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

Advice Memorandum

DATE: September 17, 2004

TO : Frederick Calatrello, Regional Director
Region 8

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

SUBJECT: United Steelworkers of America (Heartland Industrial Partners, LLP, Collins & Aikman Corp. and Collins & Aikman Products Co.)
Case 34-CE-9 (formerly 8-CE-84)

584-1250
584-1275-6700
584-3700

This Section 8(e) case was submitted for advice regarding whether (1) the Union and two employers, Heartland and Collins & Aikman, acted unlawfully when they agreed that whenever they acquired majority ownership or majority voting power over another entity or gained the power to direct the acquired enterprise, the Union thereafter could require the acquired enterprise to agree to enter into a similar overall agreement, which included neutrality provisions; (2) the Heartland Agreement's investment restrictions were reaffirmed within the 10(b) period, when the Union and TriMas Corp. entered into a similar overall agreement; (3) the Collins & Aikman or Heartland Agreements' investment restrictions were reaffirmed within the Section 10(b) period when the Union and Collins & Aikman applied only the lawful neutrality provisions; and (4) the Union and the employers acted unlawfully when they agreed that whenever the employers acquired less than a controlling interest over another entity, the employers would use their "best efforts" to cause the other enterprise to enter into a similar overall agreement.

We conclude that (1) the Heartland Agreement investment restrictions violate Section 8(e) because they evince a "cease doing business" object and are secondary as not concerned with Heartland's labor relations but rather with the labor relations of acquired entities that are not a single employer with Heartland; (2) the investment restrictions in the Heartland Agreement were reaffirmed when TriMas, a Heartland acquired entity, and the Union entered into an agreement within the 10(b) period; (3) the

charge allegation against the Collins & Aikman Agreement is time barred; and (4) the parties lawfully agreed that whenever the employers acquired less than a controlling interest over entities, the employers would use their "best efforts" to cause these those entities to enter into similar overall agreements.

FACTS

This case involves very similar Agreements between the United Steelworkers of America ("Union") and each of three employers, Heartland Industrial Partners, Collins & Aikman ("C&A"), and TriMas Corporation. Each Agreement consists of two parts: investment restrictions and a neutrality agreement. The investment restrictions require the signatory employers to impose these Agreements, including the neutrality provisions, on certain after-acquired business entities, upon the Union's request.

I. The Heartland Agreement

Heartland is an investment firm that acquires and consolidates midwestern industrial companies. The Union does not represent any Heartland employees. On November 27, 2000, Heartland and the Union became parties to an agreement that specified the circumstances and conditions for applying a neutrality agreement to future Heartland acquisitions. A "Side Letter" and a "Framework for Constructive Bargaining Relationship" constitute the overall agreement between Heartland and the Union ("Heartland Agreement"). The Side Letter, despite its name, is the primary document.[1]

Heartland Agreement Side Letter Section 3 specifies that the Heartland Agreement will apply to any facility that is a subsidiary or a "covered business enterprise" ("CBE"). Section 3 defines a CBE to include any enterprise in which Heartland:

> directly or indirectly (i) owns more than 50 percent of the common stock; (ii) controls more than 50 percent of the voting power; or (iii) has the power, based on contracts, constituent means,

[1] Side Letter Section 13 provides in part: "[T]he provisions of this Side Letter definitively interpret and override any contrary or ambiguous provision of the Framework Agreement." Thus, we have interpreted the overall Agreement in the light of Section 13.

> to direct the management and policies of the enterprise . . .

Heartland Agreement Side Letter Section 2.B. provides that after six months have elapsed from Heartland's investment in a CBE, the Union may choose to notify Heartland of the Union's intent to organize that CBE. Within 10 days of Union notification, Heartland must cause the CBE to execute a Framework and a Side Letter similar to the Framework and Side Letter signed by Heartland. Heartland Agreement Side Letter Section 11 concerns Heartland acquired entities that are less than that of a CBE. Section 11 requires Heartland to attempt to use its "reasonable best efforts" to cause such entities to adopt the Agreement.[2]

Heartland Agreement Framework Section I sets forth the neutrality agreement, which includes the following provisions: the CBE-employer will grant the Union access to distribute information and to meet with employees; the CBE will provide employee names and addresses; and the CBE will grant recognition based upon a majority showing after a neutral card check procedure. The CBE will bargain within 14 days of recognition and will resort to interest arbitration of open issues after 90 days of bargaining. The parties will define the appropriate bargaining units by mutual agreement, or absent agreement, will submit the unit issue to arbitration.

II. Collins & Aikman Corp. becomes a Heartland CBE; the C&A Agreement

In the first quarter of 2001, Heartland acquired C&A, and gained majority ownership and control. On January 8, 2003, C&A became a party with the Union to C&A's Side Letter and Framework Agreement pursuant to the Heartland Agreement. The C&A Side Letter explicitly states that C&A is a CBE of Heartland, as

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[2] Section 11 reads in pertinent part:

> In the event that Heartland becomes the owner of an interest in a business enterprise, but such enterprise does not quality as a CBE as defined in #3 above, then Heartland shall inform the [Union] of its investment and use its reasonable best efforts to cause the enterprise to adopt the Framework Agreement and this Side Letter.

defined in Section 3 of the November 27, 2000 Heartland Side Letter.[3]

The Heartland and C&A Agreements are very similar. C&A Side Letter Section 3 states that the "Side Letter is based upon the Side Letter between Heartland and the Union of November 27, 2000 but with sections not pertinent removed or modified."[4] C&A Side Letter Section 2 provides that if, after six months, the Union notifies C&A of its intent to organize a CBE of C&A, that CBE will also execute a Framework Agreement and a Side Letter. C&A Side Letter Section 3 definitions of "Company" and "CBE" are identical to that in the Heartland Side Letter.

On about May 19, 2003, the Union began an organizing drive at Collins & Aikman Accessory Mats, a Holmesville, Ohio designer and manufacturer of automotive interior components that is a wholly owned subsidiary of C&A. On May 19, the Collins & Aikman Accessory Mats plant manager notified employees that the Union was beginning an organizing drive. The manager posted a notice stating that a neutrality agreement governed the Union organizing drive. The manager's announcement and the posted notice conformed to the neutrality requirements of the C&A Framework. Between May and August, the Union distributed campaign flyers some of which discussed the terms of the neutrality agreement. Nearly all Union flyers stated that they were published pursuant to the neutrality agreement between C&A and the Union.

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[3] The C&A Side Letter states:

> The following will confirm our understanding regarding certain matters concerning the [Union] and [C&A]. [C&A] has entered into this agreement and an accompanying Side Letter as a Covered Business Entity of Heartland Industrial Partners, as defined at Section 3 in a letter of November 27, 2000 from David Stockman to George Becker.

In addition, the C&A Framework introductory paragraph states that C&A is a CBE of Heartland, as defined in the November 27, 2000 Heartland Letter.

[4] The C&A Side Letter Section 2(iii) parallels the Heartland Side Letter Section 2.B.

On about August 6, four Collins & Aikman Accessory Mats employees filed the instant Section 8(e) charge alleging violations arising from the Union's and Heartland's entering into Section 2 through Section 7, and Section 11, of the Side Letter, and also from the Union's, Heartland's, and C&A's entering into Section I.E.3 of the Framework. The Union organizing drive at the Holmesville plant ultimately was unsuccessful, ending on about August 12, 2003.

III. TriMas Becomes a Heartland CBE; the TriMas Agreement

In June 2002, Heartland acquired TriMas Corporation. TriMas has four operating segments, which manufacture transportation accessories, electrical products, packaging and fastening systems, and other industrial products. On July 11, 2003, pursuant to the November 27, 2000 Agreement between Heartland and the Union, TriMas and the Union entered into an Agreement that includes a Side Letter and Framework.[5] Heartland required TriMas to enter into the Agreement.

The TriMas Agreement is very similar to the C&A Agreement. The TriMas Side Letter Section 3 states that the Side Letter is based upon the Heartland November 27, 2000 Side Letter.[6] The TriMas Side Letter also opens with the same language set forth above in the C&A Side Letter, i.e., the TriMas Letter explicitly states that TriMas is a CBE of Heartland as defined in the November 2000 Heartland Side Letter Section 3. As with the other Agreements, the TriMas Side Letter provides that if, after six months, the Union notifies TriMas of its intent to organize a CBE of TriMas, TriMas will cause that CBE to execute a Framework Agreement and a Side Letter. The TriMas Framework, with its neutrality provisions, is identical to the C&A

[5] The TriMas Agreement is dated July 11, 2003. Heartland's counsel represents that the Agreement was "fully executed and exchanged" by August 11, 2003.

[6] The TriMas Side Letter is organized in the same fashion as that of the C&A Side Letter. In certain respects that do not affect what is alleged to be unlawful, the TriMas Agreement varies from both the Heartland and C&A Agreements. For example, TriMas Side Letter Section 9.D states that the particular Framework sections applicable to hiring questions generally would not become effective until some future agreement.

Framework. There is no evidence that TriMas has applied its Agreement to require any of its acquisitions to enter into similar overall agreements.[7]

ACTION

I. Section 8(e) and Cease Doing Business Object

Section 8(e) makes it an unfair labor practice for a union and an employer "to enter into any contract or agreement, express or implied, whereby such employer . . . agrees to . . . cease doing business with any other person . . . ." The Board has applied the "cease doing business" proscription to agreements that impose only a partial cessation of, or interference with, business.[8] In particular, the Board has applied the "cease doing business" proscription to agreements that interfere with business investment decisions.[9]

In Alessio, the Board held that a union violated Section 8(b)(3) by insisting to impasse on an "integrity clause" because the Board found that clause to violate Section 8(e). The "integrity clause" provided that if the signatory employer's partners, stockholders or beneficial owners participated in the formation of another company engaging in the same or similar business or employing the same or similar classifications of employees, the signatory employer's bargaining agreement would apply to the second business. The clause had a "cease doing business" object because it was "calculated to cause Alessio to sever its ownership relationship with affiliated firms . . ."[10]

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[7] According to Heartland counsel, Cequent Towing, a TriMas subsidiary, voluntarily agreed to abide by neutrality provisions.

[8] 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).

[9] Carpenters Dist. Council of Northeast Ohio (Alessio Constr.), 310 NLRB 1023, 1025 n.9 (1993).

[10] Id. at 1025. See also Sheet Metal Workers Local 91 (Schebler Co.), 294 NLRB 766, 767 (1989), enf'd in part, 905 F.2d 417 (D.C. Cir. 1990)(clause violated 8(e) because it imposed monetary penalties on signatory employers and also rescinded their bargaining agreements if they had "ownership interests . . . in any business entity that engages in work within the scope of [the bargaining

Section 8(e) does not ban all "cease doing business" agreements but rather tracks the distinction drawn in Section 8(b)(4) between lawful "primary" and unlawful "secondary" activity.[11] To determine whether a "cease doing business" agreement is secondary and unlawful, the Board considers whether the agreement addresses the labor relations of the contracting employer regarding its own employees, or is "tactically calculated to satisfy union objectives elsewhere."[12]

II. The Investment Restrictions Violate 8(e)

A. The investment restrictions have a "cease doing business" object

The Union's Agreements with Heartland and C&A clearly restrict the investments of those entities. Heartland and C&A agreed to invest only in entities that must become bound to these Agreements, including their neutrality provisions, if the entity is a "covered business entity" under any of the criteria in Side Letter Section 3, and the Union subsequently chooses to invoke the neutrality provisions. On its face this is a restriction on investment. Although the Board has applied Section 8(e) to restrictions on business investments,[13] we recognize that this case involves a different investment restriction, i.e., the potential imposition of a neutrality agreement. The restriction in Alessio involved the imposition of an entire bargaining agreement, and the restriction in Schebler involved monetary penalties and the rescission of the bargaining agreement. We conclude, however, that the

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agreement] using employees whose wage package, hours, and working conditions are inferior to those prescribed in this Agreements." The clause's restriction on "ownership interests" had a "cease doing business" object because it imposed penalties and rescinded bargaining agreements.)

[11] National Woodwork Mfrs. Ass'n v. NLRB, 386 U.S. 612, 620, 623-639 (1967); Schebler Co., supra, 294 NLRB at 770.

[12] National Woodwork Mfrs. Ass'n, 386 U.S. at 644-645. See also Retail Clerks Local Union No. 1288 (Nickel's Pay-Less Stores), 163 NLRB 817, 818-819 (1967), enf'd in pertinent part, 390 F.2d 858, 861-862 (D.C. Cir. 1968).

[13] Alessio Constr., 310 NLRB at 1025, n.9; Schebler, 294 NLRB at 767.

potential imposition of a neutrality agreement is a clear restriction, limiting the range of businesses in which the signatory employers may choose to invest, having a partial cease doing business object.

We recognize that the Agreements do not mandate the automatic, immediate application of the neutrality provisions; they are to be implemented subsequently at the Union's option. However, these time and Union option conditions do not eliminate the impact of the investment restrictions. Rather, these conditions merely delay the actual imposition of these investment restrictions and then actually impose them at the Union's option.

Charged Party Heartland argues that its investment decisions do not turn on whether a company may or may not remain neutral during a subsequent Union organizing campaign. Heartland asserts it favors investments in companies that are receptive to unionizing, so that the investment restrictions here do not pragmatically impact its investment decisions. Heartland's willingness to accept these investment restrictions is not dispositive; all Section 8(e) violations consist of willing or "voluntary agreements."[14]

Finally, it is the terms of the Agreements as written that are alleged to be unlawful, not their particular application to Heartland.

B. The investment restrictions are secondary

1. Side Letter Sections 2 and 3 are secondary in nature and not limited to a single employer

The terms of the investment restrictions do not concern the labor relations of the signatory employers. Rather, the investment restrictions are directed solely at the labor relations of any CBE of the signatory employers. If the CBE is a separate employer, the investment restrictions are secondary because the restrictions necessarily would be "tactically calculated to satisfy union objectives elsewhere."[15]

If Side Letter Sections 2 and 3 were applicable only to CBEs that constitute a single employer with the

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[14] See Ohio Valley Carpenters Dist. Council (Cardinal Indus.), 136 NLRB 977, 985 (1962).

[15] National Woodwork Mfrs. Ass'n, 386 U.S. at 644-645.

signatory employer, no Section 8(e) violation could arise. The requisite two employers would not exist; the Sections would be primary.[16] We conclude, however, that the Side Letter Sections are not limited by their terms to CBE entities that constitute a single employer with the signatory.

In determining whether entities constitute a single employer, the Board and courts consider whether the entities share the following factors: (1) common ownership; (2) common management; (3) interrelation of operations; and (4) centralized control of labor relations.[17] While no single factor is controlling, the Board stresses the latter three factors, and places particular emphasis upon the centralized control of labor relations.[18] In general, single employer status exists if, under all the circumstances, the relationship among the nominally separate entities lacks "the arm's length relationship found among unintegrated companies."[19]

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[16] Cf. Sheet Metal Workers Local 91 (Schebler Co.), 294 NLRB at 771 (integrity clause is secondary as written when it is not limited to entities that constitute single employer).

[17] See, for example, Radio Union v. Broadcast Service of Mobile, Inc., 380 U.S. 255, 256 (1965); Emsing's Supermarket, Inc., 284 NLRB 302 (1987); Blumenfeld Theatres Circuit, 240 NLRB 206, 215, enf'd, 626 F. 340 2d 865 (9th Cir. 1980).

[18] See, for example, Mercy Hospital of Buffalo, 336 NLRB 1282, 1283-1287 (2001)(finding no single employer with common ownership and identical boards of directors, but no centralized control of labor relations and no evidence of common officers in control of day-to-day operating decisions); Grass Valley Grocery Outlet, 332 NLRB 1449, 1450 (2000)(finding no single employer with common ownership and financial control, but no centralized control of labor relations); Dow Chemical, 326 NLRB 288 (1998). Cf. Masland Industries, 311 NLRB 184, 186 (1993)(finding single employer where all four factors met).

[19] Blumenfeld Theatres, 240 NLRB at 215. See Emsing's Supermarket, 284 NLRB 302 (1987)(finding single employer where operations characterized by absence of arm's length relationship of unintegrated companies).

Side Letter Sections 2 and 3 apply when the acquiring enterprise has the power, based on (i) more than 50 percent ownership of the common stock; (ii) more than 50 percent control of the voting power; or (iii) "contracts, constituent means, to direct the management and policies of the enterprise." These Sections cannot be read as limited solely to single employer settings.

Side Letter Section 3(i) and (ii) involve ownership, which does not mandate that the CBE entities be actively managed in common, or that they have centralized day-to-day administration of labor policies, or that they have an interrelationship of operations. Mere ownership cannot establish single employer status because ownership does not establish actual control over day-to-day management.[20] Side Letter Section 3(iii) does not establish single employer status because the power to direct and manage encompasses only potential control or management; it does not expressly encompass active, day-to-day management.

We also note that the parties have not applied these provisions to only single employer situations. The evidence does not show that Heartland and C&A, or Heartland and TriMas, constitute a single employer. Although Heartland and C&A apparently share the same CEO and Chairman, that factor alone does not establish that those two entities lack the arm's length relationship typical of unintegrated companies. Even if evidence showed common management and common ownership, these entities do not have interrelated operations nor active centralized control of operations and labor relations. In any event, the parties' particular application of those clauses to Heartland and C&A is not relevant. A Section 8(e) violation can arise even where the clause might have been applied lawfully.[21]

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[20] See Dow Chemical, 326 NLRB 288 (1998). Cf. Painters Dist. Council 51 (Manganaro Corp.), 321 NLRB 158, 164-165 (1996)(clause on its face requires actual, active exercise of the right of control of assignment of work).

[21] See Carpenters (Novinger's, Inc.), 337 NLRB 1030, 1030 (2002), enf'd, 352 F.3d 831 (3d Cir. 2003) (Board rejected judge's single-employer analysis as unnecessary to determining whether a Section 8(e) violation occurred; complaint alleged 8(e) violation based on the express terms of the clause regardless of any effect on any particular entity). See also Teamsters (Active Transp. Co.), 335 NLRB 830 (2001)(in finding no 8(e) violation, Board finds it "unnecessary" to determine whether in fact one entity controls another because the language on its face shows

The express terms of the Agreements violate Section 8(e). They are directed at the labor relations of a CBE and not confined to an entity that would constitute a single employer. A Section 8(e) violation thus exists based on the Heartland Agreement's terms as written, not as they may have been applied.[22]

2. "Work preservation" test is not applicable

The Section 8(e) cases cited above for determining whether the disputed clauses have a "cease doing business" object, also discuss whether the clauses in those cases were primary or secondary based on the NLRB v. Longshoremen ILA[23] two-part work preservation test.[24] The work preservation test is often applied in double-breasted contexts to assess whether "cease doing business" agreements have secondary objectives.[25] Clauses that

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that the disputed agreement would apply only if the entity controlled the work in question).

[22] Even if the parties were to apply the facially unlawful clauses to a primary setting, any such lawful application still would be sufficient to constitute "reaffirmation" of the unlawful clauses within the Section 10(b) period. See Teamsters Local 467 (Mike Sullivan Assoc.), 265 NLRB 1679 (1982)(unlawful clause reaffirmed by grievance even though no determination made whether grievance sought to enforce clause lawfully), enf'd mem. 723 F.2d 915 (9th Cir. 1983). See also Bricklayers Local 2 (Gunnar Johnson), 224 NLRB 1021, 1025 (1976).

[23] NLRB v. Longshoremen ILA, 447 U.S. 490, 503-504 (1980).

[24] See, for example, Alessio Constr., 310 NLRB at 1025 & n.6, 1026 (citing Longshoremen ILA, 447 U.S. at 503-504).

[25] See, for example, Iron Workers (Southwestern Materials), 328 NLRB 934 (1999)(finding unlawful a clause binding "any person, firm or corporation owned or financially controlled" to the signatory employer's bargaining agreement); Carpenters (Mfg. Woodworkers), 326 NLRB 321 (1998). Cf. Teamsters (Active Transp. Co.), 335 NLRB 830 (3002)(in case involving trucking and hauling complex of ventures, agreement did not violate 8(e) where the terms as

otherwise violate Section 8(e) may be lawful if they have the primary objectives of preserving work performed by the signatory employers' represented employees.[26]

However, those cases are relevant here only as to their "cease doing business analysis;" work preservation is not an issue in this case. Since Heartland does not have any employees represented by the Union, work preservation cannot be an issue in this case. Therefore, as discussed above, the secondary nature of the investment restrictions here is shown by the restrictions' application to the labor relations of other, separate entities.

In sum, Side Letters Sections 2 and 3 violate 8(e) on their face. They have a partial "cease doing business" object because they limit the range of businesses in which the signatory employers are able to invest by requiring the potential imposition of neutrality provisions. They are secondary in character because they are directed at the labor relations of other, separate entities. Complaint should issue, absent settlement, against Heartland and the Union alleging that they violated Section 8(e) by entering into the Heartland Side Letter 2 and 3.[27] Finally, as discussed below, charge allegations against the C&A Agreement should be dismissed because they are time barred.

II. The Section 10(b) Question

A. TriMas Agreement reaffirmed the Heartland Agreement Section 8(e) clauses

Section 8(e) may be violated not only when the parties initially execute an unlawful agreement, but also when a party reaffirms, enforces, or gives effect to such an

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written established work preservation and right of control).

[26] Nat'l Woodwork Mfrs. Ass'n, 386 U.S. at 644-645.

[27] Because TriMas is not specifically alleged in the charge, we do not address whether the TriMas Agreement violates Section 8(e). Rather, as discussed below, the Union and Heartland reaffirmed the Union-Heartland Agreement when the Union and TriMas entered into the TriMas Agreement within the 10(b) period. TriMas entered into that Agreement at the direction of Heartland.

agreement within the 10(b) period.[28] The Board interprets the statutory phrase "to enter into" more broadly than simply an initial contract execution. Thus, "the words 'to enter into' must . . . encompass the concepts of reaffirmation, maintenance, or giving effect to any agreement which is within the scope of Section 8(e)."[29]

The Charging Parties filed the charge on August 6, 2003, less than one month after TriMas and the Union executed their Agreement. The TriMas Agreement clearly constituted an application of the unlawful investment restrictions set forth in the Heartland Agreement. The TriMas Side Letter specifically refers to the Heartland Agreement, stating that TriMas is a CBE of Heartland as defined in the 2000 Heartland Agreement. Heartland caused TriMas to enter into the Agreement with the Union based on the 2000 Heartland Agreement, as Heartland's counsel admits. We therefore conclude that the entering into of the July 2003 TriMas Agreement by TriMas and the Union constituted a reaffirmation of the November 2000 Heartland Agreement by both Heartland and the Union.

B. The Charge was not timely filed against the C&A Agreement, and the parties did not reaffirm that agreement

The charge allegation against the C&A Agreement is time barred. The Charging Parties filed their charge about

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[28] See, for example, Dan McKinney Co., 137 NLRB 649, 653-657 (1962) (employer's refusal to do business with another employer because of its contract with the Union, "whether or not it was sought, assented to, or acquiesced in by the other party to the contract, . . . is within the scope of the prohibition of Section 8(e) against entering into such contracts").

[29] Dan McKinney Co., 137 NLRB at 654 (grievance filing constitutes "entering into"). See NLRB v. Central Penn. Regional Council of Carpenters (Novinger's, Inc.), 352 F.3d 831 (3d Cir. 2003)(entering into met by Union's pursuit of grievance during 10(b) period); Teamsters Local 277 (J & J Farms Creamery Co., 335 NLRB 1031 (2001)(entering into applies to any bilateral affirmation or interpretation that is unlawful, including an arbitrator's award that unlawfully interprets a facially valid clause); Iron Workers (Southwestern Materials), 328 NLRB 934, 935 (1999)(entering into met where respondent filed motion for summary judgment within 10(b) period, pursuant to court order, in connection with suit to compel arbitration of one unlawful Section 8(e) clause and one clause lawful under the construction industry proviso).

seven months after C&A and the Union initially executed that Agreement. C&A and the Union have not caused any after-acquired company to enter into its own Agreement with investment restrictions and neutrality provisions. Thus, the parties have not applied or reaffirmed the C&A Agreement investment restrictions within the 10(b) period.

At the Union's request for the organizing drive at C&A Accessory Mats, C&A agreed to abide by the neutrality provisions contained in the C&A Framework. However, the parties' application of the lawful neutrality provisions did not amount to a reaffirmation of the C&A Agreement's unlawful investment restrictions.[30]

In Sage Client,[31] the employer entered into a lawful neutrality agreement to receive funds under a city ordinance that required a labor agreement. After the employer refused to accord the union recognition that the union had earned under the neutrality agreement, the union sought to enforce the neutrality agreement through arbitration.

The neutrality agreement in Sage Client also contained paragraph 14, which required the employer to incorporate the neutrality provisions into any sublease giving any other person the right to operate an enterprise on the employer's premises. Paragraph 14 violated Section 8(e). It had a "cease doing business" object because it barred leases with entities refusing to accede to the neutrality provisions, and it was secondary because its objective was to regulate the labor relations of the leasing employers. We concluded that the charge against paragraph 14 was time barred because the only conduct occurring within the 10(b) period was the union's enforcement of the valid neutrality provisions.

Here, the only application of the C&A Agreement within the 10(b) period concerned application of the neutrality provisions. Here, as in Sage Client, application of lawful neutrality provisions does not constitute reaffirmation of other separate provisions, i.e., the 8(e) investment restrictions contained in Side Letter Sections 2 and 3.

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[30] Hotel & Restaurant Employees Local 57 (Sage Client 441, LLC d/b/a Pittsburgh Fulton Renaissance Hotel, Cases 6-CB-10675 and 6-CE-46, Advice Memorandum dated February 7, 2002.

[31] Id.

Maloney Specialties,[32] cited by the Charging Parties, is distinguishable. In that case, the Board found that enforcement of an unlawful penalty clause constituted reaffirmation of another related, unlawful clause. Specifically, the parties' agreement contained two clauses that limited the employer's subcontracting. The first clause required any subcontract covering unit work to require the payment of bargaining agreement wages and benefits. The second clause required the employer to pay a penalty and permitted the union to rescind the bargaining agreement, if the employer subcontracted work without requiring the payment of bargaining agreement wages and benefits. Both provisions violated Section 8(e). The ALJ, adopted by the Board, held that the union's application of the penalty provision also effectively reaffirmed the related subcontracting provision.[33]

We find Maloney distinguishable in two respects. First, the two Maloney subcontracting clauses were inextricably interrelated. The penalty clause served to enforce the subcontracting clause; no penalty would have existed if there had been no breach of the subcontracting clause. In contrast, the Heartland, C&A, and TriMas Frameworks' neutrality provisions are separable from the Side Letters' investment restrictions. The parties could have agreed to the neutrality provisions without also having agreed to the investment restrictions. Second, both of the provisions in Maloney Specialties violated 8(e); here, only the investment restrictions, and not the neutrality provisions, violate 8(e).

In sum, the allegations regarding the C&A Agreement are time barred, and should be dismissed, absent withdrawal.

III. Side Letter Section 11

We conclude that the allegation that Side Letter Section 11 violates Section 8(e) should be dismissed, absent withdrawal. This clause merely requires Heartland and C&A, to use their "best efforts" to persuade an entity that is not a CBE to agree to sign a Side Letter and Framework. Requiring "best efforts" at persuasion is a minimal requirement unlikely to affect the investment decisions of the signatory employer. We therefore conclude that this mere "persuasion" requirement has too minimal or

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[32] Painters Orange Belt Dist. Council 48 (Maloney Specialties), 276 NLRB 1372 (1985).

[33] Id., 276 NLRB at 1386.

attenuated an affect to encompass a "cease doing business" object.[34] We also note that Section 11 was neither applied nor reaffirmed with the 10(b) period.

In sum, we conclude that complaint should issue, absent settlement, alleging that Heartland and the Union violated Section 8(e) when they entered into Side Letter Sections 2 and 3, which require a CBE to agree to the overall Agreement including the Framework's neutrality provisions. We also conclude that the Region should dismiss, absent withdrawal, the allegations that C&A and the Union violated Section 8(e) when they entered into their Agreement, and should dismiss, absent withdrawal, the alleged violation based on Side Letter Section 11, which requires mere persuasion of an entity other than a CBE.

B.J.K.

[34] See NLRB v. Operating Engineers Local 825 (Burns & Roe), 400 U.S. 297, 305 (1971)(observing that it is possible that "secondary activity could have such a limited goal and the foreseeable result of the conduct could be, while disruptive, so slight that the 'cease doing business' requirement is not met").