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

Advice Memorandum

DATE: May 13, 2005

TO : Cornele A. Overstreet, Regional Director
Region 28

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

SUBJECT: Local Joint Executive Board of Las Vegas
Case 28-CB-6209, 28-CB-6210, 28-CE-58

536-2563
536-2570
584-1250
584-1275-6700
584-3700

These cases were submitted for advice on several issues arising out of the Union's attempt to apply a "neutrality agreement" contained in a collective bargaining agreement with a signatory employer to properties recently acquired by the signatory's parent company. The issues are: (1) whether the Union violated Section 8(b)(1)(A) by seeking, through a federal lawsuit, to apply the signatory's neutrality agreement, which contained an application-of-contract clause, to the parent company's newly acquired properties upon a showing of majority support; (2) whether the Union violated Section 8(b)(3) by asserting that the signatory's collective bargaining agreement replaced the collective bargaining agreement that the Union already had in place with one of the newly acquired properties; and (3) whether the Union's attempt to apply the signatory's collective bargaining agreement to the parent employer's acquisitions violated Section 8(e).

[*FOIA Exemptions* 2 and 5

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[1] [*FOIA Exemptions* 2 and 5

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FACTS

Boyd (the Employer) is the parent company of California Hotel & Casino Corporation. In 1985, Boyd created a subsidiary to California Hotel and Casino called Mare-Bear to purchase Stardust Casino, located on the Las Vegas "Strip." Stardust had a long-standing collective bargaining relationship with the Local Joint Executive Board of Las Vegas (the Union). Pursuant to the Owners and Successors clause in Stardust's CBA with the Union, Mare-Bear assumed Stardust's contract. The Stardust Recognition clause, Section 1.01, refers to the Union as the representative of employees in certain specified classifications at the Stardust Resort and Casino and excludes "any persons working for the Employer at any other facility. . . ."

In 1989, Mare-Bear and the Union began negotiating a new contract for Stardust.[2] During these negotiations, the Union proposed a modification to the owners clause and, for the first time, a neutrality agreement. The Union essentially sought to amend the definition of Employer to include parents of the Employer and to bind the Employer, its parents, and all their subsidiaries located in the greater Las Vegas area to the neutrality agreement. Mare-Bear eventually agreed to these terms. The agreed-upon 1989 owners clause and neutrality clause language remain in the current contract, effective until May 31, 2007.

The Stardust ownership clause, Section 28.01, provides in relevant part:

> This Agreement shall cover all employees employed in classifications listed in Exhibit 1 in operations within the jurisdiction of the Union, in Greater Las Vegas, Nevada, which during the term of this Agreement, are owned by, or operated by or substantially under the control of the Employer. The term "Employer" shall be deemed to include any person, firm, partnership, corporation, joint venture or other legal entity substantially under the control of the Employer, or one or more principal(s) of the Employer covered by this Agreement, or a subsidiary of the

[2] The Nevada Resort Association represented several Las Vegas employers in negotiations with the Union until 1989, when the employers decided to negotiate separately.

> Employer covered by this Agreement, or any person, firm[,] partnership, corporation, joint venture or other legal entity which substantially controls the Employer covered by this Agreement. (Emphasis added).

The new owners language thus bound Mare-bear's parents, as well as properties in Greater Las Vegas owned by the parents, to the agreement.

The Stardust neutrality agreement provides that the Employer will take a "positive approach to unionization;" that the Employer will not interfere with Union access to its premises upon being provided notice of the Union's intent to organize; and that, within 10 days of notice of intent to organize, the Employer will furnish the Union with a list of employees and, two weeks later, a second list including addresses.

The neutrality agreement also contains recognition and application-of-contract provisions that provide that if a majority of employees within the unit join the Union or designate it through a card check, "the Employer will recognize the Union as such representative of the employees and will extend to such employees this collective-bargaining agreement between the Union and the Employer together with any amendments agreed to by the parties." The neutrality agreement also provides that any disputes over the interpretation of the agreement will be submitted to a designated arbitrator, who has the authority to order compliance with the agreement.

The Union also has a long-standing collective bargaining relationship with Barbary Coast Casino, also located on the Strip. During 1989 negotiations with Barbary Coast, the Union proposed an owners clause and a neutrality clause similar to that proposed to Mare-Bear. Barbary Coast did not agree to the new language. Barbary Coast eventually agreed to an ownership provision, Section 26.01, covering:

> all employees employed in classifications listed in Exhibit 1 in operations with the jurisdiction of the Union in Clark County, Nevada . . . which after the effective date of and during the term of this Agreement are acquired and owned, operated or substantially under the control of the Employer. The term "Employer" shall be deemed to include any person, firm, partnership, corporation, joint venture or other legal entity

> substantially under the control of the Employer covered by this Agreement.

Thus, the Barbary Coast ownership clause language, which remains in the present contract effective until May 31, 2007, does not apply to parents of Barbary Coast or their subsidiaries.

Barbary Coast also agreed to a neutrality agreement covering employees working at any operations covered by Section 26.01. Like the Stardust neutrality agreement, the Barbary neutrality agreement contains substantive provisions regarding Employer neutrality, union access, and the provision of names and addresses. Unlike the Stardust Agreement, however, the Barbary Coast neutrality agreement does not apply to facilities in the "greater Las Vegas area" but applies:

> only to hotel-casino facilities which the Employer may during the term of that agreement construct, purchase or acquire by other means which are located in the geographic areas that [are] commonly known as "Downtown Las Vegas" . . . or the "Las Vegas Strip." . . .

Thus, the Barbary Coast neutrality agreement does not apply to casinos located outside of both the Strip and Downtown Las Vegas, nor does it apply to parents of Barbary Coast or the parents' subsidiaries.

In January 1996, Coast Casinos purchased Barbary Coast and its partner, Gold Coast. Later that year, Coast Casinos opened Orleans and, in 2000, Sun Coast. Gold Coast, Sun Coast and Orleans are located outside of the Strip and of the area known as "Downtown Las Vegas." The Union has never represented employees at any of these three casinos, nor has it attempted to apply the Barbary Coast neutrality agreement to any of them.

On July 1, 2004, Boyd merged with Coast Casinos, which became a wholly-owned subsidiary of Boyd. Coast maintained its corporate structure and identity. Pursuant to a provision in the Barbary Coast contract, Boyd immediately assumed the Barbary Coast agreement.

On July 2, 2004, the Union sent a letter to Mare-Bear and to Boyd stating that, as a result of the Boyd-Coast merger, the Stardust agreement had to be applied to Barbary Coast, Gold Coast, Sun Coast, and Orleans. The Union recognized that it would need to show majority support at the latter three casinos but claimed that because the Union

already represented Barbary Coast employees, the Stardust Agreement was automatically extended there. The Union also demanded that, pursuant to the Stardust neutrality agreement, Boyd provide the Union with information about the employees of Gold Coast, Sun Coast, and Orleans.

The Employer rejected the Union's position, claiming that the Barbary Coast Agreement was still in effect as to Barbary, and that the terms of that agreement exclude the application of its neutrality clause to Gold Coast, Suncoast, and Orleans based on their location outside of the Strip and Downtown Las Vegas. The Union responded by reiterating its position and also demanding that Mare-Bear and Boyd participate in expedited arbitration under the Stardust neutrality agreement. When Boyd refused to arbitrate, the Union filed a Petition and Complaint to Compel Labor Arbitration in the United States District Court for the District of Nevada. The petition argued that Mare-Bear and Boyd had an obligation to abide by the Stardust neutrality clause and that any unresolved disputes over its interpretation and application were to be arbitrated.

On September 1, 2004, Boyd filed a motion to dismiss the district court proceeding on the ground that it was not a party to or signatory to the Stardust CBA, which reflects the Employer as Mare-Bear d/b/a Stardust. On September 23, Boyd filed a separate action in federal court seeking a declaration that the Barbary Coast agreement was in full force and effect and that both Boyd and the Union were bound to the agreement.

On December 15, 2004, Boyd and the Union filed a stipulation agreeing that the Barbary Coast contract was in effect, that Boyd had validly assumed that contract, and that Boyd and the Union were bound to abide by all the rights and obligations embodied in that agreement. However, the Union still asserts that, under the Stardust owners and neutrality provisions, Boyd was required to apply the Stardust agreement to Gold Coast, Sun Coast, and Orleans. The Union claims that because Barbary Coast's neutrality agreement applies only to entities owned by Barbary Coast, and not to parent or sister companies, the Barbary Coast neutrality agreement is inapplicable to Gold Coast, Sun Coast, and Orleans.

On March 23, 2005, the district court denied Boyd's motion to dismiss, concluding that it did not appear certain that the Union would not be entitled to relief under any set of facts that could be proven. It was unclear, for instance, whether Boyd might be bound by the

Stardust agreement under an agency or alter ego theory. The district court proceeding is thus ongoing.

Meanwhile, on December 22, 2004, Boyd and Coast filed charges alleging that the Union, through its lawsuit, was violating Section 8(b)(1)(A) and 8(b)(3) by attempting to apply the collective bargaining agreement between the Union and Stardust to the employees of Barbary Coast, Gold Coast, Sun Coast, and Orleans and by repudiating the collective bargaining agreement between the Union and Barbary Coast. On February 8, Boyd filed a Section 8(e) charge, alleging that the Union's prosecution of its lawsuit in an effort to require Boyd to apply the Stardust neutrality agreement to all hotels/casinos that it acquires is limiting its future investments in violation of Section 8(e).

ACTION

[*FOIA Exemptions* 2 and 5

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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).[3] Such conduct violates the Act even when the recognition and contract are conditioned upon the union's obtaining majority support from the employees.[4] This is because premature contract negotiation affords the minority union "a deceptive cloak of authority with which to persuasively elicit additional employee support," thereby tainting any employee support the union subsequently obtains.[5] Under these principles, neutrality agreements in which the employer and the union agree to terms and conditions of employment that would apply to

[3] Int'l Ladies Garment Workers Union (Bernhard Altmann) v. NLRB, 366 U.S. 731, 737-38 (1961).

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

[5] Bernhard-Altmann, 366 U.S. at 736.

employees if the union obtained majority status may also violate Section 8(a)(2) and 8(b)(1)(A).[6]

The Board has established an exception to the above rule in cases involving "after-acquired" or "additional stores" clauses negotiated by an employer and a Section 9(a) union. In Houston Div. of Kroger Co.,[7] the Board held that the employer violated Section 8(a)(5) by breaching a contract clause that would have added stores to a bargaining unit if the union obtained a showing of majority status at those facilities. The Board interpreted the clause as a waiver of the employer's right to demand an election. The Board has subsequently held that the Kroger decision implicitly found that after-acquired clauses that contemplate the absorption of employees into an existing multi-location unit are mandatory subjects of bargaining.[8]

On the other hand, bargaining subjects involving employees outside the bargaining unit are considered mandatory subjects only if they "vitally affect" unit

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[6] See Thomas Built Buses, 11-CA-20038, Advice Memorandum dated September 17, 2004 (finding 8(b)(1)(A) and 8(a)(2) violation where, in neutrality agreement, union agreed to provisions concerning guaranteed transfer rights, severance in the event of layoff or plant closure, strikes and subcontracting prohibitions, and restrictions on overtime, should the union obtain majority status); Dana Corporation, Inc., 7-CA-46965-1, General Counsel's Minute dated September 3, 2004 [*FOIA Exemption* 7(A)

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[7] 219 NLRB 388, 388-89 (1975).

[8] Pall Biomedical Products Corp., 331 NLRB 1674, 1675 (2000), enf. denied on other grounds 275 F.3d 116 (D.C. Cir. 2002); United Mine Workers of America (Lone Star Steel Co.), 231 NLRB 573, 576 (1977), enf. denied on other grounds 639 F.2d 545 (10th Cir. 1981), cert. denied 450 U.S. 911 (1981). See generally Allied Chemical Workers v. Pittsburgh Plate Glass Co., 404 U.S. 157, 188 (1971) ("remedy for a unilateral mid-term modification to a permissive term lies in an action for breach of contract..., not in an unfair-labor-practice proceeding").

employees' terms and conditions of employment.[9] Application-of-contract clauses that extend a collective-bargaining agreement to employees who would remain outside the existing unit must satisfy the "vitally affects" test to be considered mandatory bargaining subjects. Thus, in Lone Star Steel, the Board applied the "vitally affects" test to an application-of-contract clause pertaining to non-unit employees, finding that the clause was a mandatory bargaining subject because it protected jobs and work standards of bargaining unit employees by removing economic incentives that might encourage the employer to transfer work to other facilities under its control.[10] On review, the 10th Circuit agreed that the "vitally affects" test governed but denied enforcement, concluding that the Board misapplied the test. Thus, the Lone Star Steel court found the application-of-contract provision overly broad because it extended the entire contract, including noneconomic provisions, to all of the employer's locations, even where no unit work was performed. The court held that the clause was thus "much broader than necessary" to accomplish the legitimate Union goals affecting unit employees.[11] The Lone Star Steel court thus recognized the following dichotomy: if an application-of-contract clause extending a CBA to employees who will remain outside the existing unit vitally affects unit terms and conditions of employment and represents a direct frontal attack on the problem threatening such interests, it will be considered a mandatory bargaining subject; on the other hand, the clause will not be a mandatory subject if it merely represents a "disguised purpose to further the union's institutional or organizational interests."[12]

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[9] See generally Allied Chemical Workers v. Pittsburgh Plate Glass Co., 404 U.S. at 179; Teamsters v. Oliver, 358 U.S. 283, 294 (1959).

[10] 231 NLRB at 576.

[11] Id. at 558.

[12] Lone Star Steel Co. v. NLRB, 639 F.2d at 557-58. Cf. Pall Corp. v. NLRB, 275 F.3d at 122, 123 (agreement providing for CBA to extend to employees performing unit work in new employer facility is "direct frontal attack" upon issue of work being transferred out of unit; on the other hand, agreement merely extending recognition to new employer facility is, at most, a way of expediting recognition of union, and whether union would eventually negotiate CBA that would equalize labor costs is too speculative to be considered a "direct frontal attack").

Unlike Kroger and Lone Star Steel, the instant case involves a Section 8(b)(1)(A) allegation rather than 8(a)(5) or 8(b)(3) refusal to bargain allegations. Nonetheless, the mandatory/nonmandatory analysis is relevant here because the Board, which has not specifically addressed whether an application-of-contract clause can be lawful under 8(b)(1)(A) and 8(a)(2), presumably would not require compliance with a contract provision as a mandatory subject of bargaining if compliance would violate 8(b)(1)(A) or 8(a)(2). Under this rationale, application-of-contract clauses that extend the CBA to employees outside of the existing unit are mandatory subjects of bargaining if they satisfy the "vitally affects" standard under Lone Star Steel, and thus would also be lawful under 8(b)(1)(A) or 8(a)(2). On the other hand, if a clause serves union institutional or organizational interests and is not a mandatory subject of bargaining, it would arguably violate Section 8(b)(1)(A) and 8(a)(2) under Majestic Weaving.[13] The question to be resolved is whether the attempt to enforce such an agreement violates Section 8(b)(1)(A) where the parties have an existing Section 9(a) relationship but, unlike Kroger, the contract would apply to a new unit. In these circumstances, in order to be lawful, the clause would have to be shown to vitally affect unit employees' terms and conditions of employment.

Here, it appears that the application-of-contract provision would apply to new, single location bargaining units at each employer facility where employees elected the Union.[14] Thus, Kroger does not directly apply. Moreover,

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[13] The Board has not decided to what degree Majestic Weaving is applicable where an application-of-contract provision is negotiated between parties to a pre-existing 9(a) relationship. See Eltra Corp., 205 NLRB 1035 (1973) (while ALJ rejected employer's 8(a)(5) defense that compliance with application-of-contract provision would violate 8(a)(2) and distinguished Majestic Weaving based on pre-existing 9(a) relationship, Board affirmed on narrower grounds and did not address the ALJ's dicta regarding Majestic Weaving).

[14] Thus, contrary to the Region, we do not believe that evidence presently establishes that the Union represented employees in a single, multi-facility, multi-employer unit in Las Vegas. Rather, we believe that the most reasonable interpretation of the parties' intent, based on the Stardust contract's recognition clause, the single-facility bargaining history, and a close reading of the neutrality agreement is that the Union would represent employees in single facility units. [*FOIA Exemptions* 2 and 5

we are unable to determine, based on the evidence before us, whether the instant application-of-contract provision "vitally affects" existing bargaining unit employees' terms and conditions of employment and, thus, whether it is a mandatory subject of bargaining. Thus, it is unclear whether the application-of-contract provision serves bargaining unit interests by protecting the jobs, wages, benefits, and work standards of the existing Stardust unit employees. Such evidence is necessary to determine whether the application-of-contract provision directly attacks specific perceived dangers to the existing bargaining unit, as required by Lone Star Steel.

[*FOIA Exemptions* 2 and 5

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[FOIA Exemptions 2 and 5, continued.

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[15] [*FOIA Exemptions* 2 and 5

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[16] [*FOIA Exemptions* 2 and 5

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[FOIA Exemptions 2 and 5, continued

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CONCLUSION

[*FOIA Exemptions* 2 and 5

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[*FOIA Exemptions* 2 and 5

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B.J.K.