

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

Advice Memorandum

DATE: September 17, 2003

TO : D. Michael McConnell, Acting Regional Director
Leonard P. Bernstein, Regional Attorney
Region 17

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

SUBJECT: ISEC Incorporated
Case 17-CA-22282

Arkansas Regional Council of Carpenters
Case 17-CB-5829

This case was submitted for advice as to whether the Union and Employer could lawfully enter into a Section 8(f) agreement within a year of a representation election that was certified as a majority employee vote against Union representation. We conclude that the parties could not lawfully enter into a Section 8(f) agreement within a year after a valid election, even though the agreement was part of a non-Board settlement agreement that also resolved ULP charges and objections that attacked the validity of the election.

Briefly, on March 21, 2003, the Union filed a petition to become the Section 9(a) representative of a unit of the construction industry Employer's employees. The Union also filed ULP charges alleging that the discharge of two Union supporters violated Section 8(a)(3), as well as a request to proceed to an election. The employees voted to reject the Union in the April 25 election by a vote of 4-2, with one non-determinative challenged ballot. The Union filed objections, mirroring its ULP charges regarding the two pre-election discharges. The Region found merit to both the charges and the objections, and had informed the parties that complaint would issue, absent settlement.

On June 10, prior to issuance of a complaint, the parties reached a non-Board settlement. In exchange for the Union withdrawing its charges and objections, the Employer agreed to enter into a Section 8(f) "job site agreement" effective from June 11 until the end of the project. The two alleged discriminates had obtained other jobs and waived both reinstatement and backpay. The Region notified the parties on June 13 of its approval of the withdrawal request concerning the charges and the objections. In the

absence of pending objections, the results of the April 25 election were certified on June 19.

The individual Charging Party in these cases filed his Section 8(a)(1), (2) and (3), and Section 8(b)(1)(A), (1)(B), and (2) charges on June 25, alleging that the Employer and Union violated the Act by entering into a Section 8(f) agreement within one year of the Union losing a Board-certified election.

We conclude that the parties could not lawfully enter into the Section 8(f) contract on June 10 or 11, within one year of the certified April 25 election in which the majority of unit employees voting rejected Union representation. See John Deklewa & Sons, 282 NLRB 1375, 1385 n. 44 (1987), enfd. 843 F.2d 770 (3d Cir. 1988), cert. denied 488 U.S. 889 (1998). Employees would be precluded by Section 9(c)(3) from filing a decertification petition within a year of the April 25 election, even though an 8(f) agreement would not bar such a petition. Deklewa, 282 NLRB at 1385. While the parties settled the charges and objections in exchange for the 8(f) agreement, and the results of the April 25 election would likely not have been certified if the apparently meritorious charges and objections had been litigated, the particular sequence of events here resulted in a valid, certified election in which a majority of unit employees rejected Union representation. While Board policy favors the settlement of unfair labor practices, one of the Act's "overarching objectives" is the promotion and protection of employee free choice. Deklewa, 282 NLRB at 1382. Once withdrawal of the charges and objections was approved, there was no basis on which to question the employees' rejection of the Union through the April 25 election. Accordingly, the Union and Employer violated the Act by entering into the Section 8(f) agreement within a year of that valid election.

B.J.K.