLRB at 1590.

unit jobs by removing economic incentives that might encourage the transfer of work.[27] The fact that the clauses extend the contract to employees outside the unit, rather than absorb new employees into the existing unit, does not limit their benefit to the union in negotiating competitive terms and conditions for existing unit employees.[28] Moreover, that the provision might have been more directly addressed to the protection of existing unit employees does not render an application-of-contract clause less vital to their interests.[29]

B. This Application-of-Contract Clause Vitally Affects the Existing Unit Employees' Interests

The Board's Kroger decision, as applied to multi-unit locations in Lone Star Steel Co. and Promenade Garage Corp., controls the instant case and dictates a finding that the application-of-contract clause is a mandatory subject of bargaining. As discussed below, the clause clearly serves the bargaining unit's interests and vitally affects existing terms and conditions of employment.

Most significantly, the application-of-contract clause, which extends the parties' national Agreement to new Employer facilities, serves existing unit interests by strengthening the Union's bargaining position in future contract negotiations. It is axiomatic that any single bargaining unit will likely achieve greater benefits through multi-unit bargaining than through bargaining alone.[30] As a practical matter, where the parties are engaged in multi-unit bargaining, either through a national collective-bargaining agreement (as in the instant case and in Lone Star Co.) or through multi-employer bargaining (as

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[27] See Lone Star Steel Co., 231 NLRB at 576.

[28] Ibid. See also Pall Biomedical Products Corp., 331 NLRB at 1677 (insignificant that neutrality clause applied to employees in separate bargaining unit because it enabled union to negotiate terms and conditions of employment similar to those enjoyed by the existing unit).

[29] Lone Star Steel Co., 231 NLRB at 576.

[30] See Mishel, Lawrence, "The Structural Determinants of Union Bargaining Power," *Industrial and Labor Relations Review*, Vol. 40, No. 1 (Oct 1986), pp. 90-104 (centralization of bargaining beyond the plant level to the level of the firm permits higher employee compensation (p. 99-100) and plant by plant bargaining in a multi-plant firm puts labor in its weakest position (p. 94)).

in Promenade Garage Corp.), the impact of the application-of-contract provision on unit employees' terms and conditions of employment will be identical to that of Kroger.[31] Thus, in Kroger, the after-acquired store clause extended an existing contract beyond the currently existing unit to subsume additional stores into that unit. Here, an existing contract is extended beyond the currently existing units to subsume additional locations into a system of multi-unit bargaining.

While denying enforcement of the Board's decisions in Lone Star Steel and Pall Biomedical Products Corp., the 10th and D.C. Circuit Courts did not reject the "vitally affects" test for determining whether after-acquired clauses on behalf of employees who would remain outside the existing unit are mandatory subjects of bargaining. In fact, in both cases the courts endorsed the test but interpreted it to require that the clause make a "direct frontal attack" on a problem facing the existing unit.[32]

However, a careful reading of the D.C. Circuit's decision in Pall Biomedical Products Corp. v. NLRB[33] illustrates that the court did not find that an application-of-contract clause would fail to meet the "vitally affects" test. In fact, the court indicated in dicta that an application-of-contract clause on behalf of employees who would not become part of the bargaining unit *would* "vitally affect" unit employees' terms and conditions of employment. Thus, although the court reversed the Board's finding that the neutrality clause "vitally affect[ed]" unit terms and conditions of employment, it specifically noted that had the clause extended the entire contract to the unit, such as the one in Lone Star (and the one at issue here), it would have been "indeed a 'direct

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[31] See Lone Star Steel Co., 231 NLRB at 576; Amax Coal Co., 238 NLRB at 1590.

[32] Lone Star Steel Co. v. NLRB, 639 F.2d at 557-558; Pall Corp. v. NLRB, 275 F.3d at 120. See also Amax Coal Co. v. NLRB, 614 F.2d at 884 (court did not specifically apply the "vitally affects" test but concluded that the clause was broader than necessary to accomplish the union's goal of protecting the employees against a shift of production to another mine).

[33] 275 F.3d 116.

frontal attack' upon the issue of work being transferred out of the bargaining unit."[34]

Here, as the Board discussed in Lone Star Steel Co. and Amax Coal Co., by ensuring that employees in other units receive the same wages and benefits as the employees at the existing unit, the clause would help preserve the employment opportunities of the employees in that unit.[35] The Union has been attempting to obtain from the Employer the same level of benefits for unit employees that they had received in their Ford contracts.[36] Applying the Agreement to new Employer facilities will prevent the Employer from implementing lower benefits and/or wages in the new units and using those lower benefits to whipsaw the Union into concessions in the national contract.

Moreover, extension of the Agreement to new units provides important tangible benefits for existing unit employees because they will be able to apply their contractual recall and transfer rights to the new facilities. Thus, under the Agreement, qualified unit employees who are laid off from their facility receive preference over other applicants for positions at other sites covered by the Agreement, and employees may transfer to positions at other facilities covered by the Agreement. Thus, it can be demonstrated that the application-of-contract clause in this case "vitally affects" unit employees.

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[34] 275 F.3d at 122. By contrast, the court reasoned that with the recognition agreement before it, the union "would still have to negotiate a [collective-bargaining agreement], which might or might not equalize labor costs between the new and the old plants."

[35] The Board, moreover, has rejected the notion that "the application of an entire collective-bargaining agreement to nonunit employees, including its noneconomic provisions, necessarily reveals a disguised purpose to promote the [u]nion's institutional or organizational interests" since the clause is "understood to become operative only if the "[u]nion is recognized by an employer or certified by the Board as the collective-bargaining representative of the employees to be covered thereby." See Lone Star Steel Co., 231 NLRB at 576. Here, the parties will apply the Agreement to a new unit only after the Union wins the right to represent that unit in a Board-conducted election.

[36] See The Detroit News, "Union Battles for Ford Jobs," March 17, 2005.

Further, by preserving and enhancing existing unit employees' terms and conditions of employment, the application-of-contract clause at issue here presents none of the problems associated with those clauses that do not satisfy the "vitally affects" standard because they serve union organizational interests instead of unit interests. In Thomas Built Buses, Inc., a subsidiary of Freightliner, LLC,[37] the union obtained the employer's agreement to voluntary recognition based on a card check only after the union first agreed to "contract relief" – or concessions – at the one facility it already represented,[38] and restrictions on bargaining over terms and conditions of employment at the facilities it hoped to represent in the future. By such conduct, the union was more clearly furthering its own organizational interests, rather than serving the vital interests of the unit employees.

The conduct that the General Counsel deemed unlawful in Dana Corp.[39] is also not present here. In Dana Corp., an employer and a union negotiated a free-standing letter of agreement that, in addition to neutrality provisions, included numerous substantive terms of employment that generally limited the gains that the employees might realize at the bargaining table should a majority of them sign authorization cards. Despite the existence of a long-standing bargaining relationship between the employer and the union, the agreement was not a product of collective-bargaining at any of the recognized facilities and thus did not bear any relationship to bargaining in any of those units. Therefore, the letter of agreement could not "vitally affect" the terms and conditions of employment of employees at those facilities.

Finally, to the extent that the Employer contends that the application-of-contract clause amounts to unlawful assistance under Majestic Weaving,[40] we reject the argument.

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[37] 11-CB-3455, Advice Memorandum dated September 17, 2004.

[38] These included, e.g., no guaranteed employment or transfer rights between business units and plants, no severance pay in the event of layoff, and the sharing of future benefits cost increases beyond inflation.

[39] JD-24-05, 2005 WL 857114 (2005). The General Counsel and other parties have filed exceptions to the ALJ's conclusion that the letter of agreement was lawful and the matter is currently pending before the Board.

[40] Majestic Weaving Co., 147 NLRB 859, 860 (1964), enf. denied on other grounds 355 F.2d 854 (2d Cir. 1966).

When an employer recognizes and negotiates a collective-bargaining agreement with a union that has not achieved majority status among the employer's employees, the employer violates Section 8(a)(2) and the union violates Section 8(b)(1)(A).[41] In Majestic Weaving, an employer provided unlawful assistance to a union that represented none of its employees whatsoever by pre-negotiating a collective-bargaining agreement. The Board held that the parties' conduct granted the union's organizational campaign a "deceptive cloak" of authority, depriving employees of any real choice regarding union representation.[42] Here, by contrast, the Union and Employer were parties to a national collective-bargaining Agreement and the clause in question was negotiated as part of that Agreement. Further, the clause only went into effect after the employees selected the Union in a Board-conducted election and, as specified in the Agreement, the Board certified the Union as the exclusive representative in the new unit. Moreover, as discussed above, the application-of-contract clause resulted in tangible benefits for the employees already covered by the Agreement, including expanded recall and transfer opportunities. Thus, unlike in Majestic Weaving, the application-of-contract clause here "vitally affects" the terms and conditions of employment of current unit employees and is not unlawful assistance.[43]

CONCLUSION

Since the application-of-contract clause "vitally affects" the terms and conditions of employment of current bargaining unit employees, it is a mandatory subject of bargaining. Therefore, we agree with the Region that the Employer violated Sections 8(a)(5) and 8(d) by refusing to honor the clause and apply the terms and conditions of the

[41] Int'l Ladies Garment Workers Union (Bernhard Altmann) v. NLRB, 366 U.S. 731 (1961).

[42] 147 NLRB at 860.

[43] In this regard, since the application-of-contract clause is a valid product of the Union's collective-bargaining relationship with the Employer at an organized facility, there is no reason to prevent the Union from providing the details of the parties' collective-bargaining to unit employees during an organizing campaign. Prohibiting a union from making that information available would merely deprive employees of relevant information they need to make an informed decision about whether to choose union representation.

existing agreement to the newly certified Ford Land unit. Conversely, the Union did not violate 8(b)(3) by attempting to apply the Agreement to that unit.

The Region should also dismiss, absent withdrawal, the 8(b)(1)(A) allegations. In light of our conclusion that the application-of-contract clause is valid, and it obligates the Employer to apply the Agreement to any newly represented units, it was not unlawful for the Union to notify the Livonia employees that if they voted to be represented by the Union the Agreement with Guardsmark would apply automatically to that unit.

B.J.K.