

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

Advice Memorandum

DATE: April 11, 2011

TO : Alvin Blyer, Regional Director
Region 29

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

SUBJECT: Teamsters Local 282 (Leticia, Inc.)
Cases 29-CE-142, 29-CC-1605, 1606

584-1250-5000
712-5042-0150-5000
712-5042-3355
712-5042-3390
712-5042-6783-6600
712-5042-6783-7500

This case was submitted for advice as to whether a contract clause prohibiting "double breasting" is unlawful under Section 8(e), and whether the Union violated Sections 8(e), 8(b)(4)(A), and 8(b)(4)(ii)(B) when Trust Funds filed a lawsuit against the Employer and another company for alleged unpaid contributions to the Funds based on the contention that the companies are alter egos, single employers, joint employers, and/or engaged in a double-breasted operation.

We conclude that the Trust Funds' lawsuit did not reaffirm the allegedly unlawful anti-double breasting provision within the Section 10(b) period or violate Section 8(b)(4), because the Trust Funds were not acting as agents of the Union. Accordingly, the Region should dismiss the charge, absent withdrawal.

FACTS

A. Background

Leticia, Inc. (the "Employer") is in the business of transporting soil and broken concrete excavated from construction sites in and around New York City. The Employer is a member of the Metropolitan Truckers Association ("MTA"), and has been a party to successive collective-bargaining agreements with Teamsters Local 282 (the "Union").

The Employer owns 18 tri-axle dump trucks operated by its employee drivers. The Employer's employee complement depends upon the number of contracts it has at any given

time. Since sometime in 2010, between 4 and 18 drivers have been on the Employer's payroll. At times in 2008 and 2009, however, the Employer had enough work to operate between 70 and 80 trucks per day. When the Employer has that level of work, it typically leases or rents trucks from other companies, hires those companies' drivers, and places them on its payroll.

York-Jersey Haulers operated from 2002 until the death of its owner, who was the mother of the Employer's owner, in 2009.¹ The Employer states that York-Jersey was in the business of transporting bio-solids, primarily using tractor-trailers but occasionally using tri-axle dump trucks. York-Jersey operated as a "non-union" company. The Employer contends that York-Jersey is a distinct entity with which it does not share ownership, facilities, or employees.

During a three to four month period in 2005, the Employer leased six of its trucks to York-Jersey to remove asphalt millings. Drivers who had been on the Employer's payroll were placed on York-Jersey's payroll for that job. The Employer states that it also rented York-Jersey's tri-axle dump trucks on occasion and used York-Jersey employees on its jobs. In those situations, the York-Jersey employees were placed on the Employer's payroll and their terms and conditions of employment were governed by the Union contract.

The Employer also entered into contracts with two customers to transport bio-solids in 2003. The Employer subcontracted that work to York-Jersey, and York-Jersey used its vehicles and employees to perform that work. The Employer, but not York-Jersey, holds a state license to perform such work. The customers paid the Employer for the performance of the bio-solids work, and the Employer paid York-Jersey, which paid its employees.

B. Collective-Bargaining Agreement and Trust Agreement

The most recent collective-bargaining agreement between the MTA and the Union (the "Contract") was in effect from July 1, 2006 to June 30, 2009, and was extended to June 30, 2012. The Contract covers employees employed

¹ The Employer states that although York-Jersey has not been dissolved, it did no business in 2009 or 2010 and is no longer operating. A surrogate's court proceeding has been commenced to appoint an administrator for the estate of the deceased owner of York-Jersey.

by signatory employers on any day that they "drive a dump truck, dump trailer, flat bed trailer, or flo-boy."

Section 30 of the Contract ("Double Breasted Operation") states that "in order to protect and preserve the work opportunities" of covered employees, the Employer "shall not establish or participate in a double breasted operation" within the Union's geographical jurisdiction. The prior contract, effective from 2002 to 2006, contained an identical provision. Neither contract defines "double breasted operation."

Section 12 of the Contract contains a provision regarding employer contributions to welfare, pension, annuity, and job training trust funds ("Trust Funds"). The provision makes the Trust Agreement governing those Trust Funds a part of the Contract "with the same force and effect as if fully incorporated herein...."

The Trust Agreement itself provides that the Trust Funds are governed by a board of trustees consisting of five representatives from the Union and five from covered employers.² Actions taken by the trustees must be decided by majority vote.³ The trustees have the "full and exclusive power," in their "sole and absolute discretion," to construe the provisions of the Trust Agreement.⁴

The Trust Agreement requires covered employers to contribute to the Trust Funds pursuant to their collective-bargaining agreements and to submit "[d]etailed written reports" with each payment.⁵ Based on those payments and reports, the trustees may audit the pertinent books and records of a covered employer as well as "any other business entity which is affiliated" with the covered employer if, inter alia, the affiliated business entity has "employed persons who have performed the same type of work" as the covered employer.⁶

² Trust Agreement Art. VII, § 1. The Employer asserts that all of the Union trustees are officers of the Union.

³ Trust Agreement Art. VIII, § 9. The entire group of Union trustees has one vote, the entire group of employer trustees has one vote, and deadlocks are resolved by an independent umpire or arbitrator.

⁴ Trust Agreement Art. VIII, § 3.

⁵ Trust Agreement Art. IX, § 1(a)-(c).

⁶ Trust Agreement Art. IX, § 1(d).

The Trust Agreement observes that a covered employer's failure to pay contributions violates both the Trust Agreement and the employer's collective-bargaining agreement. The Trust Agreement authorizes the trustees, in their discretion, to initiate whatever proceedings may be proper and necessary to enforce a covered employer's obligations under the Trust Agreement, including "proceedings at law and in equity and arbitration...."⁷ If the trustees authorize legal proceedings regarding a covered employer's obligations, the lawsuit must be commenced "in the names of one Union Trustee and one Employer Trustee in behalf of the Trustees."⁸

C. Grievance, Audits, and Lawsuit

On December 28, 2005, the Union filed a grievance alleging that the Employer violated the "Double Breasted Operation" provision of the extant contract. The grievance does not specify how the provision was violated, but states the violation was "on going." The grievance was withdrawn prior to a scheduled March 7, 2006, hearing before the Local 282 Management Disputes Panel.⁹

The Trust Funds performed several audits of the Employer between 2005 and 2009 and have demanded payment pursuant to those audits. The Employer has provided lengthy and detailed objections to the conclusions reached by the auditors.

On July 14, 2009, the trustees sued the Employer and York-Jersey in federal court. The complaint alleges violations of ERISA and seeks to collect from the Employer and York-Jersey, jointly and severally, unpaid contributions determined, based on Funds audits, to be owed to the Trust Funds, together with interest and other fees. The complaint also seeks additional audits of the records of York-Jersey and other entities affiliated with the

⁷ Trust Agreement Art. IX, § 4.

⁸ Trust Agreement Art. IX, § 5.

⁹ The Panel is made up of Union and employer representatives and is designed to be a final and binding arbiter of Contract disputes, although arbitration is available when the Panel deadlocks. The attorney who represents both the Union and the Trust Funds did not provide a definitive response to the Region's inquiries about why the Union withdrew the grievance.

Employer, and to collect any contributions identified as deficient by such audits.

The complaint asserts joint and several liability "based on the alter-ego and/or single employer, and/or joint employer and/or double breasted relationship that the Companies share." The complaint specifically alleges that the Employer and York-Jersey have common management, interrelated business and financial operations, common facilities and equipment, a common business purpose, centralized control of labor relations, common supervisors, and a common pool of employees. The complaint also alleges that both entities are engaged in the business of truck rental and heavy construction and excavating in the New York metropolitan area; that the Employer has an ongoing practice of paying contractual wages and benefits for some, but not all, of the hours worked by employees in covered employment; that the Employer has underreported contributions to the Trust Funds by using York-Jersey to pay employees performing covered employment; and that the Employer has failed to report those hours to the Trust Funds.

On June 1, 2010, the Trust Funds' attorney (who also represents the Union) sent a letter to the Employer's attorney, enclosing audit reports, and stating:

Enclosed are audit reports #07-0008 and #11-0213 for York-Jersey Haulers, Inc., a non-signatory affiliate of Leticia, Inc. Audit #07-0008 covers the period February 6, 2002, through June 30, 2006 and audit #11-0213 covers the period from July 1, 2006 through June 30, 2008. The total amount owed for this period is \$3,820,081.68.

Please call me to discuss payment of this audit as well as the other outstanding audits.

On June 10, the Employer filed the instant unfair labor practice charge.

On June 30, the trustees filed an amended complaint. The Employer filed an answer on July 16 and an amended answer on September 23, denying the allegations in the Trust Funds' complaints. The Employer also filed a third-party complaint on July 30, amended September 14, in which it alleged, inter alia, that the Trust Funds are acting as agents of the Union. It also alleges that the Trust Funds administrator communicated with Union trustees regarding the Employer without communicating with the employer trustees, and that either the employer-appointed trustees never voted on the actions taken against the Employer or

the evidence concerning the Employer's ERISA violations was presented to the employer trustees in a distorted and deceptive manner.

ACTION

We conclude that the Trust Funds' lawsuit did not reaffirm the allegedly unlawful anti-double breasting provision within the Section 10(b) period or violate Section 8(b)(4), because the Trust Funds were not acting as agents of the Union. Accordingly, the Region should dismiss the charge, absent withdrawal.

Section 8(e) makes it an unfair labor practice for a union or 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.¹⁰ In addition, a union violates Section 8(b)(4)(A) and/or (B) if it construes and seeks enforcement of an otherwise lawful collective-bargaining agreement provision to accomplish an objective prohibited by Section 8(e).¹¹

A Section 8(e) violation requires: (1) that the agreement has a secondary, as opposed to a primary work or work standards preservation, object, and (2) that the agreement has a cease or refrain from doing business object.¹² 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."¹³ Thus, companies bound only by common ownership are generally found to be neutral with respect to each other's labor relations.¹⁴

¹⁰ Carpenters District Council of Northeast Ohio (Alessio Construction), 310 NLRB 1023, 1025 (1993).

¹¹ See Elevator Constructors (Long Elevator), 289 NLRB 1095, 1095 n.2 (1988), enfd. 902 F.2d 1297 (8th Cir. 1990); Longshoremen Local 1291 (Holt Cargo Systems), 309 NLRB 1283, 1284-85 (1992).

¹² Alessio Construction, 310 NLRB at 1025.

¹³ Los Angeles Newspaper Guild Local 69 (Hearst Corp.), 185 NLRB 303, 304 (1970), enfd. 443 F.2d 1173 (9th Cir. 1971), cert. denied 404 U.S. 1018 (1972).

¹⁴ Alessio Construction, 310 NLRB at 1025-26 (finding that an "integrity clause" between a signatory employer and union that would have required separate, commonly owned

Section 8(e) also can only be violated if an offending clause is "entered into" within the Section 10(b) period. A unilateral attempt to enforce a facially unlawful provision within the Section 10(b) period is sufficient to reaffirm the agreement.¹⁵ An unlawful application of a facially valid clause, however, must be bilateral to constitute "entering into" a Section 8(e) agreement for Section 10(b) purposes.¹⁶

Only labor organizations, employers, or their agents can violate Section 8(e), and only labor organizations or their agents can violate Section 8(b)(4). The trustees of a Section 302(c)(5) jointly administered trust fund are presumed to act as fiduciaries on behalf of the trust beneficiaries rather than as agents of the appointing union or employer.¹⁷ Such trustees are agents of a union or employer only where the facts demonstrate that the union or employer is in "de facto control of a nominally independent trust fund."¹⁸

employers to adopt the collective-bargaining agreement or its terms violated Section 8(e)).

¹⁵ See Dan McKinney Co., 137 NLRB 649, 654 (1962) (signatory employer's grievance filing constitutes "entering into" a facially invalid "agreement"); Chicago Dining Room Employees Local 42 (Clubmen, Inc.), 248 NLRB 604, 607 (1980) (lawsuit to compel compliance with facially invalid provision reaffirmed the provision).

¹⁶ See Sheet Metal Workers Local 27 (AeroSonics, Inc.), 321 NLRB 540, 540 n.3 (1996) (solely unilateral action by union to enforce an unlawful interpretation of facially valid clause does not violate Section 8(e) because such conduct does not constitute an "agreement").

¹⁷ NLRB v. Amax Coal Co., 453 U.S. 322, 334 (1981) (finding that employer-selected trustees were not representatives of the employer for purposes of collective bargaining within the meaning of Section 8(b)(1)(B)). See also Commercial Property Services, 304 NLRB 134, 134 (1991) ("[w]e simply proceed from the premise that a trustee is not acting for the union or the employer unless contrary evidence shows otherwise").

¹⁸ Food & Commercial Workers Local 1439 (Layman's Market), 268 NLRB 780, 781 (1984) (no de facto union control over trust fund where union-appointed trustee took no action to prevent employer from gaining access to requested information and provided employer with means of obtaining the information).

The Board and courts have attributed trust fund actions to a union where (1) the provisions of a collective-bargaining agreement remove the discretion to administer the funds solely for the benefit of the employees; (2) the trustees' actions were in fact directed by union officials; or (3) the trustees' acts were undertaken in their capacities as union officials rather than as trustees.¹⁹ Accordingly, where the facts demonstrate that trustees are clearly acting on behalf of the party which appointed them, the trustees are agents of that party.²⁰ Likewise, where the facts demonstrate that a trustee's actions were intended to promote the appointing party's goals, rather than the goals of the trust, the trustee acted as an agent.²¹ However, the Board will not find agency status where a trustee takes action that

¹⁹ Service Employees Local 1-J (Shor Co.), 273 NLRB 929, 931 & n.7 (1984), and cases cited therein.

²⁰ Jacobs Transfer, Inc., 227 NLRB 1231, 1233 (1977) (agency found where trustee, who was also union president, was instrumental in directing trusts to reject employer's contribution on behalf of discriminatee where trust gave conflicting and inconsistent reasons for refusing to accept payments, which Board found to be designed to obscure denial of employee benefits at union's urging); Truck Drivers Local 449 (Universal Liquor Corp.), 265 NLRB 1539, 1545 (1982), enf. denied 728 F.2d 80 (2d Cir. 1984) (agency found where trustee, who was also union officer, refused to accept employer trust fund contributions unless employer modified collective-bargaining agreement); Paul Mueller Co., 335 NLRB 808, 809 (2001) (agency found where trustees, who were also employer's management officials, changed negotiated benefit provisions and there was no evidence as to the "nature and extent of the powers given to the trustees by the plan, let alone evidence that they possessed the power to change the benefit provisions").

²¹ Shor Co., 273 NLRB at 931 (agency found where union-appointed trustee's action constituted a "transparently pretextual retaliation against an employee for filing a decertification petition, not a good-faith effort to preserve fund assets"); Teamsters Local 334 (Halle Bros.), 253 NLRB 1090, 1092 (1981), enf. denied 670 F.2d 855 (9th Cir. 1982) (agency found where trust fund created vision care plan after proposed plan was rejected in contract negotiations, because conduct advanced union's, not trust's, goals).

clearly furthers the fund's objectives even if it coincidentally benefits the appointing party as well.²²

Here, the Amax Coal presumption against finding an agency relationship between the Trust Funds and the Union applies, because the Funds are jointly administered per Section 302(c)(5). For the reasons set forth below, we conclude that there is insufficient evidence to overcome that presumption and find the Trust Funds to be agents of the Union.

First, neither the Contract nor the Trust Agreement removes the trustees' discretion to administer the Funds for the benefit of the beneficiaries. The Contract merely sets forth the signatory employers' contribution amounts and permits the Union to strike if payments are not made. The Trust Agreement, which is incorporated by the Contract, gives trustees "full and exclusive power" to construe its provisions in their "sole and absolute discretion."²³ The Trust Agreement further states that trustees shall discharge their duties "solely in the interest of the participants, former participants and beneficiaries of the Funds...."²⁴

Moreover, there is no evidence to support the Employer's contentions that the lawsuit is simply a continuation of the Union's double-breasting grievance in another form after the Union withdrew the grievance, and that this demonstrates that the Union is controlling the Funds' action. Although the lawsuit alleges that the Employer and York-Jersey share a single employer, alter ego, joint employer, and/or double-breasted relationship, it does not rely upon or make any reference to the

²² Garland-Sherman Masonry, 305 NLRB 511, 511 n.1, 514-15 (1991) (trust fund's suspension of benefits policy insufficient to establish agency relationship even though trust fund's interests "may have paralleled" those of the union); Operating Engineers Local 12 (Griffith Co.), 243 NLRB 1121, 1125 (1979), enfd. 660 F.2d 406 (9th Cir. 1981), cert. denied 457 U.S. 1105 (1982) (trust fund administrator's threat of a renewed notice to the union concerning its right to strike because the employer failed to pay accrued delinquencies insufficient to establish agency relationship even though the interests of the administrator "harmonize[d] with or parallel[ed]" those of the union).

²³ Trust Agreement Art. VIII, § 3.

²⁴ Trust Agreement Art. VIII, § 7.

contractual no-double breasting provision or to the withdrawn grievance which alleged a "double breasting" violation.

Nor does the evidence demonstrate that the trustees filed the lawsuit in their capacity as Union officials rather than trustees. The lawsuit was filed in the name of all 10 trustees, half of whom are not Union officials but rather individuals appointed by signatory employers. Also, there is no evidence, other than the Employer's unsubstantiated assertions, that the Trust Funds administrator and the Trust Funds/Union attorney communicated to the Union-appointed trustees the Employer's compensation practices and Funds contributions, but did not simultaneously communicate with the employer-appointed trustees, or that the employer trustees did not vote to authorize the suit.²⁵ Although the lawsuit may coincidentally benefit the Union, it also furthers a legitimate Trust goal of ensuring that covered employers do not reduce contributions to the Funds by siphoning off covered work to non-signatory entities. Such circumstances, alone, do not give rise to an agency relationship.²⁶

²⁵ The mere fact that the same attorney represents both a union and a trust fund is not sufficient to establish an agency relationship. See Commercial Property Services, 304 NLRB at 134-35 (employer's refusal to provide information regarding audit requests did not violate Section 8(a)(5) because request not made by union agents; although the same attorney represented the union and the trust funds, he had informed the employer that the audit request was "in regard to the pending lawsuit brought by the Pension Plan and Welfare Fund"). Compare Teamsters Local 122 (August A. Busch & Co. of Massachusetts), 334 NLRB 1190, 1228-29 (2001), enfd. mem. 2003 WL 880990 (D.C. Cir. 2003) (agency found where attorney who represented union and trust fund did not indicate which entity he was representing in correspondence and described fund's lawsuit against employer as a "wake-up call" regarding contract negotiations, in addition to other strong evidence of de facto union control over trust fund).

²⁶ Garland-Sherman Masonry, 305 NLRB at 515; Griffith Co., 243 NLRB at 1125. See also Teamsters Local 71 (United Parcel Service), Cases 11-CB-2775, et al., Advice Memorandum dated March 31, 1998 (fund not agent of union when it ceased benefits coverage for employee who crossed picket line but continued benefits for strikers after employer stopped contributions; fact that fund action coincidentally served union tactical interest insufficient to establish agency).

For all the reasons stated above, there is insufficient evidence to overcome the Amax Coal presumption against finding that the Trust Funds acted as agents of the Union. Accordingly, there is no violation of Section 8(e) or 8(b)(4), even assuming the no-double breasting provision of the Contract is facially unlawful, because that provision was not "entered into" within the Section 10(b) period by the Union or a Union agent. Therefore, we need not decide the substantive issue of whether the lawsuit - if attributable to the Union - would violate Section 8(e) or 8(b)(4).²⁷ Moreover, we note that the suit is clearly lawful to the extent it is grounded on a single employer, joint employer, or alter ego theory.

We also leave open the question of whether, to avoid Section 8(e) liability, the Union would be required to disavow any District Court order finding the Employer liable to the Trust Funds on the basis of something less than a single employer, joint employer, or alter ego relationship. Such an order would be binding upon both the Union and the Employer as both are parties to the Trust Agreement, and because the Trust Agreement is incorporated in the Contract. Therefore, such an order arguably would constitute a bilateral entering into, within the Section 10(b) period, of an unlawful secondary interpretation of the Contract.²⁸

B.J.K.

²⁷ See Metropolitan Regional Council of Carpenters, Philadelphia & Vicinity (R.M. Shoemaker Co.), Cases 4-CC-2212-1, et al., Advice Memorandum dated December 18, 1998 (lawfulness of fund actions under Section 8(e) and 8(b)(4) not reached because fund not acting as union's agent).

²⁸ See Elevator Constructors (Long Elevator), 289 NLRB at 1095 n.2. In this regard, we note that the Employer has argued to the court that the lawsuit presents a claim violative of Section 8(e). Further, the court is free to consider the dictates of Section 8(e) in determining the parties' ERISA obligations. Thus, it is well settled that federal courts have the authority to "decide labor law questions that emerge as collateral issues in suits brought under independent federal remedies...." Connell Construction Co. v. Plumbers Local 100, 421 U.S. 616, 626 (1975) (construing Section 8(e) in context of antitrust lawsuit). Thus it is not at all clear that any secondary interpretation will result from the lawsuit.