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

DATE: September 3, 2013

TO: William A. Baudler, Regional Director
Region 32

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

SUBJECT: UNITE HERE Local 2850
(Host International, Inc.)
Cases 32-CC-099139 and 32-CE-103715

560-2575-6713
560-7520-7500
560-7540-4001
584-3740-5900
584-3780-6700

These cases were submitted for advice as to whether the Union violated the Act by filing and arbitrating a contractual grievance over the Employer's subcontracting. We agree with the Region that the Union did not violate the Act, because its grievance had a lawful primary work preservation object.

FACTS

For close to 30 years before 2006, UNITE HERE Local 2850 (the Union) represented all, or substantially all, of the employees working in the concession businesses throughout the Oakland International Airport, including retail shops and restaurants/cafes. At that time, those businesses were operated, or subcontracted as a joint employer, by Delaware North Company.

In 2006, the entity operating the airport solicited bids for a new airport concessionaire to take over or subcontract the operation of all of the concession businesses in the airport, including those in a new terminal then under construction. The solicitation required the successful bidder to subcontract a portion of its spaces to certified Disadvantaged Business Enterprises ("DBEs") -- companies that are certified as being owned by one or more individuals who are both "socially and economically disadvantaged."

In April 2006, prior to submitting a bid proposal, Host International, Inc. (the Employer) entered into a "Letter of Commitment" with a locally-owned restaurant, Silver Dragon. It is undisputed that Silver Dragon was not, and has never been, a DBE. The letter permitted the Employer to use Silver Dragon's name and trademark in its bid proposal as a possible subcontractor in the newly-built terminal. By its terms, the letter was to remain in effect for 180 days following execution, unless

extended by mutual written agreement of the parties. There is no evidence indicating that the agreement was extended beyond the first 180 days.

In June 2006, the Employer and the Union signed a "Labor Peace Agreement" ("LPA"), which was required of all airport concessions bidders. The LPA provided for card check recognition for the contemplated bargaining unit and for the Employer to remain neutral regarding unionization of any other employees. The LPA also included language that obligated the Employer to include card check recognition and neutrality provisions in any subsequent subleases/subcontracts. By its terms, the LPA would expire upon the signing of a collective bargaining agreement with the Union, if the Employer was selected as the airport concessionaire.

In October 2006, the Employer was awarded the contract for the operation of the airport concession businesses.

In June 2007, the Employer recognized the Union as the representative of all of its employees throughout the Oakland International Airport. In September 2008, the Union and the Employer signed a collective bargaining agreement, effective from September 2008 through July 2012. This agreement gave the Employer the right to subcontract only: (1) work of the type not currently performed by the bargaining unit; (2) work requiring skills not available in the bargaining unit; (3) to DBEs, as provided in its airport lease; and (4) work that was currently subcontracted out. Although the Union proposed that the Employer be a joint employer with any subcontractors and be required to include card check recognition and neutrality provisions in any subsequent subleases/subcontracts, the Employer did not agree to include these provisions in the parties' agreement.

In March 2009, the Employer and Silver Dragon entered into a sublease agreement for space in the newly-built terminal. The Employer also entered into subleases with several other subcontractors, all of whom were DBEs. Soon thereafter, the Employer and all of these businesses began operations in the newly-built terminal. The Union met face to face with each of the new subcontractors and asked them if they would consider signing an LPA. According to the Union, each of the new subcontractors refused. The Union then decided to research each store to verify their DBE status. It then determined that Silver Dragon was not a DBE.

In July 2009, the Union filed a grievance regarding the sublease of concession space to subtenants, alleging that the subcontracting did not meet any of the conditions in the parties' agreement that would permit subcontracting. The Union sought a remedy requiring the Employer to cease and desist subcontracting, and providing make-whole relief. In March and April 2012, an arbitration hearing was held on this grievance.

In August 2012, the Union and the Employer began negotiating a successor collective-bargaining agreement. The Union proposed that the Employer become a joint employer with any subcontractor, thereby bringing those employees into the bargaining unit, as had the previous airport concessionaire, or that the Employer include an LPA in any subcontract. The Employer has not agreed to either of these proposals.

Beginning in August 2012, and continuing until at least December 2012, the Union handbilled, rallied, and picketed in support of a boycott against the Employer's subcontractors because of their failure to agree to LPAs.

In October 2012, the arbitrator issued a decision in favor of the Union. In particular, the arbitrator found that the Employer's sublease/subcontract with Silver Dragon was in violation of the parties' collective-bargaining agreement. There was no dispute that Silver Dragon was not performing work of the type not currently performed by the unit, and that Silver Dragon did not require skills that were not available in the unit. The arbitrator found that Silver Dragon was not a DBE, and that Silver Dragon was not performing work "currently subcontracted out" as of the date the agreement was executed (September 2008), as the Employer's sublease with Silver Dragon was not executed until March 2009. In this regard, the arbitrator determined that the Employer's April 2006 "Letter of Commitment" with Silver Dragon was not an effective and binding subcontract. The arbitrator's award required the parties to attempt to reach a mutual resolution, and if those efforts failed, to return to arbitration and litigate the issue of the appropriate remedy.

On several occasions thereafter, attorneys for the Employer and the Union have discussed a remedy based on the arbitrator's decision. The parties have not reached any agreement on this issue.

In February and April 2013, the Employer filed the charges in the instant cases, alleging that the Union entered into and/or enforced a contract with the object of forcing the Employer to cease and/or refrain from doing business with Silver Dragon, in violation of Section 8(b)(4)(A), 8(b)(4)(B), and 8(e) of the Act.

ACTION

We agree with the Region that the Union did not violate the Act, because its grievance had a lawful primary work preservation object.[1]

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[1] We would not, however, rely on the argument that the charges in the instant cases are time-barred by Section 10(b) of the Act [redacted]
Exemption 5

Section 8(b)(4)(ii) of the Act prohibits a union from threatening, coercing, or restraining an employer with an object of: (A) forcing or requiring the employer to enter into an agreement which is prohibited by Section 8(e); or (B) compelling the employer to cease doing business with any other person. A violation is established if an unlawful object is shown, even if there are other lawful objects of the union's conduct.[2]

It is well established, however, that Section 8(e) does not prohibit agreements to preserve bargaining unit work for bargaining unit employees.[3] Rather, Section 8(e) prohibits only those agreements that have a secondary purpose, i.e., agreements directed at a neutral employer or entered into for their effect on another employer.[4] The relevant inquiry is "whether, under all the surrounding circumstances, the Union's objective was preservation of work for [bargaining unit] employees, or whether the [agreement was] tactically calculated to satisfy union objectives elsewhere . . . The touchstone is whether the agreement or its maintenance is addressed to the labor relations of the contracting employer vis-à-vis his own employees."[5] Because a union has a legitimate interest in preserving unit work for bargaining unit employees, a union may negotiate work preservation clauses and union-standard clauses despite their incidental effect of limiting the group of persons with whom the primary employer may do business.[6]

Generally, to determine whether a work preservation claim is valid, one must focus on what work unit employees have historically performed. If the work claimed is of the same nature as the work historically performed, the claim is not defeated just because the union claims the right to perform that work on a new product or for a new or different customer of the employer. Thus, for example, in *Newspaper & Mail Deliverers (Hudson News)*,[7] the Board found that a union had a primary work

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F Exemption 5

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[2] See, e.g., *NLRB v. Denver Building Trades Council*, 341 U.S. 675, 689, 692 (1951).

[3] See *National Woodwork Mfrs. Assn. v. NLRB*, 386 U.S. 612, 635 (1967).

[4] *Id.* at 632.

[5] *Id.* at 644.

[6] *Associated General Contractors*, 280 NLRB 698, 701 (1986).

[7] 298 NLRB 564, 566-68 (1990).

preservation object when it sought to claim work related to the distribution of newly added publications within a specific geographic area for a bargaining unit whose traditional work jurisdiction encompassed all employer-distributed publications within that area. Similarly, in *Retail Store Employees, Local 876 (Allied Supermarkets),*[8] the union lawfully demanded that the employer assign unit employees to shelve a new product at grocery stores, rather than allow the employees of the product distributor to perform the work, pursuant to a collective-bargaining agreement which provided that the employer's unit employees would perform shelving and related services. The Board refused to define unit work by reference to brand name or supplier, stating that "to define unit work so narrowly would deny the union any remedy for piecemeal reduction and potential elimination of unit work opportunities."[9] Rather, it found that the work on the specified brand-name products was not so "foreign to the unit as to negate the union's assertion of a job protection object."[10]

In the instant cases, the parties' collective-bargaining agreement recognizes the Union as the representative of all of the Employer's employees throughout the airport. The agreement expressly restricts subcontracting in all but four instances: 1) subcontracting to a DBE; 2) prior subcontracts; 3) subcontracting of work the bargaining unit does not possess the skills to perform; and 4) subcontracting work not previously performed by the bargaining unit. As the arbitrator found, the Employer's sublease/subcontract with Silver Dragon was in violation of this provision. Silver Dragon was not a DBE, the subcontract was not executed prior to the parties' collective-bargaining agreement, and Silver Dragon was not performing work that required skills that were not available in the unit or was of a different type than unit performed. Thus, as in *Hudson News* and *Allied Supermarkets*, the Union here was merely seeking to enforce a contractual provision that preserved bargaining unit work. And, as in *Hudson News* and *Allied Supermarkets*, it made no difference that the work at issue had newly arisen (i.e., was in the newly-constructed terminal), as it was clearly within the bargaining unit's work jurisdiction, which covered the entire airport.[11] Therefore, we agree with the Region that the Union had a lawful primary work jurisdiction object.

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[8] 174 NLRB 424 (1969), pet. for review denied sub. nom. *Canada Dry Corp. v. NLRB*, 421 F.2d 907 (6th Cir. 1970).

[9] *Id.* at 425.

[10] *Ibid.*

[11] For this reason, we agree with the Region that *Airline Pilots Assoc.*, 345 NLRB 820 (2005), enf. denied on other grounds 525 F.3d 862 (9th Cir.2008), and *Local 32, SEIU*

The Employer argues that the result in *Hudson News* and *Allied Supermarkets* should not apply here on the theory that it did not have the right to control the assignment of the work at Silver Dragon. In this regard, it is well established that, to support a work preservation defense, a union must show that the employer had the right to control the assignment of work, such that the employer had the power to give bargaining unit employees the work in question.[12] The rationale of this test is that, if the contracting employer has no power to assign the work, it is reasonable to infer that the agreement has a secondary objective to influence whoever does have such power over the work. In that case, the contracting employer "would be a neutral bystander, and the agreement or boycott would, within the intent of Congress, become secondary."[13] In evaluating the employer's right to control work, the Board looks to the surrounding circumstances that brought about the employer's purported lack of control to determine whether the employer is in fact a neutral.[14]

(Nevins Realty), 313 NLRB 392 (1993), enfd. in pertinent part 68 F.3d 490 (D.C. Cir. 1995), cited by the Employer, are inapposite. In *Airline Pilots Assoc.*, the union was attempting to have its members assigned to new shifts/routes that were added as a result of a merger and that were not in control of the employer at the time the collective bargaining agreement was executed. In *Nevins Realty*, the union relied upon a subcontracting provision that had nothing to do with the subcontract at issue -- the provision covered maintenance work, but the subcontract was for janitorial services. Thus, the purpose of the grievance was to acquire new work, rather than preserving work already being performed by bargaining unit employees. In the instant cases, the work in the subleased space at issue was within the Employer's control when the parties executed their collective-bargaining agreement, and the Union was merely seeking to preserve the work for bargaining unit members as contemplated in the parties' agreement. Thus, it is clear that the Union's grievance had a work preservation, rather than a work acquisition, object. See, e.g., *Hudson News*, supra; *Allied Supermarkets*, supra; *Service and Maintenance Employees Union Local No. 399 (Karl Effron)*, 148 NLRB 1033, 1034 (1964).

[12] See, e.g., *NLRB v. Enterprise Assn. of Steam Pipefitters*, 429 U.S. 507, 517 (1977).

[13] *National Woodwork*, 386 U.S. at 644-45.

[14] See, e.g., *NLRB v. Enterprise Assn. of Steam Pipefitters*, 429 U.S. at 523 fn. 11 (the Board examines "not only the situation the pressured employer finds himself in but also how he came to be in that situation"); *Pipefitters Local 120 (Mechanical Contractors' Assn. of Cleveland)*, 168 NLRB 991, 992 (1967) (notwithstanding a work preservation clause in a collective-bargaining agreement, the employer "contract[ed] away" performance of bargaining unit work in the absence of any demand that it do so

In the instant cases, it is undisputed that the Employer had the exclusive right to control the work performed in all of the concession businesses in the new terminal and, by its own doing, entered into the sublease with Silver Dragon. The Employer argues that it is in a legally binding commercial agreement with Silver Dragon that "long predated" the Employer's contractual relationship with the Union. This argument, however, appears to be contrary to the facts and was explicitly rejected by the arbitrator, who found that the sublease was entered into after the parties' collective-bargaining agreement was in effect. Therefore, under clear Board law, as it was only through the Employer's own doing that it relinquished control of work performed at Silver Dragon, the employer was not a neutral and the Union did not violate the Act by seeking to claim the work at issue.

Finally, the Employer argues that, even if nothing on the face of the grievance is unlawful, the Union's real object here is secondary and unlawful. In this regard, the Employer points to the Union's unsuccessful efforts to enter into LPAs with Silver Dragon and the other subcontractors, the Union's subsequent attempts to boycott these subcontractors because of their failure to agree to LPAs, and the Union's bargaining proposal to the Employer for a more favorable subcontracting clause.

While it is clear that the Union does have an ongoing labor dispute with the subcontractors, including Silver Dragon, over their refusal to enter into LPAs, there is nothing inconsistent between that labor dispute and the primary work preservation object claimed by the Union as to the Employer. Thus, the Union has consistently sought to retain the Employer's work for the bargaining unit, through its collective-bargaining agreement with the Employer's predecessor, its proposals that the Employer be a joint employer with any subcontractors and be required to include card check recognition and neutrality provisions in any subsequent subleases/subcontracts, the limited subcontracting provision of the parties' collective-bargaining agreement, and the grievance/arbitration at issue here. These actions all have had the lawful primary work preservation object discussed above. The Union's additional efforts to execute LPAs with subcontractors after it failed to achieve its primary work preservation object does nothing to undermine that primary object. Indeed, it might even be argued that such efforts further support the Union's primary work preservation object, particularly given its consistent, decades-long actions to retain such work within the primary Employer's collective-bargaining agreement. In any case, despite the "incidental effect" on the subcontractors,[15] there is simply no evidence that would demonstrate that the Union was seeking to satisfy union

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by the project owner; because loss of control over assignment of work was the "result of [the employer's] own conduct," the employer was not a neutral).

[15] *Associated General Contractors*, 280 NLRB at 701.

objectives elsewhere, rather than addressing the Employer's labor relations vis-à-vis its own employees. Therefore, we agree with the Region that the Union did not violate the Act, because its grievance had a lawful primary work preservation object.

Accordingly, the Region should dismiss the charges in the instant cases, absent withdrawal.

/s/
B.J.K.