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

Advice Memorandum

DATE: July 8, 2004

TO : Stephen Glasser, Regional Director
Region 7

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

SUBJECT: Auto Workers (UAW)
(Ford, GM, Chrysler)
Case 7-CE-57 584-1225-6700
584-1250-5000

Auto Workers (UAW) 584-3740
(Dana Corp.) 596-0440-5000
Case 7-CC-1786

OVERVIEW

In this case, the National Right to Work Foundation (RTW), which is representing the Charging Party, a Dana Corporation employee, asserts that an agreement between the Auto Workers (UAW) and Ford, GM, and DaimlerChrylser (the Big 3) violates Section 8(e). Under that agreement, reached during negotiations for the national collective-bargaining agreement, the automakers are to advise suppliers that the Big 3 prefer suppliers that are good corporate citizens and abide by state and federal labor laws, and that the Big 3 will not refuse to deal with suppliers that do not oppose unionization.

RTW, however, asserts that under this agreement, as shown by the parties' conduct, the Big 3's stated preference for good corporate citizenship means that the Big 3 will coerce suppliers to sign neutrality agreements with the UAW, and that the suppliers understand that failure to do so will result in loss of contracts with the Big 3. RTW is not challenging the legality of the neutrality agreements here.

The Region submitted this matter for advice on (1) whether the UAW entered into an unlawful 8(e) agreement with each of the Big 3; (2) whether that agreement was entered into within the 10(b) period; and (3) whether the UAW has placed secondary pressure on certain Big 3 automobile suppliers, such as Dana Corporation, in violation of Section 8(b)(4)(A) and (B).

We conclude that the terms of the agreement are not facially unlawful. [*FOIA Exemptions* 2 and 5

[*FOIA Exemptions 2 and 5*, continued

.] Finally, no evidence shows violations of Section 8(b)(4)(A) and (B) at this time [*FOIA Exemptions* 2 and 5 .]

FACTS

In recent years, the UAW has used a strategy of promoting and using neutrality agreements to organize suppliers whose primary business is to sell products to the Big 3. RTW has challenged the legality of neutrality agreements in other cases, some pending before the General Counsel on appeal.[1] In this case, RTW is not challenging the neutrality agreements' legality, but is alleging that the UAW, through 8(e) agreements with the Big 3, has unlawfully imposed pressure upon suppliers to sign such neutrality agreements. The unlawful UAW-Big 3 agreements allegedly consist of "good corporate citizenship" policies, "supplier selection" policies, and form letters from the automakers to suppliers.

Good Corporate Citizenship

The UAW and the Big 3 are parties to national collective bargaining agreements that are effective from September 14, 2003 through September 14, 2007. While bargaining for the national agreements in September 2003, the UAW and the Big 3 agreed, as they had in earlier contracts, that the Big 3 would inform its suppliers that each of the automakers has a policy that favors "Supplier Corporate Citizenship" or "Good Corporate Citizenship." That agreement was embodied in letters initialed by all parties.

In the letter agreement, each automaker recapitulated the parties' stated interests. Each agreement stated that the automaker recognized that it was in UAW's interest that each of the Big 3 continues to recognize the importance of using good corporate citizens as suppliers that reliably produce and deliver quality products.

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[1] See, for example, Dana Corp., 7-CA-46965 and 7-CA-47078; UAW (Dana Corp.), 7-CB-14119 and 7-CB-14083.

The letter agreement did not specify what makes an employer a good citizen. In discussing this concept, the agreement noted that UAW had stressed the importance of the Big 3 using "high quality, reliable suppliers which maintain good, fair and equitable relations with their employees, and which satisfy the Corporation's need for a continuous, reliable, and cost-effective supply of quality parts and materials." According to the agreement, the UAW's concerns contributed to the automaker's success in the marketplace and had an effect on the employees' job and income security. Each of the Big 3 recognized the importance of a good relationship with the Union and stated that they had no interest in beginning a purchasing strategy that would detract from that relationship. Each of the Big 3 would continue to notify suppliers of the "importance of harmonious relationships."

Supplier Selection Policy and Form Letters

In connection with the good corporate citizenship policy in the letter agreement reached during national negotiations, the Big 3 agreed to a supplier selection policy that set forth the criteria for selecting suppliers, to be "applied in conformance with legal requirements." The policy would be included in letters sent to suppliers upon their request. In those letters, the Big 3 automakers would state that their decisions on supplier selection would not be based on the suppliers' employees' decision to join the UAW. The Big 3 automakers would note that they had a "positive and constructive relationship" with the UAW and encouraged suppliers to strive for similar relationships with employees' representatives. The automakers would further observe that they did not discourage recognition based on a showing of majority to support a card check certified by a neutral third party, but that use of such a procedure would be at the option of the supplier.

Each of the Big 3 also agreed to send a form letter to current suppliers within 60 days of the effective date of the parties' national agreement, and to send the same form letter, at the request of the Union, within 14 days of any supplier being awarded a contract with one of the Big 3. In the form letters, the Big 3 automaker would state that it had a "positive and constructive relationship" with the UAW and refer again to the lack of opposition to suppliers whose employees join a labor union.

Finally, RTW alleges as unlawful certain "look to Visteon/Delphi" and supplier sourcing policies. We discuss these policies separately at the end of this memorandum.

ACTION

We conclude that the terms of the agreement are not facially unlawful. [*FOIA Exemptions* 2 and 5

.] Finally, no evidence shows violations of Section 8(b)(4)(A) and (B) at this time but, [*FOIA Exemptions* 2 and 5

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Applicable principles

Section 8(e) makes unlawful any contract or agreement in which the employer agrees to refrain from or cease doing business with any other person; it prohibits those agreements with a secondary purpose, that is, agreements directed at a neutral employer or entered into for their effect on another employer.[2] The critical question is whether the agreement is addressed to the labor relations of a contracting employer and its own employees or whether it is "tactically calculated to satisfy union objectives elsewhere."[3] Secondary agreements that impose a partial cessation of, or interference with, business will violate Section 8(e) to the same extent as agreements that impose a total cessation.[4] If contractual language is ambiguous, the Board will not presume that it violates Section 8(e), but will consider extrinsic evidence to determine whether the parties intended to apply the provision unlawfully.[5]

The Board has held that an agreement with one entity that imposes an entire collective-bargaining agreement on another entity violates 8(e) where the imposed agreement has a secondary, cease doing business object. In Alessio

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[2] National Woodwork Mfrs. Ass'n v. NLRB, 386 U.S. 612, 632 (1967).

[3] National Woodwork, 386 US at 644.

[4] See Operating Engineers Local 520 (Massman Construction Co.), 327 NLRB 1257, 1257-1258 (1999); Int'l Longshoremen's Local 1410, 235 NLRB 172, 179 (1978).

[5] See Ets-Hokin Corp., 154 NLRB 830, 841 (1965).

Construction,[6] the Board held that a union violated Section 8(b)(3) by insisting to impasse on an "integrity clause" which the Board found violated Section 8(e). The integrity clause provided that if the signatory employer's partners, stockholders or beneficial owners participated in the formation of another company engaging in the same or similar business or employing the same or similar classifications of employees, the signatory employer's collective-bargaining agreement would apply to the second business. The clause did not have the primary object of preserving the work of the employer's bargaining unit.[7] The clause had a cease doing business object because it was "calculated to cause Alessio to sever its ownership relationship with affiliated firms that seek to remain nonunion. . . ."[8]

The Board also has held that an agreement which imposes terms and conditions of employment on another entity violates Section 8(e) where the agreement is secondary and has a cease doing business object.[9] In Schebler, the Board found that the parties violated 8(e) by entering into an "integrity clause" which both imposed monetary penalties on signatory employers and also rescinded their bargaining agreements if they had

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[6] Carpenters District Council of Northeast Ohio (Alessio Constr.), 310 NLRB 1023 (1993). See Operating Engineers Local 520 (Massman Constr. Co.), 327 NLRB at 1257-1258 (citing Alessio) (joint venture clause requires signatory employer to refrain from entering into a joint venture unless joint venture parties were also bound by terms of collective-bargaining agreement).

[7] "[T]he clause neither refers to diverted work nor requires that work performed by the employees of the nonunion affiliates be assigned to unit employees." Alessio, 310 NLRB at 1026.

[8] 310 NLRB at 1025. See Iron Workers (Southwestern Materials), 328 NLRB 934, 936 (1999) (finding unlawful a clause binding "any person, firm or corporation owned or financially controlled" to the signatory employer's bargaining agreement). But cf. Painters District Council 51 (Manganaro Corp., Maryland), 321 NLRB 158, 164-67 and n.20 (1996) (anti dual-shop clause does not violate 8(e), where clause preserved unit work of signatory employer, and where signatory employer had effective right to control dual shop).

[9] See Sheet Metal Workers Local 91 (Schebler), 294 NLRB 766 (1989), enf'd in part, 905 F.2d 417 (D.C. Cir. 1990).

"ownership interests . . . in any business entity that engages in work within the scope of [the bargaining agreement] using employees whose wage package, hours, and working conditions are inferior to those prescribed in this Agreements."[10] The clause had no primary work preservation object,[11] and the imposition of penalties and rescission of the bargaining agreement had a partial cease doing business effect.[12]

The Agreement is facially valid

Applying the above principles, the good corporate citizenship agreement, with its accompanying supplier selection policy and form letter, is not clearly unlawful by its terms. The agreement has no unambiguous total or partial cease doing business effect because it does not require that the Big 3 demand, as a condition of doing business with the automakers, that suppliers enter collective-bargaining agreements with the Union or abide by such terms and conditions of employment as neutrality agreements. At most, the language merely requires that the Big 3 not oppose unionization among the suppliers and encourage positive employee relations at supplier employers.

Further investigation required to assess whether agreement as applied is unlawful

RTW asserts that the challenged language is intentionally ambiguous, and that the UAW and the Big 3 understand that only a supplier that signs a UAW neutrality agreement is a Good Corporate Citizen. If the language is ambiguous and there is evidence indicating that the intent of the parties may be unlawful, further investigation is required to ascertain whether the agreement's terms are unlawful as applied.

RTW has supplied numerous news accounts to support its contention that the UAW and the Big 3 interpret their agreement as requiring suppliers to sign neutrality agreements in order to be Good Corporate Citizens. The articles present the personal views of reporters or relate

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[10] 294 NLRB at 767.

[11] "The Integrity Clause is not limited to protecting bargaining unit work." 294 NLRB at 770.

[12] "The plain words of the clause force a cessation or alteration of business with the related firm." 294 NRLB at 770-771.

hearsay accounts; RTW has presented no direct evidence of such an interpretation of the agreement. [*FOIA Exemptions* 2 and 5

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As noted, the agreement does not explicitly make a link between good corporate citizenship and neutrality agreements, and RTW provides no direct evidence that this is the parties' intention. However, RTW's position statement refers to 2002 and 2003 union leader speeches and documents that stated that in the face of employer hostility to organizing, the UAW intended to expand its efforts to win neutrality and card check agreements through bargaining and other "leverages." These accounts are not inconsistent with what the parties have lawfully agreed, that is, that the Big 3 have no objection to neutrality and card check agreements. As to the reference to leverage, there is no evidence that this means anything beyond what the UAW already has obtained through bargaining with the Big 3.

Another account reports that a union official states that the "Big Three will agree to pressure non-union parts supplier companies to allow the UAW into those plants." Even if we could substantiate such a hearsay account with direct evidence, and thus establish that the Union intended to apply the agreement in an unlawful manner, evidence is still required to show that the Big 3 joined with the Union in that understanding. No such evidence has been suggested or proffered.

At present, only two hearsay accounts suggest there may be evidence that the Big 3 interpret the agreement to mean that a good corporate citizen must sign a neutrality agreement, and that the Big 3 intend to coerce the suppliers to agree to neutrality. In a July 2003 interview, an analyst with an Ann Arbor automotive research center quotes unnamed Big 3 sources who reportedly said to him, "That's all we really have to give the union is pressure on the suppliers to take the union. There's nothing else we can give the union that's really important to them."[13] [*FOIA Exemptions* 2 and 5

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[13] RTW provided this evidence in Appendix II-CC to its April 7, 2004 position statement. Several articles refer to the opinions of the quoted analyst, Sean McAlinden.

Secondly, in a November 2003 press account, a reporter writes that an attorney, who was preparing to hold a conference at his law firm for suppliers to discuss the UAW-Big 3 agreements, stated that he expected that the Big Three would direct nonunion suppliers privately to "embrace the UAW," and noted, "Beyond the contract language, the key is what's unspoken or only spoken behind closed doors."[14] The attorney further stated that the contractual language attacked by RTW here was not unlawful and that "They've pushed it as far as they can without violating the [Act]." In another November 2003 news account, a reporter stated that at that same law firm conference, "dozens" of suppliers complained of pressure from the Big 3 "to submit to union-friendly policies."

However, the reporters of those accounts arguably possess at least a qualified privilege under the First Amendment.[15] [*FOIA Exemptions* 2 and 5

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[14] See Appendix II-HH of RTW's April 7 position statement.

[15] See In re Grand Jury, 810 F.2d 580 (6th Cir. 1987) (in grand jury setting, no qualified reporter's privilege exists, but court must weigh whether reporter is being harassed, whether information sought has more than remote and tenuous relationship to investigation, and whether law enforcement need is met with disclosure); Southwell v. Southern Poverty Law Center, 949 F. Supp. 1303 (W.D.Mich. 1996) (in civil case, applying qualified privilege to deny disclosure; disclosure permitted if material goes to heart of claim, party has exhausted all other avenues, and no potential harm with disclosure).

[16] [*FOIA Exemptions* 2 and 5

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The remaining accounts on which RTW relies do not provide information that could lead to any admissible evidence.

Remaining Allegations: Visteon/Delphi policy and Supplier sourcing

RTW alleges that two other policies, one as to Visteon and Delphi and another as to supplier sourcing, both discussed below, also violate Section 8(e). However, these policies are facially lawful and no extrinsic evidence exists to suggest that the parties intend to enforce or have enforced them unlawfully.

In this regard, RTW alleges as 8(e) violations the policy of Ford and GM to give priority to their largest suppliers, Visteon or Delphi. The so-called "look to" agreements call for Ford and GM to "look to Visteon first" and "look to Delphi first," respectively, as "suppliers of choice" when making sourcing decisions. In a letter to UAW, GM noted that GM and UAW had engaged in extensive discussions about GM's largest supplier, Delphi, which employs union-represented former GM employees. GM agreed that over the term of the new collective-bargaining agreement, GM will continue its established practices ensuring that a full review and fair award of "all sourcing decisions impacting union-represented" Delphi operations. Ford agreed to the same as to Visteon.

There is no evidence that these Visteon and Delphi provisions constitute agreements to cease doing business with any other suppliers because of their status with the Union. Rather, the provisions would affect union and non-union shops in the same manner. Indeed, the form letters to suppliers and the supplier selection policy letters contradict RTW's assertion. An additional hearsay account further undercuts RTW's contentions. A May 2003 press account quotes a GM representative as stating that GM bought from UAW suppliers when it made business sense, that they bought from the most competitive suppliers, without regard to union affiliation.[17] Therefore, this allegation does not support finding a violation.

RTW also challenges a supplier sourcing policy. As an appendix to the national agreement, the parties agreed that the Big 3 would notify the Union of the "potential use" of

[17] The representative was further quoted as stating that GM was "letting suppliers run their own business," and that GM did not "want to take a position either way" on unionization.

a supplier before the supplier being selected for use. Under this provision, the Union also has the opportunity to "nominate qualified candidates" and "give valuable input regarding potential supplier integrators, and opportunities to review information and contribute to these early sourcing decisions."

There is nothing on the face of this provision that is unlawful, and no extrinsic evidence establishes that it has been applied in an unlawful manner. Rather, the Big 3 will look to UAW input as one factor among many in choosing suppliers. Significantly, the Big 3 have not granted the UAW veto power over any sourcing decisions. Therefore, the Visteon and Delphi policy and the sourcing policy do not violate the Act.

Section 10(b) - Further investigation may be required to determine whether the charges were timely filed

A contract clause that is facially invalid under Section 8(e) must be "entered into" within the 10(b) period to constitute a violation. A later reaffirmation of the initial agreement constitutes "entering into."[18] The Board interprets the statutory phrase "to enter into" more broadly than initial contract execution. Thus, "the words 'to enter into' must . . . encompass the concepts of reaffirmation, maintenance, or giving effect to any agreement which is within the scope of Section 8(e)."[19]

No evidence has been presented at this point to show that the charges were timely filed. The Big 3 collective bargaining and related agreements were executed in September 2003. The instant charges were filed in April, outside the 10(b) period. Unless the agreement was reaffirmed later, the allegations encompassed by the charge are outside the 10(b) period.

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[18] Teamsters Local 277 (J & J Farms Creamery), 335 NLRB 1031 (2001).

[19] Dan McKinney Co., 137 NLRB 649, 654 (1962) ("entering into" occurred with grievance filing). See NLRB v. Central Penn. Regional Council of Carpenters (Novinger's, Inc.), 352 F.3d 831 (3d Cir. 2003), enf'g 337 NLRB 1030 (2002) (entering into requirement met by Union's pursuit of grievance during 10(b) period); Teamsters Local 277 (J & J Farms Creamery), 335 NLRB at 1031 (entering into requirement met by an arbitrator's award that unlawfully interprets a facially valid clause).

Sending the form letters to a supplier within the 10(b) period would constitute reaffirmation of any 8(e) agreement because that conduct would enforce the agreement. However, RTW presented no evidence to establish that supplier form letters were sent to suppliers within the 10(b) period. Further, the form letters at present only invoke a facially valid agreement. [*FOIA Exemptions* 2 and 5

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Section 8(b)(4)(A) and (B) allegations

At present, there is no evidence of any Section 8(b)(4) violations. RTW alleges that any enforcement by the UAW of the allegedly 8(e) agreement would violate Section 8(b)(4)(ii)(B). RTW also asserts that even if the agreement were lawful, the UAW would violate Section 8(b)(4)(ii)(B) by coercing suppliers to signing neutrality agreements in the manner set forth above. RTW also asserts that the Union would violate 8(b)(4)(ii)(A) by requiring the Big 3 to pressure the suppliers to sign neutrality agreements that require the supplier to cease doing business with any entity that could not be lawfully accreted into a UAW unit. [*FOIA Exemptions* 2 and 5

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[*FOIA Exemptions* 2 and 5

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B.J.K.