

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

## Advice Memorandum

DATE: March 19, 2013

TO: Dorothy L. Moore-Duncan, Regional Director  
Region 4

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

SUBJECT: Stanker & Galetto, Inc.  
Cases 4-CA-88952, 4-CA-91001

524-5029-5050-0000

524-5067-2500-0000

This case was submitted for advice as to whether the Employer, a general contractor, violated Section 8(a)(3) and (5) of the Act by permanently subcontracting the small portion of construction work it still self-performed, laying off its remaining unit employees, and then repudiating its obligations under two Section 8(f) pre-hire agreements. We conclude that the Employer was motivated by legitimate, non-discriminatory reasons in deciding to cease self-performing the work, and thus, its subcontracting decision was lawful. Because the Employer no longer employed anyone in the applicable units after lawfully subcontracting the work, it was also entitled to repudiate the pre-hire agreements before their expiration.

### FACTS

The Employer is a general contractor in the construction industry and a member of the Building Contractors Association of New Jersey (“Association”). Through this membership, and/or its delegation of bargaining authority to the Association, it was bound to pre-hire agreements with the New Jersey Building Construction Laborers District Council and the New Jersey Regional Council of Carpenters (collectively, “Unions”) set to expire in April 2013. Both agreements permit the Employer to subcontract work, but only to companies that are also signatories to the pre-hire agreements. Historically, the Employer has subcontracted much of the work on its construction projects to union signatories, but self-performed a small portion of the work using a steady crew of carpenters and laborers.

On April 10, 2012, the Employer laid off its construction employees in the middle of a renovation project and subcontracted the remainder of the work to another company that was a signatory to the Carpenters’ pre-hire agreement. The Employer took this action pursuant to a decision to permanently cease self-performing construction work in favor of hiring subcontractors to perform all of the work, assertedly because it determined that would be more efficient and profitable, as

discussed below. It arranged for three of the five employees working on the renovation to continue the project with the selected subcontractor. According to the subcontractor, when the Employer approached it about taking over the renovation project, the Employer stated that it was giving up its contract with the union (i.e. the Carpenters) and would no longer be able to perform the work itself.

During the meeting with employees to announce the layoff, the Employer's owners stated that the industry was changing and that the Employer was going in a different direction. According to one employee, the owners also stated that it was not economically feasible to continue employing construction workers, and that the company was having trouble getting work and could not be competitive. Another employee reported that the owners announced that the company was "pulling out of" the union. Two employees recall that the owners cited a dispute with the Laborers about maintaining a shop steward on the job site as motivation for the decision.<sup>1</sup> The Employer denies that it blamed competitiveness or the shop steward dispute for its decision to stop self-performing.

The same day the Employer announced the layoff, it also notified the Association and the Unions that it was withdrawing its delegation of bargaining authority to the Association and repudiating the pre-hire agreements because it no longer employed anyone in the covered units.

Since the Employer repudiated the pre-hire agreements, it has continued to subcontract a majority of its projects to union signatories. Beginning a few months after its repudiation of the pre-hire agreements, the Employer started using non-union subcontractors on certain projects. The president has acknowledged that more work became available to the company once the union signatory restriction was lifted, and that some customers preferred using non-union labor.

The Carpenters filed two grievances over the Employer's use of non-union subcontractors. During a meeting in August to discuss the issue, an Employer representative allegedly stated that the decision to no longer directly employ employees and to repudiate the pre-hire agreements was implemented because it was "tough to get work," the company was not making any money, and it needed to have flexibility in order to secure work. The Employer denies telling the Carpenters that the reason for the decision was to avoid costs associated with the pre-hire agreement.

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<sup>1</sup> The Region has concluded that there is insufficient evidence that the decision to cease self-performing was motivated by the shop steward issue given that the decision was reached before the dispute arose.

The Employer contends that its decision to subcontract all of its construction work follows an industry trend away from general contractor self-performance. It claims that it has considered the idea of converting exclusively to subcontracting for years based on the advice of consultants. Also, the president of the company testified in district court<sup>2</sup> that the decision was motivated by four factors: (1) profitability comparisons between self-performed and subcontracted projects, (2) subcontractors' greater efficiency due to specialization, (3) savings from reduced managerial overhead and equipment, and (4) the expectation that the company could attract lower bids from subcontractors once the threat of self-performance was removed.

### ACTION

We conclude that the legitimate, non-discriminatory reasons the Employer advances in support of its layoff and subcontracting decision warrant dismissing the Section 8(a)(3) allegation. Furthermore, since the layoff was lawful and resulted in the permanent termination of all unit employees, the Employer did not violate Section 8(a)(5) by repudiating the pre-hire agreements during their terms.

#### 1. Subcontracting Decision

Whether a mid-contract subcontracting decision that results in layoffs or employee terminations violates Section 8(a)(3) turns on the employer's motivation. If it is discriminatorily motivated, e.g., motivated by a desire to rid an employer of union-represented employees, it is unlawful.<sup>3</sup> But where a subcontracting decision is motivated by legitimate, nondiscriminatory business reasons, such as cost savings, it is lawful.<sup>4</sup> *Wright Line* is the applicable test for ascertaining an employer's intentions under these circumstances.<sup>5</sup>

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<sup>2</sup> The hearing was held as part of the Employer's unsuccessful effort to enjoin the Carpenters from arbitrating the grievances over the Employer's use of non-signatories after it withdrew from the pre-hire agreements.

<sup>3</sup> See "*Automatic*" *Sprinkler Corp.*, 319 NLRB 401, 402 (1995), *enforcement denied*, 120 F.3d 612 (6th Cir. 1997) (subcontracting unlawful where internal documents demonstrated that employer sought to gain control of labor costs, eliminate negotiating and grievance costs, and become competitive against non-union contractors).

<sup>4</sup> *Manhattan Day School*, 346 NLRB 992, 994-95 (2006).

<sup>5</sup> *Wright Line*, 251 NLRB 1083 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981). See *Manhattan Day School*, 346 NLRB at 994 (applying *Wright Line* in the subcontracting context).

Here, even assuming that a desire to evade a pre-hire agreement in order to be able to utilize non-union subcontractors constitutes an unlawful motive, on balance the evidence demonstrates that the Employer's subcontracting decision was driven by legitimate business reasons. At best, the Unions have presented weak prima facie evidence of anti-union motive based on statements by company representatives possibly reflecting a desire to eliminate the Employer's 8(f) obligations in order to become more competitive. And the Employer has presented sworn testimony identifying several valid reasons that it preferred subcontracting to self-performing, which it contends is the trend in the industry. Moreover, there is no evidence that the Employer harbors hostility toward unions generally. It selected a union signatory to take over the work on its partially completed renovation project, and even arranged for several of the laid-off employees to continue working for that subcontractor. Indeed, it still utilizes unionized subcontractors for a majority of its projects. Thus, even accepting the prima facie evidence of unlawful motive, we conclude that the Employer would be able to demonstrate that it subcontracted that work for legitimate business reasons.

We further agree with the Region that this case should not be analyzed under the business closure principles enunciated in *Darlington*.<sup>6</sup> Although there could be circumstances under which a subcontracting scheme is tantamount to a partial closure, the Employer's conduct here—continuing to act as a general contractor in the same industry and merely ceasing to perform certain aspects of the work with its own employees—clearly cannot be termed a “closure.”<sup>7</sup>

## 2. Repudiation of the Pre-Hire Agreements

An employer may lawfully repudiate a Section 8(f) pre-hire agreement when the number of employees performing unit work permanently falls to one or fewer

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<sup>6</sup> *Textile Workers Union of Am. v. Darlington Mfg. Co.*, 380 U.S. 263 (1965) (holding that an employer may lawfully close its entire business for anti-union reasons, but that it may not partially close for the purpose of chilling union activity among remaining plants if it may reasonably have foreseen such an effect).

<sup>7</sup> See *Plaza Properties of Michigan, Inc.*, 340 NLRB 983, 987 (2003) (unlawful subcontracting is recognized exception to *Darlington* principles); *Lear Siegler, Inc.*, 295 NLRB 857, 860 (1989) (*Darlington* not applicable where employer did not cease operations, but rather transferred some work to another location and subcontracted the remaining work; *Darlington* explicitly distinguished discriminatory relocation and subcontracting from partial closings).

workers.<sup>8</sup> In the 8(f) context, the appropriate unit is a single employer unit, notwithstanding that the employer has joined a multiemployer association or signed a letter of assent granting the association bargaining authority.<sup>9</sup> Thus, in applying the one-person unit rule, only the applicable employer's permanent employees covered by the pre-hire agreement are normally counted toward the unit total.<sup>10</sup>

Since the Employer no longer employed any bargaining unit workers at the time it repudiated the pre-hire agreements in April 2012, we conclude that the Employer's disavowal of those agreements was lawful.<sup>11</sup> We reject the Carpenters' assertion that the appropriate unit here is the multiemployer unit because the Employer was a member of the multiemployer Association. In *Bufco*, the Board reversed the judge's finding that the appropriate unit consisted of all employees employed by members of the association simply due to the employer's membership in the association.<sup>12</sup> Thus, in applying the one-person unit rule, we exclusively rely on the Employer's work force, which contained no unit employees at the time of the repudiation.

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<sup>8</sup> See, e.g., *Stack Electric*, 290 NLRB 575, 577-78 (1988).

<sup>9</sup> *John Deklewa & Sons*, 282 NLRB 1375, 1385 & n.42 (1987), *enforced*, 843 F.2d 770 (3d Cir. 1988); *Bufco Corp.*, 291 NLRB 1015, 1016 & n.3 (1988), *enforced*, 899 F.2d 608 (7th Cir. 1990); *Stack*, 290 NLRB at 577 (in the absence of a Board election or voluntary recognition based on a showing of majority support for the union, the parties' relationship is governed by Section 8(f) and the appropriate unit consists of the individual employer's employees). Under the now-abandoned merger doctrine, an employer that joined a multiemployer association, or signed a letter of assent granting the association bargaining authority, effectively merged its single employer unit into a multiemployer unit. See *Deklewa*, 282 NLRB at 1379; *Vincent Electric Co.*, 281 NLRB 903, 903-04 (1986), *overruled by Stack*, 290 NLRB at 577 n.3.

<sup>10</sup> See, e.g., *Stack*, 290 NLRB at 576-77 (appropriate unit for purposes of the one-person unit rule consisted of single employer unit where the employer had granted an association bargaining authority); *Haas Garage Door Co.*, 308 NLRB 1186, 1186-87 (1992) (employer member of multiemployer association not bound by pre-hire agreement because it did not have more than one employee performing unit work).

<sup>11</sup> The evidence does not establish that the Employer continued to jointly employ the renovation workers after they shifted their employment to the subcontractor.

<sup>12</sup> 291 NLRB at 1016-17.

Accordingly, the Region should dismiss, absent withdrawal, the allegations that the Employer unlawfully subcontracted the residual unit work, laid off those employees, and repudiated the pre-hire agreements.

/s/  
B.J.K.