

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

Advice Memorandum

DATE: July 28, 2011

TO : Richard L. Ahearn, Regional Director
Region 19

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

SUBJECT: Marion Construction Company
Case 19-CA-32601

██████████ ██████████
530-6001-2500
530-6083-1000
530-6033-2800
590-0150

This case was submitted for advice as to whether a Section 8(f) employer violated the Act by refusing to execute a collective-bargaining agreement reached between its bargaining agent and the Union.

We conclude that the Employer did not violate the Act because it granted only limited authority to its bargaining agent by reserving the right to reject any agreement reached, and under 8(f), the Employer had no duty to bargain for a successor agreement.

FACTS

The Employer, a construction industry employer, was a member of the Associated General Contractors of America (the "AGC"), which served as a bargaining agent for several employers on a single employer basis. According to the Union, the Employer was a party to a collective-bargaining agreement with the Union, negotiated by the AGC, which was due to expire on May 31, 2009, but automatically continued for an additional year. The Union cannot produce documentation to support its assertion that the Employer was party to that agreement.¹

The AGC and the Union began bargaining for a new agreement on May 15, 2009. The AGC's spokesperson read aloud the following statement at the beginning of that first session:

¹ The Employer was a party to a different collective-bargaining agreement with the Union, negotiated by the General and Concrete Contractors Association, Inc. ("GCCA") and this may have created confusion as to whether the Employer was bound by the expiring AGC agreement. The parties' relationship through the GCCA agreement is not at issue.

The AGC bargains under a single employer method of bargaining. We are here today representing the employers who are listed on [a list prepared by the AGC and provided to the Union]. Each employer on that list, including those sitting here today, reserves their right on an individual basis to determine acceptability of any proposed new labor agreement, without being bound by the decisions of any other employers. Each employer retains the right to decide whether or not to sign any agreements we may reach.²

The Employer's Human Resources Director ("HR Director") attended this bargaining session and the two additional bargaining sessions held in 2009. The Employer executed an authorization granting the AGC a limited delegation of authority by which it reserved the right to decide for itself whether it would sign any agreement reached between the AGC and the Union, rather than being bound by the decision of any other employers. On February 25, 2010, the Employer wrote to the Union stating that it was repudiating and terminating the AGC agreement effective upon its expiration, May 31, 2010.³

The HR Director also attended the next two bargaining sessions, which occurred in the spring of 2010, but claims that she was not present for the sixth and final bargaining session on May 17, 2010.⁴ There is no dispute that, when she attended, the HR Director actively participated in the negotiations and, as the parties reached tentative agreements, did not inform the Union that the Employer had any serious objections or concerns. The HR Director claims that, during employer caucuses, she did inform the representatives of other employers and the AGC's

² The preamble to the 2005-2009 AGC agreement and the successor agreement state that the AGC, "is not acting as a multi-employer bargaining agent in a single multi-employer unit but is acting for and on behalf of employers who have individually requested the [AGC] to act as their individual and separate bargaining agent in individual employer units." The Employer reiterated to the Union itself, in a February 25, 2010 letter, that the AGC was representing the Employer on a "single employer basis."

³ The AGC agreement required 90 days notice if either party wished to prevent the agreement from automatically renewing upon expiration.

⁴ The Union claims that the Employer's HR Director attended on that date but arrived late and did not sign in.

representative that, given the current economy, she could not agree to any increase in compensation.

At the end of the May 17 bargaining session, the parties agreed on all terms for the new agreement, with the exception of wages. The AGC was offering an increase of \$.80 per hour but the Union was requesting \$.85 per hour. Via telephone discussions between the Union and the AGC's representative, agreement was reached on all terms by May 26, 2010. The AGC wrote to the employers and informed them that agreement had been reached and included the revised wage and fringe benefit rates.

The Employer contacted the AGC around this time and informed it that the Employer would not sign the agreement. On June 7, 2010, the Employer wrote to the Union that it was withdrawing recognition of the Union as the representative of its employees.

ACTION

We conclude that, given the 8(f) relationship between the Employer and the Union, the Employer had no duty to bargain with the Union for a successor agreement. Furthermore, the Employer and the Union never reached agreement on all material terms and the Employer did not grant the AGC authority to bind it to the successor agreement.

In a 9(a) relationship, the union is the exclusive representative of the employees in a given workplace based on a showing of majority support.⁵ The employer must continue to recognize and bargain with the union indefinitely unless that majority support is called into question.⁶ The employer is also obligated to maintain terms and conditions of the parties' collective-bargaining agreement after expiration, absent a bargaining impasse, because the union continues to enjoy a presumption of majority support.⁷

By contrast, in the construction industry, an employer and a union may enter into an agreement under Section 8(f)

⁵ See, e.g. *International Ladies Garment Workers' Union, AFL-CIO v. NLRB*, 366 U.S. 731, 737-738 (1961).

⁶ See, e.g., *Staunton Fuel & Material d/b/a Central Illinois Construction*, 335 NLRB 717, 718 (2001).

⁷ See, e.g., *Litton Financial Printing Div. v. NLRB*, 501 U.S. 190, 206-07 (1991).

without a showing of majority support for the union.⁸ As the Board explained in *John Deklewa and Sons*, an employer is obligated to maintain terms and conditions of employment during the terms of the 8(f) contract and violates Section 8(a)(5) if it fails to do so.⁹ In contrast to a 9(a) agreement, however, once an 8(f) agreement expires, an employer may terminate the bargaining relationship and repudiate the terms of the agreement.¹⁰

In cases following *Deklewa*, the Board has continued to apply the principle that an employer's 8(a)(5) obligations do not extend beyond the expiration of the 8(f) agreement,¹¹ unless parties reach a new agreement subject to 8(a)(5) strictures. In *Ryan Heating*, the employer and union reached agreement on all aspects of a successor agreement after the expiration of their 8(f) agreement, but then the employer refused to execute the contract.¹² The Board applied *H. J. Heinz Co. v. NLRB*,¹³ finding that the employer could not refuse to sign a contract to which it had orally agreed.¹⁴ Likewise, in *Clarence Spight Contractor*¹⁵ and *Coulter*

⁸ *John Deklewa and Sons*, 282 NLRB 1375, 1377-78 (1987), enforced, 843 F.2d 770 (3d Cir. 1988).

⁹ *Id.* at 1377-78, 1387.

¹⁰ *Id.* at 1388 ("[a]n 8(f) employer has no 8(a)(5) obligations after expiration of the agreement underlying a union's claim of representative status").

¹¹ See *Sheet Metal Workers Local 9 (Concorde Metal)*, 301 NLRB 140 (1991) (finding no duty to bargain for a successor agreement where union lacked 9(a) status); *Yellowstone Plumbing*, 286 NLRB 993, 994 (1987) (finding lawful employer's withdrawal of recognition, refusal to bargain, and unilateral changes following expiration of multiemployer agreement). See also *James Luterbach Construction Co.*, 315 NLRB 976, 978 (1994) ("mere inaction by an employer during the multiemployer negotiations is not sufficient to show that the 8(f) employer has reaffirmed its intention to be bound"); *Garman Construction Company*, 287 NLRB 88 (1987) (finding employer that timely withdrew from multiemployer bargaining may withdraw recognition from the union after expiration of 8(f) agreement).

¹² 297 NLRB 619, 619 (1990), enforcement denied on other grounds, 942 F.2d 1287 (8th Cir. 1991).

¹³ 311 U.S. 514 (1941).

¹⁴ *Ryan Heating*, 297 NLRB at 620.

¹⁵ 312 NLRB 147, 148 (1993).

Carpet,¹⁶ the Board held the parties to an interim agreement wherein the employer agreed to be bound by future collective-bargaining agreements, and an oral agreement wherein the parties had agreed on all terms of a successor agreement, respectively. The Board did not hold that the parties, independent of the agreements they had already reached, had any obligation to bargain for a successor agreement or that any other duties of Section 8(a)(5) attached. Rather, the Board continued to apply one of the principles articulated in *Deklewa*, that parties who voluntarily agreed to an 8(f) agreement would be held to their promises only during the term of that agreement.¹⁷

Here, we conclude that the Employer did not violate Section 8(a)(5) because, even assuming that that the Employer was a signatory to the prior AGC agreement¹⁸ and had a duty to bargain with the Union regarding any changes to working conditions during the term of that agreement, it had no obligation to continue recognizing the Union or to bargain with it to impasse for a successor collective-bargaining agreement.

Furthermore, the Employer granted the AGC only limited authority to bargain on its behalf and therefore was not automatically bound to the collective-bargaining agreement negotiated by the AGC. The Employer reserved the right to decide whether it would sign an agreement reached between the AGC and the Union and, at the first bargaining session,

¹⁶ 338 NLRB 732, 733 (2002).

¹⁷ 282 NLRB at 1387.

¹⁸ Although the Union has failed to produce evidence that the Employer signed the earlier agreement, it arguably was bound to that contract by its conduct. The Board has applied the "adoption by conduct" principles, articulated in *Hagerman Construction Co.*, 236 NLRB 79, 85-86 (1978), enforced, 641 F.2d 351 (5th Cir. 1981), to 8(f) employers where the employer held itself out as a union signatory employer and applied the collective-bargaining agreement. See *300 Exhibit Services and Events*, 356 NLRB No. 66, slip op. at 3-5 (2010) (finding adoption of a union's short form agreement where employer obtained work under a collective-bargaining agreement requiring union subcontractors and applied the terms of the agreement to its work); *ESP Concrete Plumbing*, 327 NLRB 711, 713 (1999) (finding adoption by conduct where employer held itself out as a union contractor, applied the collective-bargaining agreement to its work, and acquiesced in a judgment against it for unpaid contributions to the union's pension fund).

the AGC notified the Union that it had only limited authority to enter an agreement on behalf of each of its employer members. The AGC and the Union reached agreement by May 26, but the Employer did not agree because it objected to the amount of the wage increase. Unlike *Ryan Heating* and *Coulter Carpet*, the Employer is not bound to that agreement because it never reached agreement on all material terms or orally agreed to sign the agreement. And, since the Employer was within its rights to repudiate the Union after the expiration of the current agreement, there is no basis to obligate the Employer to bargain to impasse or execute a successor contract with the Union upon which the Employer and the Union never agreed.

Accordingly, we conclude that the Employer did not violate Section 8(a)(1) and (5) of the Act. The Region should dismiss the charge, absent withdrawal.

B.J.K.

[REDACTED]

[REDACTED]