

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

Advice Memorandum

DATE: February 24, 1997

TO : Louis J. D'Amico, Regional Director
Region 5

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

SUBJECT: Prentiss Properties Limited and 177-1650-0000
ISS Energy Services 177-1650-0100
Case 5-CA-26280 512-5006-6783

This Section 8(a)(3) case was submitted for advice as to whether a maintenance contractor and its former client were joint employers when the client terminated their commercial relationship and, if not, whether this case is an appropriate vehicle for revisiting the holding of Local 447, Plumbers (Malbaff Landscape Construction), 172 NLRB 128 (1968). This case was also submitted as to whether a threat made by a client's supervisor to a contractor's supervisor violates 8(a)(1).

FACTS

1. History of the Prentiss/ISS/Union Relationship

In August 1995, Prentiss entered into a service contract with Bell Atlantic under which, for a monthly fee, Prentiss was to provide building maintenance at 21 locations throughout northern Virginia, Maryland, and Washington D.C. Prentiss subsequently contracted with ISS to provide most of the services required of Prentiss under the Bell Atlantic agreement.

On March 22, 1996,¹ Operating Engineers Local 99-99A (the Union) filed an election petition seeking to represent all ISS mechanics and engineers, including chief engineers, working on the Prentiss contract. In early April, a Prentiss supervisor threatened an ISS chief engineer that if the Union was successful in the election, the subcontract would be canceled and thus the ISS employees

¹ All dates are in 1996 unless otherwise noted.

would be terminated. Pursuant to a stipulated election agreement, a Board election was held on April 22 and the Union prevailed by a unanimous vote.² By letter dated April

² The Employer, in position statements to the Region and Advice, notes that the certification did not name Prentiss as an employer as an additional factor militating against a joint employer finding. We recognize that primarily relying on procedural due process considerations, the 7th and 9th Circuits have denied enforcement in refusal-to-bargain cases where the alleged joint employer was not a party in the prior representation case. See Central Transport v. NLRB, 997 F.2d 1180, 1184-88 (7th Cir. 1993) (representation case proceedings affect important employer interests and therefore a certification should be binding on the employer and Board, as well as the union and employees); Alaska Roughnecks and Drillers Association v. NLRB, 555 F.2d 732, 735 (9th Cir. 1977), cert. denied 434 U.S. 1069 (1978) (notice and opportunity to be heard in ULP proceedings were untimely, since the representation proceeding was where employer status should have been litigated; Board also failed to follow its own regulations for certification proceedings). However, the Board has consistently disagreed with this view. See American Air Filter Co., 258 NLRB 49, 52-54 (1981) ("[t]he significant question, then, should not be whether it is unfair to litigate a respondent's status as a joint employer when it was not certified initially as an employer, but whether its rights are unjustly affected during the unfair labor practice proceeding.... [A]n employer ... is in no way prejudiced simply because it was not named an employer or failed to participate in the representation hearing where it had ample opportunity to and did, in fact, litigate fully the question of its joint employer status in the unfair labor practice proceeding.... To find otherwise would elevate form over substance"). In any event the courts' concerns appear to be limited to the 8(a)(5) refusal to bargain context. See Central Transport, 997 F.2d at 1189 ("Non-Bargaining Violations of the Act ... Central's lack of formal status as a joint employer does not excuse the threats to, and interrogations of its employees, nor the retaliatory layoffs and closing of the Roanoke terminal"); Alaska Roughnecks and Drillers Association v. NLRB, 555 F.2d at 733 (sole issue was 8(a)(5) refusal to bargain).

16, Prentiss notified ISS that it was terminating the subcontract. Prentiss subsequently advised ISS that the effective termination date was May 1. On that date the contract was canceled and ISS terminated the bargaining unit employees due to lack of work.

The Union filed charges against Prentiss and ISS, as joint employers, alleging that termination of the contract violated 8(a)(3) and the threat made by the Prentiss supervisor to the ISS chief engineer violated 8(a)(1). Regarding the 8(a)(3) charge, Prentiss contends that there is insufficient evidence to support a joint employer finding under either the Board's traditional approach or the joint employer standard which has developed since the early 1980s. According to Prentiss, any indicia of joint employer status is far less than the quantum of such evidence supporting a joint employer finding in such cases as Browning-Ferris and Whitewood Maintenance, cited below, and Prentiss reserved no contractual right of control, did not hold itself out as an integrated enterprise with ISS, and cannot be the "ultimate source" of any wage increase that may be negotiated with a union since the commercial contract between Prentiss and ISS provided for a fixed reimbursement rate. Thus termination of the contract was privileged under Malbaff. Although the employer status of Prentiss was submitted for advice, the Region has concluded that ISS was an employer of the unit employees since ISS shared control over hiring³ and firing,⁴ promulgated work rules, and was responsible for setting wages and benefits. The Region has also concluded that the contract was terminated due to anti-union animus. Regarding the 8(a)(1) charge, Prentiss contends that any threats made to the chief engineer did not violate the Act since the chief engineer was a 2(11) supervisor. The Region has concluded that the chief engineer was a 2(11) supervisor.

³ Former ISS employee Myers was initially interviewed by ISS management, former ISS chief engineer Edwards was hired by ISS. Additionally, Myers filled out an application with ISS written on the top.

⁴ Former ISS employee McKenzie detailed considerable control by ISS, including the termination of two employees.

2. Facts Relevant to the Joint Employer Status of Prentiss

Myers, a former ISS employee, stated that he filled out an ISS application and was initially interviewed by ISS management. However, at Myers' final interview, Prentiss project manager Wittner told Myers that he was hired and noted that he (Wittner) was the final authority on the decision. Shortly after he was hired, Wittner told Myers that he had decided to terminate ISS employee Laurey. Wittner told ISS official Ell to remove Laurey.

Edwards, a former ISS chief engineer and 2(11) supervisor, stated that Holvey, Prentiss vice-president in charge of operations in northern Virginia and the Bell Atlantic portfolio, directed ISS employee Gates to cut off his pony tail. Holvey also was involved in the removal of Gates and the approval of his replacement.

According to Myers, Wittner acted as his supervisor. Thus, Myers stated that his work orders came from Wittner, who had an office at the complex, or by electronic pager from the Prentiss office.

Edwards stated that Holvey managed daily operations, assigned weekend overtime, approved early departures, found a replacement for Edwards when he took a day off, and was involved in planning building maintenance. Holvey discussed with Edwards tenant relations, the manner in which the work was to be carried out, response time, overall building operations, and how the men were to be supervised. All of Edwards' work orders came from Prentiss. Prentiss directly oversaw the monthly preventative maintenance programs, and Edwards assigned the two involved mechanics in coordination with Prentiss. ISS representatives told Edwards that any and all orders given by Prentiss were to be carried out. Holvey told Edwards to take orders from Prentiss, not ISS.

Myers' uniform said ISS but his ID badge said Prentiss. Edwards was issued a Prentiss ID card. Correspondence Edwards received from tenants or vendors addressed him as a Prentiss employee. Myers and Edwards indicated that if they got any letters of commendation from tenants, Prentiss would give them a \$100 bonus although they were normally paid by ISS.

3. The Threat by Holvey to Edwards

In early April, Holvey, outside the presence of others, spoke to Edwards about the upcoming election. Edwards, though subsequently deemed a 2(11) supervisor, had been included in the bargaining unit pursuant to a stipulated election agreement. Holvey said "if I had known that ISS had anything to do with the Union, I would have never entered into this agreement with them ... if the men go union, [I will] cancel the contract with ISS." Holvey told Edwards that he did not like unions, none of their properties were unionized and never would be as long as he had any say. Holvey reiterated that if the Union was successful in the election, the contract would be canceled and everyone would be out of a job. Approximately three days later, Edwards told Holvey that Dick Stewart of Local 99 told him that one of Local 99's best contracts was with Prentiss. Holvey responded that Dick was "a f***** liar" and again stated that if the Union was successful in the election, the contract would be canceled and everyone would be out of a job.

Holvey essentially contradicts or denies all of the allegations and statements made by Myers and Edwards.

ACTION

We conclude that Prentiss and ISS were joint employers and, therefore, Prentiss violated Section 8(a)(3) by terminating its ISS contract because of the Union's election victory.⁵ We also conclude that complaint should issue, absent settlement, alleging that the threat made by Prentiss supervisor Holvey to ISS supervisor Edwards violated 8(a)(1).

Under Malbaff, one employer can terminate its business relationship with another employer, even if it does so for discriminatory reasons, without violating Section 8(a)(3) and (1).⁶ However, such discriminatory termination is

⁵ Thus, we need not address the Malbaff issue in this case.

⁶ Local 447, Plumbers (Malbaff Landscape Construction), 172 NLRB 128, 129 (1968).

unlawful where the employers in question are joint employers.⁷

A. Joint Employer

Joint employer status is a factual issue.⁸ Under the Board's traditional joint employer approach, an insubstantial amount of actual control over employment terms and conditions will support a joint employer finding.⁹ Potential control or the right to control employment conditions, standing alone, is also sufficient under the traditional approach.¹⁰ Additionally, the Board has long recognized that the commercial reality of the business relationship is an important consideration.¹¹

We recognize that since the early 1980s, the Board has developed a joint employer standard which examines whether the entity in question shares or codetermines such "essential" employment conditions as "hiring, firing,

⁷ Whitewood Maintenance, 292 NLRB 1159, 1165, 1166 n.24 (1989), enfd. 928 F.2d 1426 (5th Cir. 1991).

⁸ Boire v. Greyhound Corp., 376 U.S. 473, 481 (1964).

⁹ See AMP, 218 NLRB 33, 35 (1975).

¹⁰ See Hoskins Ready-Mix Concrete, 161 NLRB 1492 (1966); Jewel Tea Co., 162 NLRB 508, 510 (1966); S.S. Kresge, 161 NLRB 1127 (1966), 169 NLRB 442 (1968), enfd. in rel. part 416 F.2d 1225 (6th Cir. 1969); Gallenkamp Stores Co. v. NLRB, 402 F.2d 525, 531 (9th Cir. 1968), enforcing 162 NLRB 498 (1966); Thriftown, 161 NLRB 603 (1966).

¹¹ See Jewell Smokeless Coal, 170 NLRB 392, 393 (1968), 175 NLRB 57 (1969), enfd. 435 F.2d 1270 (4th Cir. 1970); Hoskins Ready-Mix Concrete, 161 NLRB at 1493; Floyd Epperson, 202 NLRB 23 (1973), enfd. 491 F.2d 1390 (6th Cir. 1974); S.S. Kresge Co., 161 NLRB at 1128; Thriftown, 161 NLRB at 604-605, 607.

discipline, supervision and direction" of employees.¹² The Board has applied this standard in a rather narrow fashion, requiring a significant degree of actual control before an entity will be deemed a joint employer.¹³ Thus, without expressly evidencing any intent to overrule prior joint employer law, the Board recently has required a greater degree of actual control and ignored the right to control employment conditions and the commercial reality of the business relationship, often leading to inconsistent approaches and results. The General Counsel recently urged the Board in several matters (Jeffboat Division, American Commercial and Marine Services, 9-UC-406 et al.)¹⁴ to resolve this inconsistency by returning to its traditional test of viewing control, actual or potential, over some employment conditions, in light of the parties' commercial relationship. The General Counsel believes that the traditional approach is consistent with Congress' intent that the Act's definition of "employer" be construed broadly.

As noted in Holyoke Visiting Nurses Association v. NLRB, 11 F.3d 302, 307 (1st Cir. 1993), "[m]ore important than the factual distinctions between cases are the

¹² Laerco Transportation, 269 NLRB 324, 325 (1984), citing NLRB v. Browning-Ferris Industries, 691 F.2d 1117, 1123 (3d Cir. 1982).

¹³ See TLI, Inc., 271 NLRB 798 (1984), enfd. mem. 120 LRRM 2631 (3d Cir. 1985); Laerco Transportation, 269 NLRB at 324; Goodyear Tire & Rubber Co., 312 NLRB 674, 677-78, 687-90 (1993) (client's contractual right to maintain operational control, direction and supervision of contractor's drivers and fact that formula by which drivers were paid was set forth in the cost-plus contract between the employers, held insufficient evidence of actual client control to establish joint employer relationship).

¹⁴ The Board held oral argument in Jeffboat on December 2, 1996. The General Counsel's brief, attached to Memorandum OM 96-86, "Joint Employer Status and Appropriate Joint Employer Units," dated December 9, 1996, sets forth the arguments to be presented in all joint employer ULP cases prior to the issuance of the Board's Jeffboat decision.

specific facts of this particular case. ... the joint employer issue is simply a factual determination, a slight difference between two cases might tilt a case toward a finding of a joint employment."¹⁵ Although joint employer determinations must be made based on the totality of facts in any case,¹⁶ it is useful to examine joint employer cases which have arisen in the same or similar industries under the Board's traditional approach. See Syufy Enterprises, 220 NLRB 738, 740 (1975):

while janitorial tasks may be routine they often also are of such a nature that they require a meticulous attention to detail and vigilant if not continuous supervision. In the service vacuum created by the absence of ABM supervisors ... Respondent's managers actually exercised needed supervision, and otherwise resolved problems arising at their entertainment centers in order to keep them functioning in a sound businesslike fashion. We find that such supervisory activities on the part of Respondent are sufficient to constitute Respondent a joint employer with ABM of the janitorial unit employees here involved, at least in the circumstances of this case.

See also Sun-Maid Growers of California, 239 NLRB 346, 348-51 (1978):

Respondent's officials did not hover over the maintenance electricians, directing each turn of their screwdrivers and each connection that they made. However ... this is hardly what the Board has meant by control of the "means used to achieve [the] end".... Control ... possessed the power to hire, fire, discipline, classify and

¹⁵ See also Texas World Service v. NLRB, 928 F.2d 1426, 1434 (5th Cir. 1991), quoting North American Soccer League v. NLRB, 613 F.2d 1379, 1382-83 (5th Cir. 1980) ("minor differences in the underlying facts might justify different findings on the joint employer issue").

¹⁶ Southern California Gas Co., 302 NLRB 456, 461 (1991).

promote the maintenance electricians ... However, it had been Respondent who had controlled their performance while at the Kingsburg facility by originating their basic workweek schedule, telling them what work needed to be done, instructing them as to the work to be done directly on a regular basis without contacting supervisors at Control, determining which of the competing assignments had priority, deciding when they would perform overtime work, and determining when additional maintenance electricians would be dispatched to Kingsburg.¹⁷

In this case, as set forth in greater detail above, Wittner made the decision to hire Myers and terminate Laurey, and Wittner acted as Myers' supervisor; Edwards' work orders came from Prentiss; Holvey managed daily operations, set personal grooming standards, was involved in the removal of Gates and the approval of his replacement, assigned weekend overtime, approved early departures, and discussed with Edwards the manner in which the work was to be performed and how the men were to be supervised. Correspondence Edwards received from tenants or vendors addressed him as a Prentiss employee. Myers and Edwards both indicated that Prentiss had a bonus program in place for letters of commendation received from tenants. Taken as a whole and viewed in light of the fact that a lesser degree of actual control is required under the traditional joint employer test, the evidence indicates that Prentiss exercised significant actual control over ISS' employees.

¹⁷ Cf., under the more restrictive approach, Service Employees Local 87 (Trinity Maintenance), 312 NLRB 715, 753 n.113 (1993); Southern California Gas Co., 302 NLRB at 461-62 (employer receiving contracted labor services will of necessity exercise sufficient control over the operation of the contractor in order to prevent disruption of its own operations or to see that it is obtaining the services it contracted for; such control, by itself, is not sufficient to sustain a joint employer finding); Union Carbide Building Co., 269 NLRB 144, 147 (1984) (ALJ examined 18 factors in the cleaning service context).

Moreover, ISS essentially granted Prentiss the right to control its employees. Prentiss' right to control ISS' employees was implicit by virtue of the geographic proximity of its managers to the work site, compared to the proximity of ISS' managers: Prentiss managers were on site, ISS managers were in New Jersey. Further, ISS representatives told Edwards that any and all orders given by Prentiss were to be carried out. Holvey similarly told Edwards to take orders from Prentiss. Under the traditional joint employer test, the fact that Prentiss had the *right* to exercise such control is indicative of joint employer status.

Viewed in their totality, the facts indicate that there was sufficient actual or right of control in light of the parties' commercial relationship to warrant a joint employer finding under the traditional approach. Thus, we conclude that Prentiss and ISS were joint employers.

B. 8(a)(1) Threat

In order to violate Section 8(a)(1) of the Act, an employer must tend to interfere with, restrain, or coerce **employees** in the exercise of the rights guaranteed in Section 7.¹⁸ Statements made between **supervisors**, which are not communicated to employees, normally do not interfere with, restrain, or coerce employees in the exercise of Section 7 rights.¹⁹ However, threatening statements made to individuals who are not employees under Section 2(3), such as supervisors, can be violative in circumstances where the "employees could reasonably be expected to become aware" of the statements.²⁰

¹⁸ Pioneer Hotel, 276 NLRB 694, 702 (1985).

¹⁹ Ibid.

²⁰ H.R. McBride Construction Co., 122 NLRB 1634, 1635 (1959), *enfd.* 274 F.2d 124 (10th Cir. 1960) (employer violated 8(a)(1) where he physically and verbally assaulted nonemployee union representative engaged in area standards picketing; the Board relied on the assaults which the employees had not witnessed, as well as the one they had, because the small size of the community made it likely that the employees would become aware of the other assaults).

In this case, Edwards, the only person to hear Holvey's threats, was a 2(11) supervisor. Thus, Holvey's threatening statements regarding termination of the Prentiss-ISS contract and consequent job loss by the employees were not made to an employee protected by the Act. However, at the time the threats were made, Edwards was a member of the bargaining unit pursuant to a stipulated election agreement and there was a small number of unit employees working on the Bell Atlantic contract. We further note that as part of its contention that Edwards was a supervisor in the Employer's February 13, 1997, position statement at 3, it concedes that "Holvey's contacts with ISS were made either through ISS's remote project managers or the Chief Engineers, and not the ISS employees directly." (Emphasis supplied.) Given Edwards' close working relationships and frequent interactions with the rest of the bargaining unit, the "employees could reasonably be expected to become aware" of the threatening statements made by supervisor Holvey to supervisor Edwards. Moreover, even if a subjective standard were the test, Holvey clearly knew that Edwards would discuss threats of job loss with other unit employees based on Edwards' close unit connections and the fact that as a chief engineer, Edwards was supposed to be Holvey's conduit of Prentiss contact with the employees. Therefore, the statements constitute a violation of 8(a)(1).²¹

See L.C. Fulenwider, Case 27-CA-10164, Advice Memorandum dated November 23, 1987 (relying on H.R. McBride Construction, we concluded that client's director of property management violated Section 8(a)(1) by making antiunion threats to janitorial contractor's director of operations, who was not an employee under the Act, since the client could reasonably anticipate that the threats would be communicated to the employees; whether the client intended that the threats be so communicated was *not* relevant).

²¹ The 8(a)(1) violation, as opposed to the 8(a)(3) aspect of this case, is independent of the joint employer/Malbaff determination. Thus, even if Prentiss was not a joint employer with ISS, while the termination of the contract may be privileged under Malbaff, the *threat* of termination could be unlawful. See Textile Workers v. Darlington Manufacturing, 380 U.S. 263, 274, n.20 (1965) ("Nothing we

C. CONCLUSION

We conclude that concerning Prentiss' termination of its contract with ISS, a Section 8(a)(3) complaint should issue, absent settlement, alleging that Prentiss and ISS were joint employers. We also conclude that the complaint should include an allegation that the threats made by the client's supervisor to the contractor's supervisor violated Section 8(a)(1).

B.J.K.

have said in this opinion would justify an employer's interfering with employee organizational activities by threatening to close his plant, as distinguished from announcing a decision to close already reached by the board of directors or other management authority empowered to make such a decision"); L.C. Fulenwider, *supra*, Advice Memorandum at page 3. However, a joint employer finding will impact the issue of liability for the 8(a)(1) threat. If Prentiss and ISS were joint employers, then both will be held responsible. Whitewood Maintenance Co., 292 NLRB at 1164 (8(a)(1) violation), quoting Ref-Chem Co., 169 NLRB 376, 380 (1968): "As joint employers, each is responsible for the conduct of the other and whatever unlawful practices are engaged in by the one must be deemed to have been committed by both." If Prentiss and ISS were not joint employers, then Prentiss would be solely responsible, since there is no evidence that any representative of ISS made threatening statements.