

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

# Advice Memorandum

DATE: March 23, 2010

TO : Martha Kinard, Regional Director  
Region 16

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

SUBJECT: IBEW Local 716 (KST Electric, Ltd.) [REDACTED]  
Case 16-CB-7938 [REDACTED]

542-3333-8700  
542-3333-8900  
554-1401-2500  
554-1401-5000

The Region submitted this Section 8(b)(1)(B) and (3) case for advice as to whether the Union bargained in good faith before it invoked interest arbitration under its expiring Section 8(f) agreement. We conclude that the instant charge should be dismissed, absent withdrawal, because the Union bargained in good faith with the Employer before it submitted the parties' dispute to interest arbitration and did not unlawfully submit nonmandatory subjects to the interest arbitration tribunal.

### **FACTS**

KST Electric, Ltd. (the Employer) and IBEW Local 716 (the Union) have a Section 8(f) relationship. In December, 2001, the Employer designated the National Electrical Contractor Association (NECA) Southeast Chapter to act as its bargaining representative. The Employer has since been a party to the Union's Inside Construction Agreements with NECA's Houston Division. The parties' most recent collective-bargaining agreement was effective August 30, 2006 through August 30, 2009.

On December 1, 2008, the Employer timely revoked its letter of assent designating NECA as its bargaining representative and timely served notice to terminate the collective-bargaining agreement. By letter dated March 26, 2009,<sup>1</sup> the Union gave timely notice that it wanted to open negotiations for a successor agreement.

Article I, Section 1.02 of the parties' 2006-2009 agreement stated that the contract terms would remain in effect until the parties concluded negotiations for a successor contract. In addition, subsection (d) provided for interest arbitration:

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<sup>1</sup> All dates are in 2009 unless otherwise noted.

Unresolved issues or disputes arising out of the failure to negotiate a renewal or modification of this Agreement that remain on the 20<sup>th</sup> of the month preceding the next regular meeting of the Council on Industrial Relations for the Electrical Contracting Industry (CIR) may be submitted jointly or unilaterally to the Council for adjudication. Such unresolved issues or disputes shall be submitted no later than the next regular meeting of the Council following the expiration date of this Agreement or any subsequent anniversary date. The Council's decisions shall be final and binding.

The Employer sent the Union a full contract proposal on June 7. By letter dated June 24, the Union suggested a list of dates when the Union would be available to meet for negotiations; the Union listed virtually every day between June 30 and July 26. In addition, the Union invited the Employer to submit the necessary forms to appear before the CIR at its August meeting. By letter dated July 15, the Employer declined to submit such forms on the grounds that it was premature and stated that if the Union submitted the dispute to the CIR, it would do so unilaterally.

The parties agreed to meet on July 19 and 20. At their first bargaining session, the Union informed the Employer that it was not receptive to the Employer's proposal and submitted its own proposal. The parties then discussed the Union's proposal, particularly, wages, work hours, and upcoming projects. The Union offered to meet again the following day, but the Employer declined and said it would submit a counterproposal by Wednesday, July 22.

The Union did not receive the Employer's counterproposal, and on July 27 requested submission forms from the CIR. The CIR immediately notified the Employer of the Union's request.

On July 29, the parties' principal negotiators attended a meeting in Oklahoma on other matters. The Union negotiator, Business Manager John Easton, sent a text message to Employer Manager Kenneth Tumlinson and asked to meet during a break. The parties met in the hallway briefly. Easton gave the Employer a handwritten proposal that lowered the Union's prior proposed wages and Employer contributions to the 401(k) plan, proposed to substitute the Federal Mediation and Conciliation Service (FMCS) for the CIR, and left all other contract terms unchanged. Tumlinson agreed to look at the Union's new proposal but noted that the Union was in effect trying to bind him to the NECA agreement. Easton told Tumlinson that the Union had not received the Employer's counteroffer, as promised, and

reminded him that that the Union was required to submit the CIR forms by August 1. Tumlinson said that the Employer would have to see what the CIR decided, and then the parties could get back together and work on gaining projects in their jurisdiction.

The Employer submitted its proposal for a one-year contract to the CIR on July 30. In an accompanying letter, the Employer listed 24 items that it had removed from the IBEW-NECA pattern agreement and asserted that the CIR had no authority to impose those terms because 23 involved permissive subjects and the 24<sup>th</sup>, entitled work preservation, was an illegal clause. On the same day, the Employer e-mailed its new counterproposal to the Union. The Employer asserted that the Union had unilaterally submitted the parties' dispute to the CIR over its objection, reiterated its opposition to the CIR's imposition of any of the 24 listed terms, and stated that it was ready to meet with the Union to reach a "mutually agreeable contract."

The Union mailed its submission to the CIR on August 1. The Union listed eight contract provisions in dispute. Those provisions related to the contract term, the retirement savings plan, Labor Day as a paid holiday, journeyman wage rates, foreman wage rates, overtime, intermediate journeyman ratios, and the favored nations clause. The Employer received the Union's CIR brief on August 6 and, once again, on August 7, wrote to the CIR to object to the Council's inclusion of any of the listed permissive or illegal terms in a successor agreement.

Meanwhile, on July 31, the Employer had made an information request. The Union replied on August 6, directing the Employer to contact trust fund administrators for the documents requested.

On August 14 or 15, Union International Representative Dan Hetzel contacted the Employer and offered it the NECA contract, modified to substitute the FMCS for the CIR as the interest arbitration tribunal. The Employer countered with an offer to accept the NECA contract with this modification for a two-year term. The Union rejected that counteroffer.

The CIR met on August 18. The Union presented its case; the Employer chose not to attend. The CIR issued its preliminary decision on August 21. Both the Union and the Employer filed objections. Once again, the Employer objected to the inclusion of permissive terms and the alleged illegal work preservation provision. On September 4, the CIR issued its final decision, adopting its preliminary decision with the exception of a surety bonds provision. The Employer filed a federal lawsuit in the southern district of Texas on November 17, seeking to vacate the CIR's decision.

The Employer filed the Section 8(b)(1)(B) and (3) charge in this case on August 14. The Employer concedes the applicability of the interest arbitration clause in the expired collective-bargaining agreement but contends that that the Union bargained in bad faith by: (1) entering negotiations with an intransigent position, seeking to impose the NECA pattern agreement; and (2) unilaterally submitting nonmandatory subjects to the interest arbitration tribunal.<sup>2</sup>

### **ACTION**

We conclude that the Region should dismiss the instant charge, absent withdrawal, because the Union did not use interest arbitration as a substitute for good-faith bargaining. Moreover, the Union did not enter negotiations with an intransigent position and lawfully submitted nonmandatory subjects to interest arbitration.

The Board has long held that a union does not violate Section 8(b)(1)(B) or (3) by submitting unresolved bargaining issues to interest arbitration pursuant to a multiemployer contract after the employer has withdrawn from the multiemployer unit if: (1) the expiring contract arguably binds the employer to interest arbitration; and (2) the union bargained in good faith prior to invoking interest arbitration.<sup>3</sup> In Collier Electric, the Board sought to balance the statutory policy of encouraging parties to abide by their agreements and the statutory right of both employers and employees to select their own collective-bargaining representatives.<sup>4</sup> The Board therefore constructed a framework that requires "a reasonable basis in fact and law" for the Union's invocation of interest arbitration, i.e., the contract must "at least arguably" bind the employer to interest arbitration.<sup>5</sup> The Board will also review the parties' bargaining to insure that the union negotiated in good faith prior to the submission of unresolved issues to interest arbitration.<sup>6</sup>

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<sup>2</sup> The Employer also filed a charge in Case 16-CB-7957, and the Region has found merit to the allegation that the Union violated Section 8(b)(3) by failing to provide requested information.

<sup>3</sup> Electrical Workers IBEW Local 113 (Collier Electric), 296 NLRB 1095, 1098 (1989).

<sup>4</sup> Ibid.

<sup>5</sup> Ibid.

<sup>6</sup> Ibid.

With regard to the latter requirement, the union must not use interest arbitration "to relieve it of its duty to bargain with the Employer[] for [a] new contract[]." <sup>7</sup> In Collier Electric, the parties had met three times before the union submitted their dispute to the CIR and once thereafter, and there was no evidence that the union engaged in bad-faith bargaining. <sup>8</sup> On the other hand, the Board has found that a union violated Section 8(b)(1)(B) and (3) by invoking interest arbitration after refusing to negotiate with, or even in the presence of, the employer's chosen representatives. <sup>9</sup>

In Baylor Heating, the Board expressly held that there is nothing in the Deklewa principles <sup>10</sup> governing Section 8(f) agreements to prevent the parties from voluntarily agreeing to interest arbitration in the prehire context. <sup>11</sup> While Deklewa permits the parties to repudiate their relationship upon their contract's expiration, where a contractual clause arguably binds the employer to a renewal of the agreement and to interest arbitration of disputes concerning that renewal, "the parties have agreed to extend their voluntary contractual relationship beyond the expiration date[.]" <sup>12</sup>

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<sup>7</sup> See, e.g., Sheet Metal Workers Local 54 (Texas Sheet Metal), 297 NLRB 672, 678 (1990)

<sup>8</sup> 296 NLRB at 1096, 1100. See also Texas Sheet Metal, 297 NLRB at 678 (no violation where union met with each employer four times before invoking arbitration and then once more); Sheet Metal Workers Local 206 (Warrens Industrial), 298 NLRB 760, 762 (1990), review denied sub nom. West Coast Sheet Metal, Inc. v. NRB, 938 F.2d 1356 (D.C. Cir. 1991) (no violation where union met with one employer six times and with the other twice prior to submitting the dispute to interest arbitration).

<sup>9</sup> See Electrical Workers IBEW Local 46 (Puget Sound), 302 NLRB 271, 273-74 (1991).

<sup>10</sup> See John Deklewa & Sons, 282 NLRB 1375, 1377-78 (1987), enfd. sub nom. International Association of Bridge, Structural and Ornamental Workers, Local 3 v. NLRB, 843 F.2d 770 (3d Cir.), cert denied 488 U.S. 889 (1988).

<sup>11</sup> Sheet Metal Workers Local 20 (Baylor Heating), 301 NLRB 258, 260 (1991).

<sup>12</sup> Id. at 260 (dismissing Section 8(b)(1)(B) complaint where the contract arguably bound the individual signatory employer to interest arbitration).

The parties in this case had a Section 8(f) agreement containing an interest arbitration clause. As noted, the Employer concedes that it was bound by that interest arbitration clause but contends that the Union engaged in a course of bad-faith bargaining.

Assuming that the Union had a bargaining obligation notwithstanding the termination of the Section 8(f) contract,<sup>13</sup> we conclude that the Union did not utilize interest arbitration as a substitute for good-faith bargaining. Indeed, the Union made itself available for bargaining on several dates in late June and July. The Union met with the Employer on July 19 and offered to meet the following day as well, but the Employer declined. Thereafter, the Union's principal negotiator sought out the Employer's representative in Oklahoma on July 29 and offered the Employer a new, less costly proposal, even though the Union had not yet received the Employer's counterproposal. And the Union contacted the Employer again in mid-August, after it had submitted the dispute to arbitration, to proffer another offer, which the Employer rejected.

Moreover, there is insufficient evidence that the Union entered the negotiations with an intransigent position. The Employer asserts that the Union was operating under a mandate from its International to follow the NECA Pattern Agreement Guide, which allegedly contains certain required contract language.<sup>14</sup> The IBEW and NECA jointly prepared this Guide for the negotiation of Inside Construction Agreements between IBEW Locals and NECA Chapters, and it did not on its face apply to the Union's negotiations with the Employer, which had withdrawn from its NECA Chapter. And the Employer has produced no evidence that the IBEW required the Union to abide by it. The Guide therefore could not, as the Employer contends, have constituted a mandate from the

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<sup>13</sup> Compare Baylor Heating, 301 NLRB at 261, fn.9 (implying that a duty to bargain in good faith survives where the Section 8(f) parties have extended their voluntary contractual relationship by agreeing to interest arbitration for a successor agreement) with Sheet Metal Workers Local 9 (Concord Metal), 301 NLRB 140, 144-45 (1991) (holding no Section 8(b)(3) violation by union that was not a Section 9(a) representative where the parties' Section 8(f) agreement did not provide for interest arbitration; Board stated broadly that "there is no duty to bargain for a successor agreement, and there can thus be no violation of Section 8(b)(3)").

<sup>14</sup> The Employer claims it obtained the Guide from another IBEW Local, along with correspondence between that Local and the International instructing the Local to apply the Guide to the Employer.

International that circumscribed the Local negotiators' authority and led to an intransigent position.<sup>15</sup>

Finally, the Union did not violate Section 8(b)(3) by including nonmandatory subjects in its submission to the interest arbitration tribunal. It is well established that a party can present a demand regarding a nonmandatory subject of bargaining so long as it does "not posit the matter as an ultimatum."<sup>16</sup> Likewise, a party can lawfully submit nonmandatory subjects to interest arbitration so long as it does not insist to impasse on those subjects.<sup>17</sup> If the interest arbitration tribunal includes nonmandatory subjects in its final award, those provisions are merely unenforceable.<sup>18</sup> There is no evidence here of insistence to impasse on nonmandatory subjects nor does this case involve any Union attempt to enforce permissive bargaining subjects.

For these reasons, the Union did not violate Section 8(b)(1)(B) or (3) by invoking and pursuing interest arbitration in this case. Accordingly, the Region should dismiss the instant charge, absent withdrawal.

B.J.K.

  
<sup>15</sup> Cf. Electrical Workers IBEW Local 428 (Kern County Chapter NECA), 277 NLRB 397, 413-14 (1985) (union violated Section 8(b)(3) by entering negotiations with intransigent position regarding certain subjects, about which the union's chief negotiator had limited authority); Teamsters Local 418, 254 NLRB 953, 957 (1981) (international's mandate that local bargaining representative not agree to any contract inconsistent with master freight agreement rendered local representatives unable to negotiate in good faith).

<sup>16</sup> Detroit Newspapers, 327 NLRB 799, 800 (1999), rev'd on other grounds 216 F.3d 109 (D.C. Cir. 2000) (citation omitted) (union did not insist to impasse or strike in support of nonmandatory proposal to merge parties' single-employer, single-union units).

<sup>17</sup> See Baylor Heating, 301 NLRB at 261 (union could include nonmandatory subject of interest arbitration in its submission to arbitration board where there was no insistence to impasse upon that clause).

<sup>18</sup> See Sheet Metal Workers Local 263 (Sheet Metal Contractors), 272 NLRB 43, 45 (1984) (interest arbitration agreements "are binding and enforceable only to the extent that mandatory subjects are resolved").