

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

# Advice Memorandum

Date: November 22, 1994

To : William A. Pascarell, Regional Director  
Region 22

From : Robert E. Allen, Associate General Counsel 530-6083-  
0100  
Division of Advice 530-8090-6000  
725-6733-3000

Subject : Essex Plaza Maintenance Company 725-6733-4000  
Case 22-CA-19598(2) 725-6733-8010  
725-6733-8030

This case was submitted for advice as to whether:  
(1) an "evergreen" or "automatic renewal" provision in a separate contract was incorporated by reference into the parties' collective-bargaining agreement; (2) if so, the evergreen clause precludes termination of the agreement pursuant to Section 8(d) of the Act; and (3) the Employer violated Section 8(a)(5) by bargaining to impasse on its decision to subcontract unit work.

### FACTS

Essex Plaza Management Company (the Employer) manages several residential apartment buildings located in Newark and East Orange, New Jersey. The Employer and the Union, Local 32B-32J of the Service Employees International Union,<sup>1</sup> have been parties to a series of collective-bargaining agreements covering the Employer's building service employees. In 1988, the parties negotiated a Memorandum of Agreement which contained the essential economic terms of their contract and provided that "[t]his agreement shall remain in full force and effect up through and including July 20, 1991.<sup>2</sup> The Memorandum of Agreement also stated:

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<sup>1</sup> Local 389 of the Service Employees International Union was the bargaining representative until it merged into Local 32B-32J in or about June 1987.

<sup>2</sup> It is undisputed the neither party signed the collective bargaining agreement.

All terms and conditions of the 1988 Apartment House Agreement<sup>[3]</sup> . . . shall be deemed part of this agreement with the following exceptions:

1. All provisions relevant to participation in and contribution to all benefit funds.
2. Wage rates and wage increases.
3. Building Classifications.
4. Holidays.
5. Vacations.
6. Termination pay.
7. Sickness benefits.
8. Health Center visits.

Article VI of the Apartment House Agreement, entitled "Sale or Transfer of Building," contained the following "evergreen" or automatic renewal provision:

(c) Upon the expiration date of this Agreement as set forth in Article VIII, Section 1,<sup>[4]</sup> this agreement shall thereafter continue in full force and effect for an extended period until a successor agreement shall have been executed. During the extended period, all terms and conditions hereof shall be in effect including, subject to the provisions of this paragraph, the provisions of this Article VI, Section 1(a), (b), and (c).<sup>[5]</sup> During the extended period, the Employer shall negotiate for a successor agreement retroactive to the expiration date, and all benefits and improvements in such successor agreement shall be so retroactive, if such agreement shall so provide. In the event the parties are unable to agree upon terms of a successor agreement, the Union, upon three (3) days oral or written notice to the Employer, may

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<sup>3</sup> The 1988 Apartment House Agreement was the Union's current contract with New York employers.

<sup>4</sup> Article VIII, Section 1 of the Apartment House Agreement set forth an expiration date of April 20, 1991.

<sup>5</sup> These provisions dealt with the Employer's obligation should it subcontract unit work.

cancel Article IV of this Agreement, and then engage in any stoppage, strike or picketing, without thereby causing a termination of any other provision of this agreement, until the successor agreement is concluded.

Around June or July, 1991, the parties negotiated a renewal agreement. The Memorandum of Agreement was modified to reflect wage increases for the next two years and the expiration date was changed from July 20, 1991 to July 20, 1993.<sup>6</sup> In all other material respects the Memorandum of Agreement remained the same. It still contained the provision incorporating by reference "terms and conditions" of the 1988 Apartment House Agreement, with the same provisions excepted.

On May 17, 1993<sup>7</sup> the Employer sent a letter to the Union informing it that Essex intended to terminate the agreement upon its expiration and that Essex was considering the permanent subcontracting of unit work "for economic and administrative reasons." In this letter the Employer further offered to discuss the "basis for this potential decision and the effects of the same, . . ." The Union received this letter but did not respond to it.

On July 29, the Employer sent a second letter to the Union stating that it was still contemplating subcontracting and offering to meet with the Union to discuss the matter. The Employer proposed August 13 or 17 as possible meeting dates. In a letter dated August 4, the Union informed the Employer that it wanted to meet with the Employer, but was not available on either of the suggested dates. The Union also requested information

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<sup>6</sup> As with the earlier contract, this Memorandum of Agreement was not signed by either party. We agree with the Region's conclusion that the absence of a signed contract is not dispositive where, as here, the parties' conduct reveals the existence of an agreement. See Mack Trucks, Inc. v. Intern. Union, UAW, 856 F.2d 579, 591-92 (3d Cir. 1988).

<sup>7</sup> All dates hereafter are 1993, unless otherwise noted.

concerning the proposed subcontracting. The Employer provided the information on August 24.

On September 3, the parties met to discuss the Employer's decision to subcontract. It is undisputed that the Employer informed the Union that the basis for its decision to subcontract was economic and that the parties discussed the annual savings to be gained by subcontracting. The Union acknowledged that it could not meet the cost reductions in the Employer's proposal and asked if Essex could get the Union-represented employees jobs with the new contractor. The Employer responded that it had no role in the contractor's hiring decisions, but offered to provide references for each employee. At the conclusion of the meeting the parties agreed they were at impasse.

On October 19, the Employer wrote a letter to the Union recounting the September 3 negotiation and informing the Union that it believed it had met "all its bargaining obligations as a prerequisite to terminating the contract and permanently subcontracting the work."

Essex subcontracted the unit work on November 1. On or about November 19, the Union filed for arbitration, alleging the subcontracting violated the contract. In response, the Employer commenced a district court action seeking, inter alia, a declaratory judgment that no contract is in effect and to enjoin the arbitration.<sup>8</sup>

On November 29, the Union filed the instant charge alleging the Employer violated Section 8(a)(5) by, inter alia, "bargaining to impasse on a condition of employment, which was permissive, given that the agreement of the parties did not require the Union to agree to any concessions . . . ."

#### ACTION

We concluded that the Region should dismiss, absent withdrawal, that portion of the charge that alleges that

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<sup>8</sup> This action is still pending in district court.

the Employer violated Section 8(a)(5) by subcontracting unit work.<sup>9</sup>

We conclude that the "evergreen clause" was not incorporated into the parties' Memorandum of Agreement, which set forth an unambiguous expiration date of July 20, 1993. The Employer's May 17 notice to terminate the Agreement fully complied with Section 8(d) of the Act and the Employer thereafter negotiated in good faith to impasse with the Union prior to implementing its decision to subcontract. Alternatively, even if the evergreen provision was incorporated into the parties' Memorandum of Agreement, the Section 8(d) notice to terminate precluded this provision from renewing or extending the term of the contract. These conclusions are set forth in more detail below.

The Union contends that the Memorandum of Agreement incorporated all terms of the 1988 Apartment House Agreement other than the enumerated exceptions. The evergreen clause of the Apartment House Agreement thus became a term of the parties' overall contract and caused the contract to remain in full force and effect until a successor agreement is reached. Thus, the Union argues that the contract terms, like a permissive subject of bargaining, can be changed only by the mutual consent of the parties and therefore the Employer violated the Act by unilaterally subcontracting in violation of the subcontracting clause of the extant contract.<sup>10</sup>

We reject this argument for the following reasons: First, the parties' Memorandum of Agreement contains a very explicit expiration provision that is plainly inconsistent with an automatic renewal clause. It is undisputed that the parties specifically bargained about the expiration date in the Memorandum of Agreement and

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<sup>9</sup> The Region has found merit to another portion of the charge.

<sup>10</sup> Article VII of the Apartment House Agreement deals with subcontracting and provides that the Employer shall require the subcontractor to retain all bargaining unit employees and maintain the existing wage and benefit structure.

did not discuss the evergreen provision in the Apartment House Agreement at all. In the absence of something more explicit in the agreement, we will not assume that the parties intended the expiration clause to be given an interpretation at odds with its plain meaning. See generally, Restatement 2d, Contracts, Sec. 203 (d) (1979) ("separately negotiated or added terms are given greater weight than . . . other terms not separately negotiated."); Southern California Edison Co., 284 NLRB 1205, 1205 fn. 1 (1987). We note that the Memorandum of Agreement states that "[a]ll terms and conditions" of the Apartment House Agreement are to be incorporated. However, we conclude that this provision incorporates only the substantive, rather than procedural, terms of the Apartment House Agreement.<sup>11</sup> This conclusion is also consistent with the principles of contract interpretation set forth above. Accordingly, the automatic renewal clause was not part of the parties' agreement.

The Employer gave its notice to terminate the contract more than 60 days before the July 20, 1993 expiration date of the Memorandum of Agreement and thus complied with Section 8(d), and we therefore find that the notice was adequate to terminate the contract. Moreover, the Employer maintained the status quo until the parties met and bargained to impasse about the subcontracting. Thereafter, and only after the parties had reached impasse, the Employer implemented the subcontracting. Based on the evidence adduced, we find no violation of Section 8(a)(5) as to the Employer's subcontracting.

Alternatively, even assuming, *arguendo*, that the evergreen clause was incorporated into the Memorandum of Agreement, we nonetheless conclude that the Employer's Section 8(d) notice to terminate the agreement had the effect of precluding the extension of the contract beyond the expiration date.

The Union's argument does not squarely address the effect of the Employer's notice to terminate. Implicit

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<sup>11</sup> Compare Fortney & Weygant, 298 NLRB 863 (1990), wherein an employer who agreed to "join in, adopt, accept, and become a party to" an agreement was held bound by the automatic renewal provision contained in that contract.

in the Union's argument that the contract is automatically renewed pending negotiation of a successor agreement is a contention that the parties' contractual relationship continues indefinitely and cannot be unilaterally terminated.

The common law presumption against agreements in perpetuity is applicable to labor contracts. See Federal Cartridge Corp., 172 NLRB 121 (1968); Montgomery Mailers' Union 127 v. Advertiser Co., 827 F.2d 709, 715 (11th Cir. 1987); CWA v. Southwestern Bell Tel., 713 F.2d 1118, 1123 fn. 4 (5th Cir. 1983); Boeing Airplane Co. v. NLRB, 174 F.2d 988, 991 (D.C. Cir. 1949). Under this principle, contracts with no specified duration are considered terminable at will upon reasonable notice. In enacting Section 8(d), Congress provided a statutory termination procedure that specified a reasonable notice period, of 60 days for contract termination. Lion Oil Company, 352 U.S. 282, 292-93 fn.13 (1957); Boeing Airplane Co. v. NLRB, 174 F.2d at 991.

In order to find that the evergreen clause prevented unilateral contract termination, we would have to conclude that the Employer knowingly surrendered its statutory prerogative to terminate its contract with the Union within the period permitted by Section 8(d). The contract contains no clear and unequivocal waiver of this significant right and we will not lightly infer such a waiver. See Beach Air Conditioning and Heating Inc., Case 21-CA-28357 et al., Advice Memorandum dated April 2, 1992, at p. 6 (citing Metropolitan Edison Co. v. NLRB, 460 U.S. 693 (1983)) (no waiver of right to repudiate 8(f) contract upon expiration, even though contract lacked a termination clause but contained "negotiation extension" and interest arbitration provisions). See also Montgomery Mailers, 827 F.2d at 715, citing Kaufman and Broad Home Systems, Inc. v. International Brotherhood of Firemen and Oilers, 607 F.2d 1104, 1110 (5th Cir. 1979).

In light of the foregoing, we further find that the Employer provided adequate notice at least 60 days prior to the contractual expiration date and fully complied with Section 8(d). Thereafter, once the parties reached a good faith impasse in negotiations, the Employer could

unilaterally subcontract without violating the Act. See Speedrack, Inc., 293 NLRB 1054, 1055-56 (1989).<sup>12</sup>

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<sup>12</sup> Therefore, we do not have to decide whether the Union should be estopped from seeking to enforce the "evergreen clause."