

"Floridians for a Level Playing Field" (FLPF) to work on a ballot initiative to amend Florida's constitution to allow gaming at pari-mutuel facilities. In or about August or September 2003, FLPF began meeting with representatives of the various tracks, lobbyists, and union representatives to discuss the ballot initiative. Havenick attended most of the meetings.

In about June or July 2004, a representative of FLPF contacted UNITE HERE Local 355 (the Union) about supporting an upcoming vote on a state constitutional amendment to allow Dale and Broward counties to hold local referendums concerning casino gaming at pari-mutuel facilities within their respective counties. The Union representatives indicated that they would support the ballot initiative if the industry would sign a card-check agreement covering efforts to organize workers in the industry. The Union made it clear that the agreement would have no force if the ballot initiative failed and would be effective only if a facility actually installed slot machines.

Subsequently, the Union negotiated a neutrality agreement with the FLPF companies. On August 23, 2004, Havenick signed the agreement as president for Flagler-Margarita Racing, Inc., a company he had created in the 1970s or 1980s.¹ The agreement includes the following provisions, in pertinent part:

(1) The term "Employer" shall be deemed to include any person, firm, partnership, corporation, joint venture or other legal entity substantially under the control of: (a) the Employer covered by this Agreement; (b) one or more principal(s) of the Employer covered by this Agreement; (c) a subsidiary of the Employer covered by this Agreement; or (d) any person, firm, partnership, corporation, joint venture or other legal entity which substantially controls the Employer covered by this Agreement . . .

* * *

(12) In the event that the Employer sells, transfers, or assigns all or any part of its rights, title, or interest in a gaming facility or substantially transfers any or all of the assets used in the operation of the gaming facility, or in the event there is a change in the form of ownership of the Employer . . . the Employer . . . agrees that as a

¹ Havenick created Flagler-Margarita Racing to enter into joint ventures. It never had any employees, customers, or assets, and was dissolved in 2007 by Havenick's wife.

condition of any such sale, assignment, or transfer, the Employer will obtain from its successor or successors in interest a written assumption of this Agreement . . .

(13) The Employer shall incorporate the entirety of paragraphs 4, 6, 7, 8, 9, and 10 of this Agreement in any contract, subcontract, lease, sublease, operating agreement, franchise agreement or any other agreement or instrument giving a right to any person to operate any enterprise at a gaming facility employing employees . . . The Employer shall enforce such provisions, or at its option, assign its rights to do so to the Union . . .

The agreement also requires the employer to take a neutral approach to unionization, binds the Union to a no-strike clause for the duration of the agreement, and binds both parties to interest arbitration for all unresolved collective-bargaining issues except retirement and profit-sharing plans. It also requires the employer to provide the Union with notice of vacancies in job classifications covered by the agreement at any gaming facility, and, upon written notice of the Union's intent to organize a facility, to provide the Union access to its premises and a complete list of employees, including their job classifications, departments, and addresses. Finally, the agreement also includes a provision stating that the parties agreed not to file any charges with the Board in connection with any act or omission occurring within the context of the agreement.

In about November 2004, the amendment to allow a local referendum passed. On February 9, 2005, Havenick registered the fictitious name Magic City Casino on behalf of Southwest Florida Enterprises, an entity that is a general partner of the Charging Party. In March 2005, Dade and Broward counties held referendums on the issue of whether to allow slot machines at pari-mutuel facilities. The referendum passed in Broward County, but did not pass in Dade County until it was placed on the ballot for a second time in January 2009.

On or about October 16, 2009, the Charging Party opened Magic City Casino for business. On November 15, 2009, the Union sent a letter to the Charging Party demanding that pursuant to the 2004 neutrality agreement, the Charging Party was obligated to assist the Union in its attempt to organize the Magic City employees. Specifically, the letter demanded that Magic City facilitate the Union's access to its employees' meal and break rooms, provide the Union with employees' personnel

information, and notify the Union regarding vacant positions at Magic City.

On or about December 30, 2009, the Union filed a Demand for Arbitration with the American Arbitration Association, purportedly under a mandatory arbitration clause in the neutrality agreement, claiming that the Charging Party breached the agreement and seeking to have an arbitrator enforce the agreement.

On January 7, 2010, the Charging Party filed a claim in state court seeking declaratory relief that no contract existed between the parties and that the agreement in various ways had expired. Additionally, the complaint sought to stay the arbitration.

On February 1, 2010, the Union removed the case to federal district court, and on July 16, 2010, it filed a motion to compel arbitration and for a stay pending arbitration. In support of its motion, the Union stated that its claim rested in part on the agreement's broad definition of the term "Employer." The Union also claimed that Havenick had actual and apparent authority to sign the agreement on the Charging Party's behalf and that the Charging Party is also bound to arbitrate on the grounds of estoppel. Moreover, it argued that because the Charging Party is an alter ego of Flagler-Margarita, its corporate veil should be pierced under common-law principles.

On September 28, 2010, the United States District Court for the Southern District of Florida granted the Union's motion to compel the Charging Party to arbitrate, and stayed the matter until the completion of arbitration. The court found that the Union presented evidence that Havenick was an agent of the Charging Party² and as such could bind the Charging Party, and that the Charging Party failed to present any evidence rebutting the Union's claim. Arbitration is scheduled for January 20, 2011.

ACTION

² In support of its position, the Union had presented evidence that prior to his death in 2006, and both before and after signing the neutrality agreement in 2004, Havenick conducted various activities on behalf of the Charging Party. For example, in November 2001, he entered into a mortgage and security agreement on behalf of the Charging Party; in March 2004, he filed an annual report with the Secretary of State for the Charging Party; and in October 2005, he filed a notice of commencement with the Miami Building Department for construction of a roof at the Charging Party's facility.

The Section 8(b) (1) (A) Charge

We conclude that the agreement does not contain "terms and conditions of employment" that would apply if the Union obtains majority status. Therefore, the Union's attempt to enforce the agreement against the Charging Party through arbitration did not constitute unlawful Section 8(b) (1) (A) restraint or coercion.

A union violates Section 8(b) (1) (A) if its conduct has a reasonable tendency to restrain or coerce employees in the exercise of their Section 7 rights.³ A union's and an employer's agreement on recognition and terms and conditions of employment that would apply to employees if the union subsequently obtains majority status violate Sections 8(b) (1) (A) and 8(a) (2).⁴

Recently, in Dana Corporation, Inc.,⁵ the Board considered whether a "Letter of Agreement" (LOA) between the union and employer violated 8(b) (1) (A) and 8(a) (2) of the Act, respectively, and concluded that the agreement was lawful.⁶ The LOA in that case created a framework for future collective bargaining that would apply if and when the employer recognized the union based on a showing of majority support. The LOA set forth certain "principles that would inform future bargaining on particular topics," such as a four-year minimum duration in any contract, mandatory overtime, and flexible compensation.⁷ It also provided that the parties would submit issues unresolved after six months of bargaining to a neutral for interest arbitration.⁸ The Board held that nothing in the agreement "affected the employees' existing terms and conditions of employment or obligated [the employer] to alter them," and that any potential future effect on employees would require substantial negotiations following recognition pursuant to

³ See Bakery, Confectionary & Tobacco Workers' Int'l Union (Stroehmann Bakeries, Inc.), 320 NLRB 133, 138 (1995); Slate Workers Local 66 (Sierra Employees Assn., Inc), 267 NLRB 601, 602-603 (1983).

⁴ Majestic Weaving, 147 NLRB 859 (1964).

⁵ 356 NLRB No. 49 (December 6, 2010).

⁶ Id. slip op. at 1.

⁷ Id. slip op. at 7, 2.

⁸ Id. slip op. at 2.

the terms of the agreement.⁹ Thus, there was nothing in the agreement that would lead employees to believe that recognition of the union was a forgone conclusion or that rejecting the union was futile.¹⁰

In the instant case, the agreement does not contain terms and conditions of employment that would apply if the Union obtains majority status. The only substantive terms that it addresses are the no-strike pledge during the life of the agreement and the submission of unresolved bargaining issues except retirement and profit-sharing plans to binding arbitration. But the agreement clearly states that these provisions only take effect if the Union becomes the exclusive representative of the Charging Party's employees and the parties enter into negotiations for a collective-bargaining agreement. Thus, as in Dana Corp., the language merely sets forth the ground rules to apply if and when the Union obtains majority status. Finally, we find nothing in the language of the agreement that would lead employees to believe that recognition of the Union as their representative is a foregone conclusion. Rather, the agreement states that only after a review of authorization cards by a third party, establishing that the employees themselves support the Union as their exclusive representative, would the employer recognize the Union as such. Therefore, the Union did not violate Section 8(b)(1)(A) by attempting to enforce the agreement.¹¹

The Section 8(e) Charge

We conclude that the Union did not violate Section 8(e) of the Act by attempting to enforce the agreement through arbitration because no claims that the Union made in its demand implicate a secondary reading of the agreement and none of the provisions that the Union is attempting to enforce has a cease or refrain from doing business object.

⁹ Id. slip op. at 7-8.

¹⁰ Ibid.

¹¹ We note that the Charging Party asserts that the agreement is also unlawful because it contains an agreement that the parties will not file any charges with the Board in connection with any act or omission occurring within the context of the agreement, and thus that it will prevent or inhibit employees from filing charges with the Board. We agree with the Region that this assertion is baseless because there is nothing in the language of the contract that in any way impacts *employees'* ability to file charges with the Board.

Section 8(e) makes it an unfair labor practice for a union or an employer to enter into any contract or agreement, express or implied, where the employer agrees to cease or refrain from doing business with any other person.¹² There are two basic requirements in proving a Section 8(e) violation: (1) that the agreement has a secondary, as opposed to primary work or work standards preservation, object, and (2) that the agreement has a cease or refrain from doing business object.¹³

In determining whether an agreement has a secondary object, the Board regards separate corporate subsidiaries as separate persons under the Act if neither "exercises actual or active, as opposed to merely potential, control over the day-to-day operations or labor relations of the other."¹⁴ Thus, companies bound only by common ownership are generally found to be neutrals with respect to each other's labor relations, because mere ownership does not establish actual control over day-to-day management.¹⁵

The Board has applied the "cease doing business" proscription to agreements that impose only a partial cessation of, or interference with, business,¹⁶ including agreements that interfere with business investment decisions.¹⁷

In this case, paragraph 1 of the agreement defines "Employer" such that it is facially overboard and secondary because it is binding on separate entities with separate employees based on common ownership alone. These would include neutral entities that the signatory owns, or owns a substantial and material interest in, but are not

¹² Carpenters Dist. Council of Northeast Ohio (Alessio Construction), 310 NLRB 1023, 1025 (1993).

¹³ Alessio, 310 NLRB at 1025.

¹⁴ Los Angeles Newspaper Guild Local 69 (Hearst Corp.), 185 NLRB 303, 304 (1970), enfd. 43 F.3d 1173 (9th Cir. 1971), cert. denied 404 U.S. 1018 (1972).

¹⁵ Alessio, 310 NLRB at 1026.

¹⁶ See Int'l Longshoremen's Local 1410, 235 NLRB 172, 179 (1978) (cease-doing-business object shown where agreement interferes with "normal business relationships;" total cessation not required).

¹⁷ Alessio, 310 NLRB at 1025 n.9.

necessarily within the signatory's right of control.¹⁸ Therefore, insofar as the provision seeks to impose the agreement on neutral employers, and not to preserve work for unit members, it is "tactically calculated to satisfy union objectives elsewhere" and has an unlawful secondary purpose.¹⁹ Yet, the claims made by the Union in its arbitration demand and the resulting district court litigation do not appear to implicate a secondary reading of paragraph 1. The Union's claim, as interpreted by the district court, is that Havenick was acting as an agent of the Charging Party and seeking to bind the Charging Party when he signed the agreement. Thus, there are no claims to a broader, secondary reading of this paragraph within the 10(b) period.

In any event, as stated above, in order for an agreement to violate Section 8(e), it must have not only a secondary objective but also a cease or refrain from doing business object.²⁰ Here, the Union is only seeking to enforce the provisions that would require the Charging Party to assist the Union in its attempt to organize the employees, facilitate the Union's access to employee meal and break rooms, provide the Union with employee personnel information, and notify the Union regarding vacant positions at its Magic City facility. Thus, none of these provisions has a cease or refrain from doing business object under Heartland. Therefore, we conclude that the Union did not violate Section 8(e) of the Act by attempting to enforce the agreement through arbitration.²¹

The Section 8(b) (4) Charge

¹⁸ For example, paragraph 1(c) of the agreement defines "Employer" as including entities substantially under the control of any subsidiaries of the employer, which would include entities not necessarily controlled by the employer. See generally Alessio, 310 NLRB at 1025-26 (unlawful secondary object could be inferred based on the fact that the application of contract provisions would reach companies performing work not within the signatory's right of control).

¹⁹ See National Woodwork Mfrs. Assn., 386 U.S. 612, 644-45 (1967).

²⁰ See generally Heartland Industrial Partners, LLC., 348 NLRB 1081, 1082-1083 (2006).

²¹ Thus, we do not need to reach whether paragraphs 12 and 13 of the agreement are evidence of a cease-doing-business object. Since the Union is not presently seeking to enforce those provisions, there is no affirmation of those provisions within the 10(b) period.

To establish a Section 8(b)(4)(ii)(B) violation, the General Counsel must demonstrate that the Union threatened, coerced, or restrained any person engaged in commerce with the object of forcing or requiring the Charging Party to cease doing business with a third person.²²

We conclude that the Union did not violate Section 8(b)(4)(ii)(B) of the Act by attempting to enforce the agreement through arbitration for the same reasons stated above in our Section 8(e) analysis, that is, that the claims made by the Union in its arbitration demand do not implicate a secondary reading of the agreement and none of the provisions that it is seeking to enforce has a cease or refrain from doing business object.

CONCLUSION

Accordingly, absent withdrawal, the Region should dismiss these charges.

B.J.K.

²² See, e.g., Holt Cargo Systems, Inc., 309 NLRB 1283, 1284 (1992) (union violated 8(b)(4)(ii)(B) by pursuing a grievance against an employer in an attempt to force the employer to cease doing business with a neutral).