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

DATE: February 1, 2013

TO: James G. Paulsen, Regional Director
Region 29

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

SUBJECT: Local 1181-1061, Amalgamated Transit Union, AFL-CIO (All American School Bus Co., et al.) 560-7540-8000
Case 29-CC-096453 560-7540-8001-1700

This case was submitted for advice as to whether the Union violated Section 8(b)(4)(i)(ii)(B) of the Act by striking private bus operators over certain provisions that had formerly been in bid contracts for bus services issued by the New York City Department of Education.[1] We conclude that the Union's strike does not violate Section 8(b)(4) of the Act, as the Union has a primary labor dispute with the Charging Party Employers.

FACTS

Local 1181-1061, Amalgamated Transit Union, AFL-CIO (the Union) has long represented 8,800 employees working at 30 different school bus operators (the Charging Party Employers), which provide school bus services for school-age children (i.e., those in grades K–12) under contract with New York City's Dept. of Education (DOE).[2]

In 1979, the Union, the then-contracting bus operators (many of whom are among the Charging Party Employers here) and DOE entered into a settlement ending a 3-month-long bus strike (the Mollen Agreement). The Mollen agreement required DOE to include Employee Protection Provisions (the EPPs) in bid contracts for school bus services for school-age children. The EPPs established a master seniority list of

[1] The Charging Party Employers have also alleged that the Union has violated Section 8(b)(3) of the Act (Case 29-CB-096457). That allegation is currently being investigated by the Region.

[2] DOE also has separate contracts with bus operators to provide bus service to pre-K students.

employees who were laid off due to an operator's loss of a contract, and required operators to hire from that list to fill vacancies and pay those employees their previous wages and pension benefits. Prior to December 2012, DOE included the EPPs in all subsequent school-age bus services contract bids.[3]

The Union negotiates with the Charging Party Employers as a group, but each Employer signs its own copy of an identical collective-bargaining agreement with the Union. The most recent collective-bargaining agreements between the Union and the Charging Party Employers expired on December 31, 2012.[4] While these collective-bargaining agreements between the Union and the Employers do not themselves expressly include the EPPs, Section 48 of the agreements provides that:

> An integral part of this Agreement is the job security of the employees … which exists by reason of the "Employee Protection Provisions" (Mollen Agreement) of the bid specifications of the New York City Department of Education. The parties agree that, in view of the forgoing [sic], should the New York City Department of Education promulgate any bid specifications without the Employee Protection Provisions then the Union, upon notice to the Employer, shall have the right to reopen this Agreement; and the provisions of Section 3 (No Strike clause) shall be deemed waived for the above mentioned re-opener.

On September 28, the Union notified the Charging Party Employers that it was opening negotiations for successor collective-bargaining agreements. On October 23, the Union and the Charging Party Employers each presented their initial contract proposals. The Union's proposal included a provision that the collective-bargaining agreements incorporate the EPPs.[5] The parties have met for at least five bargaining sessions, with the Union continuing to maintain its EPPs proposal. The Charging Party Employers have not agreed to the Union's EPPs proposal, although they do not deny that they have the ability to do so.

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[3] DOE included the EPPs in its contract bids for pre-K students until 2011. In 2011, DOE stopped including the EPPs in the pre-K contract bids, consistent with a state court decision specific to the pre-K contract bids.

[4] All dates hereafter are in 2012, unless otherwise noted.

[5] The Union's proposal appears to have been motivated by DOE's dropping the EPPs from the pre-K contract bids, raising the possibility that DOE might do the same with regard to the school-age contract bids specifically relevant to the instant case.

On December 21, New York City Mayor Michael Bloomberg publicly announced that DOE would be issuing new bids for school-age special education school bus transportation that would not include the EPPs.

On January 14, 2013, the Union's President announced that the Union would be going on strike two days later. In his public statement, he described the importance of the EPPs to Union members and to the safety of the children riding school buses. On January 16, 2013, the employees of the Charging Party Employers represented by the Union went on strike. The employees remain on strike.

The Charging Party Employers' charge alleges that the Union violated Section 8(b)(4)(i)(B) and/or (ii)(B) by engaging in a strike against the Charging Party Employers and threatening, coercing, or restraining people engaged in commerce with the object of forcing the Charging Party Employers to cease doing business with DOE. The Charging Party Employers and the Union agree that the Union has a primary dispute with DOE, because of its power to include the EPPs in the contract bids. The issue in the instant case is whether it has a primary or a secondary dispute with the Charging Party Employers.

ACTION

We conclude that the Union's strike does not violate Section 8(b)(4) of the Act, as the Union has a primary labor dispute with the Charging Party Employers.

Section 8(b)(4)(ii)(B) makes it "'an unfair labor practice for a labor organization … to threaten, coerce, or restrain' a person not party to a labor dispute 'where … an object thereof is … forcing or requiring [him] to … cease doing business with any other person.'"[6] Thus, the provision prohibits unions that have disputes with primary employers from pressuring other neutral or secondary employers that deal with the primary employers, where the union's conduct is calculated to force the neutral to cease dealing with any primary employers and thus increase the union's leverage in its dispute with such primary employers.[7]

Congress enacted Section 8(b)(4)(B) out of a concern that secondary activity brings pressure "not 'upon the employer who alone is a party (to a dispute), but upon some third party who has no concern in it' with the objective of forcing the third party to bring pressure on the employer to agree to the union's demands."[8] As a result, Section

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[6] *NLRB v. Retail Clerks Local 1001 (Safeco Title Ins. Co.)*, 447 U.S. 607, 611 (1980) (quoting 29 U.S.C. § 158(b)(4)(ii)(B)).

[7] See *National Woodwork Mfrs. Assn. v. NLRB*, 386 U.S. 612, 620-627 (1967).

[8] *NLRB v. Operating Engineers Local 825 (Burns & Roe, Inc.)*, 400 U.S. 297, 302-303 (1971).

8(b)(4)(B) implements "the dual congressional objectives of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own."[9] In determining whether a union's conduct is secondary, the touchstone is whether the "boycott was 'tactically calculated to satisfy union objectives elsewhere.'"[10] In this regard, it is undisputed that "the traditional right of striking employees to bring pressure against employers who are substantially involved in their dispute" should not be compromised.[11] A party "directly and intimately involved in the underlying dispute" is not a neutral party.[12]

In the instant case, it is clear that the Union has a primary labor dispute with the Charging Party Employers as to whether the EPPs will be included in the parties' collective-bargaining agreements, as the Union has proposed. This primary dispute directly involves the job security and other terms and conditions of employment of the employees of the Charging Party Employers. Significantly, while the Charging Party Employers have not agreed to the Union's proposal that the collective-bargaining agreements incorporate the EPPs, the Charging Party Employers do not deny that they have the ability to do so. Indeed, the parties themselves have made clear the primary nature of this dispute by their acknowledgment in their past collective-bargaining agreements that the job security provided by the EPPs is "an integral part" of the agreements, as well as by the express provisions permitting the Union to reopen the agreements and to strike the Charging Party Employers in the event DOE promulgates any contract bid without the EPPs. Given this primary labor dispute with the Charging Party Employers, we conclude that the Union has not violated Section 8(b)(4) by its strike.

We recognize that the Charging Party Employers argue that only DOE is a primary employer, because only it has the power to include the EPPs in the contract bids. The Charging Party Employers claim that they are therefore neutral secondary parties. In support of their contention, the Charging Party Employers have proffered evidence of several statements made by the Union about the strike which refer solely to DOE and the inclusion of the EPPs in the bid contracts. The Charging Party

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[9] *NLRB v. Denver Bldg. & Constr. Trades Council (Gould & Preisner)*, 341 U.S. 675, 692 (1951); *Longshoremen ILWU Local 62-B (Alaska Timber)*, 271 NLRB 1291, 1292 (1984), enfd. in pertinent part 781 F. 2d 919 (D.C. Cir. 1986).

[10] *NLRB v. Pipefitters Local 638 (Austin Co.)*, 429 U.S. 507, 511 (1977) (citation omitted).

[11] *Teamsters Local 560 (Curtin Matheson Scientific)*, 248 NLRB 1212, 1212-13 (1980).

[12] *Teamsters Local 70 (Dept. of Defense)*, 288 NLRB 1224, 1225 (1988).

Employers' argument, however, ignores the primary labor dispute between the Union and the Charging Party Employers as to whether the EPPs will be included in the parties' collective-bargaining agreements. Thus, the proffered statements made by the Union merely demonstrate that the Union also has a primary labor dispute with DOE, a point on which both the Charging Party Employers and the Union agree. They do not contradict or undermine the Union's primary labor dispute with the Charging Party Employers as to whether a condition of employment (the EPPs) will be included in the parties' new collective-bargaining agreement. In this regard, it is well established that more than one employer may be a primary employer under Section 8(b)(4), particularly where, as here, one of the employers (DOE) has inserted itself in a "basic area" of the other employer's labor relations, i.e., the provision of EPPs covering the Charging Party Employers' employees.[13]

Accordingly, as the Union has a primary labor dispute with the Charging Party Employers, the Region should dismiss the charge in the instant case, absent withdrawal.

/s/
B.J.K.

[13] See *Bricklayers Union Local 29 (J. E. Hoetger and Co.)*, 221 NLRB 1337, 1339 (1976), citing *Teamsters Local 363 (Roslyn Americana Corp.)*, 214 NLRB 868 (1974) (general contractor required subcontractors to supply labor agreeable to it and "other trades employed" on the site, and could require subcontractors to dismiss any employees incompetent or "a hindrance to the progress of any of the work" on the site; therefore, general contractor had sufficient control over work assignment that it could not be considered a neutral in a dispute between the union and a subcontractor).