

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

DATE: December 3, 2012

TO: Ronald K. Hooks, Regional Director  
Region 19

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

SUBJECT: Andersen Construction Co. 530-4855-7500  
Case 19-CA-083141 530-4855-7550  
530-8023-9700

This case was submitted for advice on whether Section 10(b) of the Act bars a Section 8(a)(5) complaint where two business entities are a single employer, one of those entities ("ACCO" or "Andersen") terminated its bargaining relationship with the Union outside the 10(b) period, and the other entity ("Structures") remains signatory to the Union contract. The Union filed this charge alleging that ACCO (specifically, Andersen Construction),<sup>1</sup> which has regularly called the contractual hiring hall to request employees before and during the 10(b) period, is violating a collective-bargaining agreement provision that requires signatories to hire only union subcontractors. We agree with the Region that Section 10(b) bars the filing of a complaint because the Union clearly knew about the single employer relationship<sup>2</sup> and ACCO's practice of using nonunion subcontractors outside the 10(b) period. Therefore, the charge should be dismissed, absent withdrawal.

Section 10(b) of the Act precludes the issuance of a complaint based upon any unfair labor practice occurring more than six months prior to filing the charge.<sup>3</sup> This limitations period begins to run when a charging party has "clear and unequivocal notice", either actual or constructive, of a violation.<sup>4</sup>

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<sup>1</sup> The Union officials clearly understood that the acronym "ACCO" has always meant Andersen Construction.

<sup>2</sup> The Region has determined that ACCO and Structures constitute a single employer, and does not seek advice on this issue.

<sup>3</sup> See generally *Machinists Local 1424 v. NLRB* (Bryan Mfg. Co.), 362 U.S. 411 (1960).

<sup>4</sup> *St. Barnabas Medical Center*, 343 NLRB 1125, 1126 (2004), citing *Leach Corp.*, 312 NLRB 990, 991 (1993), *enfd.* 54 F.3d 802 (D.C. Cir. 1995).

A party has "constructive knowledge" of an unfair labor practice where it is aware of facts sufficient to raise a suspicion of a violation such that "it could have discovered the alleged misconduct through the exercise of due diligence."<sup>5</sup> If the alleged unfair labor practice constitutes a repudiation of the union's representational status, the unfair labor practice occurs at the moment of the repudiation, and the Section 10(b) period begins to run at the moment the union has clear and unequivocal notice of that act.<sup>6</sup> When an employer consistently fails to apply a collective-bargaining agreement to a group of employees, the union is put on notice that the employer has refused to recognize the union as their bargaining representative and repudiated application of the agreement as to them.<sup>7</sup>

Here, ACCO wrote to unions having jurisdiction where it did business in Oregon and Washington<sup>8</sup> in 2002 that because it was converting to a construction management firm and would have no craft employees, it would not be party to future collective-bargaining agreements, but that instead its subsidiary, Andersen Structures ("Structures"), would act as a union subcontractor and enter into collective-bargaining agreements. In 2009, when both entities began doing business in the Charging Party Union's jurisdiction, the Union Vice President/Lead Organizer met with representatives of ACCO and Structures and was informed that Structures would sign the collective-bargaining agreement but ACCO would not. Following the meeting, the Union official told his boss that he suspected, and was going to accumulate evidence to prove, that the two entities were a single employer.

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<sup>5</sup> *Id.* at 1127, citing *Moeller Bros. Body Shop*, 306 NLRB 191, 193 (1992).

<sup>6</sup> *A&L Underground*, 302 NLRB 467, 469 (1991).

<sup>7</sup> *St. Barnabas Medical Center*, 343 NLRB at 1127-28 (finding employer's consistent failure to recognize the union as the representative of certain registered nurses over a 17-month period akin to a total contract repudiation charge for 10(b) purposes, even though employer continued to recognize the union and apply the collective-bargaining agreement as to other unit employees).

<sup>8</sup> ACCO had been a party to 8(f) agreements with the Oregon District Council of Laborers and Southwest Washington Laborers. The Charging Party, Laborers Local 242, is affiliated with the Washington and Northern Idaho District Council. In 2009, Structures designated the Associated General Contractors of Washington (AGC) as its agent and became party to the 2007-2012 agreement between AGC and the Washington and Northern Idaho District Council.

In 2009, superintendents who identified themselves as working for "Andersen" called the hiring hall and requested employees. Most of these employees were paid by Structures and reported to either Structures or ACCO superintendents.<sup>9</sup> During this same period, the Union official knew that ACCO was also working with nonunion subcontractors, and was concerned that he could not enforce the Union's subcontractor clause against ACCO unless it was a signatory to the collective-bargaining agreement.

Thus, the Union had actual notice in 2009 that ACCO would not sign the collective-bargaining agreement and was hiring nonunion subcontractors for its construction projects. We agree with the Region that under these circumstances, ACCO's actions were consistent with a total contract repudiation.<sup>10</sup> Around this time, the Union also believed that ACCO and Structures might be a single employer and, when ACCO superintendents began calling the hiring hall, the Union had additional evidence that the two entities were not operating at arm's-length.<sup>11</sup> We agree with the Region that even if this was not sufficiently clear notice of a single employer relationship to satisfy the "clear and unequivocal" standard, the Union had an obligation to exercise reasonable diligence to determine if a violation of the Act was occurring. This duty was based on the Union's knowledge that ACCO was using its hiring hall for employee referrals and on the Union's Vice President/Lead Organizer's stated suspicions that the two entities were a single employer. Instead, the Union waited over two years to file a charge.

Accordingly, the Region should dismiss the charge in the instant case, absent withdrawal.

/s/  
B.J.K.

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<sup>9</sup> Under the collective-bargaining agreement, subcontractors are not required to have their own superintendent onsite unless the number of employees reaches a certain threshold.

<sup>10</sup> *See supra* note 5.

<sup>11</sup> *See Mercy Hosp. of Buffalo*, 336 NLRB 1282, 1283-84 (2001) ("Single -employer status ultimately depends on 'all circumstances of a case' and is characterized by the absence of an 'arm's-length relationship found among unintegrated companies'") (internal citations omitted).