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

Advice Memorandum

DATE: November 2, 2010

TO : Joseph A. Barker, Regional Director
Region 13

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

SUBJECT: International Brotherhood of Teamsters,
Local 673 (RW Dunteman Company)
Case 13-CE-137

This case was submitted for advice as to whether the Union violated Section 8(e) by seeking to apply and enforce through the grievance procedure Articles 3 and 6 of the parties' collective-bargaining agreement. Under those articles, the Employer agrees that when subcontracting work covered by the Agreement, performed within the geographical area covered by the Agreement but not at the site of construction, it will 1) subcontract such work only to an employer who agrees that persons it hires will work in accordance with the schedule of hours and receive no less than the wages and benefits in the Agreement; and 2) submit any disputes regarding compliance with the above procedures to the contractual grievance procedure.

We conclude that the contractual provisions do not violate Section 8(e).

FACTS

RW Dunteman (the Employer) is a general contractor in the business of building asphalt roads, and was contracted by the State of Illinois to resurface and rebuild a portion of Interstate 290. The Employer hires its own employees to perform the road building.[1] The Employer also hires its own drivers, who are represented by Teamsters Local 673 (the Union).

The Employer and the Union are parties to the MARBA agreement.[2] Following are the pertinent MARBA provisions:

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[1] The employees who build the roads are represented by IUOE Locals 150 and 96 and are not involved in this dispute.

[2] MARBA is an area-wide construction agreement with Teamsters Joint Council 25.

ARTICLE 3, SUBCONTRACTING . . . .

3.2(a): In order to protect the wages, working conditions and job opportunities of workers employed under this Agreement, the Employer agrees that when subcontracting work covered by this Agreement which is to be performed within the geographical area covered by this Agreement, but which is not to be performed at the site of the construction, alteration, painting or repair of the building, road or other work, he will subcontract such work only to an Employer or person who agrees that the persons performing such work will work in accordance with the schedule of hours and will receive not less than the wages and economic benefits provided in this agreement including holidays, vacations, premiums, overtime, health and welfare and pension contributions, or benefits of their equivalent and any other programs or contributions required by this Agreement, and who further agrees to submit any grievance or disputes concerning his performance or compliance with such undertaking to the procedures set forth in Article 6 [Grievances and Arbitrations] of this Agreement.

3.2(b): the Employer will give written notice to the Union of any subcontract involving the performance of work covered by this Agreement within (5) days of entering into such subcontract and shall specify the name and address of the subcontractor. Any Employer who gives such notice and requires the subcontractor to agree to comply with and observe the provisions of 3.1 hereof with respect to job site work and Section 3.2 hereof with respect to work performed other than at the job site shall not be liable for any delinquency by such subcontractor in the payment of any wages, fringes, benefits or contributions provided hereinafter.

The Employer uses several subcontractors on the I-290 jobsite. One of these subcontractors, Brown R Cartage, provides trucking services. Brown R Cartage drivers bring materials to the Employer's asphalt plant in Addison, Illinois; bring materials to the jobsites; and haul off broken asphalt, dirt, concrete, and grindings from the jobsite. Brown R Cartage is a "Disadvantaged Business Enterprise" (DBE). The Teamsters Local 673 employees working for the Employer perform the same type of work that the Employer subcontracted to Brown R Cartage.

In mid April 2010,[3] the Union's business agent told the Employer during several telephone conversations that he was concerned that all Brown R Cartage employees were union and getting the prevailing wages on that job. Brown R Cartage, in response to the Employer's inquiries, responded that it was a signatory to a collective-bargaining agreement with Teamsters Local 786. That collective-bargaining agreement provides lesser wages and benefits than the MARBA.

On April 23, 2010, the Union filed a grievance alleging that since April 12 and ongoing, the Employer violated contract articles 3.1, 3.2(a), and 3.2(b).[4] The "Nature of Complaint section provides:

> RW Dunteman failed to execute an agreement with the DBE it hired to perform work on I-290 as per article 3.2a thereby RW Dunteman failed to comply with Article 3.1a. RW Dunteman was given written notice on April 16 during a meeting at the company's office per Article 3.2b that the company shall cease employment of such subcontractor on all of its projects within 3 days of receipt of written notice. They failed to comply.

The "Settlement Requested" section provides:

> To cease and desist the use of any and all subcontractors and DBEs it employs on projects to perform work covered by MARBA, until such time as the subcontractor(s) and DBE(s) RW Dunteman employs execute an agreement stating they will comply with Article 3.1 and 3.2 and 6 as outlined in Article 3 of MARBA.

In mid May, the Employer stopped using Brown R Cartage on that part of the I-290 job that is within the Union's

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[3] Herein all dates are 2010 unless otherwise noted.

[4] Article 2, Section 3.1(a) provides that the "[e]mployer agrees that neither he nor any of his subcontractors on the job site will subcontract any work to be done at the site of construction . . . except to a person, firm or corporation, party to an appropriate, current labor agreement with the appropriate Union . . . ." Although the Union's grievance refers to Section 3.1(a), the Employer is not alleging that the Union violated Section 8(e) by maintaining or giving effect to that section and the Region has confirmed that Section 3.1(a) is not directly implicated here.

geographical jurisdiction. According to the Employer, by that time it was close to meeting the Illinois Department of Transportation DBE money goal.

On May 27, the parties held a grievance meeting. At the meeting, the Union business agent reiterated the language of the grievance and stated that the owner-operators Brown R Cartage was using did not have union contracts. The committee was unable to reach a majority decision and a deadlock resulted. The grievance is still pending. On August 18, the Local 673 attorney sent an email to the Employer's attorney, attaching an arbitration panel issued by FMCS. The email also stated that "[t]he Union's position, as clarified at the grievance hearing, is that the union signatory obligations under article 3.1(a) as well as the union standards obligations under article 3.2(a) are both applicable to Brown R Cartage.

ACTION

We conclude that the Union did not violate Section 8(e) by seeking to apply articles 3 and 6 of the parties' collective-bargaining agreement, which are lawful work preservation provisions.

A union has a legitimate interest in preventing the undermining of the work opportunities and standards of employees in a contractual bargaining unit by subcontractors who do not meet the prevailing wage scales and employee benefits covered by the contract.[5] Thus, its contract with an employer may require the employer, if it subcontracts, to subcontract to another employer who agrees to observe "'the equivalent of union wages, hours, and the like'" provided for in the bargaining agreement.[6] Such a provision, generally referred to as a union standards clause, does not violate Section 8(e) because it has a primary object, i.e., to aid the employees in the work unit.[7] By contrast, where the object is not to protect or preserve the working standards of employees in the unit, but to control the employment practices of firms which seek to do business with the employer and to aid and assist

[5] General Teamsters Local 386, 198 NLRB 1038, 1038 (1972).

[6] General Teamsters Local 386, 198 NLRB at 1038, quoting Truck Drivers Union Local 413 (Brown Transport Corp. Patton Warehouse, Inc.), 334 F.2d 539, 548 (D.C. Cir. 1964).

[7] General Teamsters Local 386, 198 NLRB at 1038.

union members generally, such object is secondary and unlawful.[8]

In General Teamsters Local 386, the Board found the identical contractual language presented here to be a lawful union standards clause.[9] The Board first explained that the subcontractor was obligated under the contract to comply solely with its economic features, i.e., to agree that his employees will receive not less than the wages and economic benefits of the contract, including all the economic benefits of the contract not specified. The Board further found that because the grievance procedure language was ancillary to the legitimate primary job protection purpose, it was designed to effectuate this same lawful primary purpose.[10]

Applying the above principles, we conclude that the contractual provisions at issue in the MARBA collective-bargaining agreement are facially valid, lawful primary clauses. Here, moreover, the Union represents drivers who perform the same work that was being performed by the

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[8] Heavy, Highway, Building and Construction Teamsters, et al, 227 NLRB 269, 272 (1976). See generally National Woodwork Mfrs. Assn. v. NLRB, 386 U.S. 612, 620, 623-39, 644-45 (1967) (Section 8(e) was intended to track the distinction drawn in Section 8(b)(4) between lawful "primary" and unlawful "secondary" activity).

[9] Thus, the contract provided that an employer party to the contract may subcontract offsite work only to another employer who agrees that his employees will work "in accordance with the schedule of hours and will receive not less than the wages and economic benefits" provided for the contract, "including holidays, vacations, premiums, overtime, health and welfare and pension contributions or benefits or their equivalent and any other programs or contributions required by this Agreement" and who further agrees "to submit any grievance or disputes concerning his performance or compliance with such undertaking to the grievance procedures set forth in . . . this Agreement." 198 NLRB at 1038.

[10] 198 NLRB at 1039. Compare Local 437, IBEW, 180 NLRB 420, 420 (1969) (clause that required a subcontractor to comply with the terms of "this Agreement," which included not only wages and hours, but all aspects of the contract, violated Section 8(e).

drivers of subcontractor Brown R Cartage, and the evidence shows that the Union's drivers earn a higher contractual wage than the subcontractor's employees. Thus, the Union's actions in filing the grievance are rooted in lawful work preservation activities. In any event, we note that an attempt to enforce an unlawful interpretation of a facially valid provision must be bilateral to constitute entering into an "agreement" under Section 8(e).[11] Thus, the Union's grievance filing and request for arbitration would not violate Section 8(e) even if it were an attempt to enforce an unlawful interpretation of the provision.

Accordingly, the Region should dismiss the charge, absent withdrawal.

B.J.K.

[11] See Sheet Metal Workers Local 27 (Thomas Roofing), 321 NLRB 540, 540 & n.3 (1996) (stating that a solely unilateral action by a union to enforce an unlawful interpretation of a facially lawful clause does not violate Section 8(e) because such conduct does not constitute an "agreement"). Compare Bricklayers Local 2 (Gunnar I. Johnson & Son, Inc.), 224 NLRB 1021, 1025 (1976), enfd. 562 F.2d 775 (D.C. Cir. 1977) (arbitral award constituted bilateral interpretation of clause that was binding on both parties to agreement); Joint Council of Teamsters No. 42 (Inland Concrete), 225 NLRB at 217 (decision of Joint Adjustment Board constituted reaffirmation within Section 10(b) period).