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

DATE: December 4, 2013

TO: Peter Sung Ohr, Regional Director
Region 13

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

SUBJECT: Teamsters Local 142 (AJ&S Trucking, Inc.)
Case 13-CB-103965

332-2560-3000
332-2580-9600
542-6725-3300
554-1467-0120
554-1467-1275
554-8487

This case was submitted for advice as to whether the Union violated Section 8(b)(1)(B) or 8(b)(3) of the Act when it withdrew its consent for the Employer to participate in multi-employer association bargaining for a successor contract and subsequently disclaimed interest in representing the Employer's employees. We conclude that the Union did not violate Section 8(b)(1)(B) or 8(b)(3) of the Act because it lawfully withdrew from multi-employer bargaining with respect to the Employer in a timely and unequivocal manner and there is insufficient evidence that its disclaimer was a sham. Accordingly, the charge should be dismissed, absent withdrawal.

FACTS

AJ & S Trucking, Inc. ("Employer") is a heavy duty trucking company located in Whiting, Indiana, which hauls dirt, gravel, concrete, and other construction materials to various jobsites throughout northwest Indiana. In 2010 the Employer joined the Four County Highway Contractors Group ("Association"), a group of nineteen contractor-employers in Lake and Porter Counties, Indiana and Calumet City, Illinois. The Employer was a signatory to a collective bargaining agreement ("Agreement") between the Association and Teamsters Local No. 142 ("Union"), which was effective from June 1, 2010 to May 31, 2013.[1] The Agreement contained a non-exclusive hiring hall provision and the Employer used the Union hiring hall to obtain drivers as needed.

[1] All dates hereinafter are in 2013 unless otherwise stated.

The Agreement's duration clause specified that it would remain in effect after expiration unless notice was given in writing by either party sixty days prior to May 31. On March 1 the Union sent a letter to all Association employers giving official notification of its desire to open negotiations for a successor contract and asked the employers to have their authorized representative contact the Union with available dates. On March 16 the Employer executed a "Multi-Employer Bargaining Agreement" delegating its bargaining authority to the Association for the purpose of negotiating a successor contract.

On March 25 the Union sent a letter to the Association chair informing him that the Union did not consent to the Employer participating in multi-employer bargaining and that the Union intended to bargain with the Employer separately. The Association chair forwarded the letter to the Employer on April 1.

In preparation for upcoming jobs, on April 4 the Employer requested drivers from the Union under the Agreement's hiring hall provision. The Union did not respond to the request and instead, on April 5, faxed a letter to the Employer stating that, effective immediately, it was "'disclaim[ing] any interest' in further representing the employees at [Employer]." The Union claims it disclaimed representation because the Employer repeatedly violated the parties' Agreement, resulting in numerous disputes and grievances.[2]

The Employer has not worked since March 1. It was scheduled to do a job on April 8, but the client canceled its contract. At least two other clients have notified the Employer by letter that, despite their desire to use the Employer's services, they will not engage the Employer until it resumes a relationship with the Union.

The Union and the Association, without the Employer, began formal negotiations for a successor contract on April 11 and soon reached an agreement, which was ratified by the Union's membership on June 9 and subsequently signed by Association members.

ACTION

We conclude that the Union did not violate Section 8(b)(1)(B) or 8(b)(3) of the Act because it lawfully withdrew from multi-employer bargaining with respect to the Employer in a timely and unequivocal manner and there is insufficient evidence that

[2] The Union's disclaimer resulted in the Employer being assessed withdrawal liability by the Union's Pension, Annuity, Welfare, and Training Trust Funds for over $1.2 million.

its disclaimer was a sham. Accordingly, the charge should be dismissed, absent withdrawal.

A. The Union's Withdrawal from Multi-Employer Bargaining

A party's withdrawal from a multi-employer unit is effective if it is timely and unequivocal.[3] A withdrawal is timely if it occurs before the time set for negotiations to start or before the time set by the expiring collective bargaining agreement for modification.[4] To be considered unequivocal, the withdrawal must "contemplate a sincere abandonment [of multi-employer bargaining], with relative permanency[.]"[5] A withdrawal is not unequivocal if the withdrawing party's subsequent conduct is inconsistent with its withdrawal.[6]

A union has the same right to withdraw from multi-employer bargaining as an employer because bargaining in a multi-employer context depends on the "continuing consent" of all parties.[7] Thus, in *Pacific Coast Association*, the Board upheld the union's right to withdraw from multi-employer bargaining as to a single employer, and to continue multi-employer bargaining with the remaining employers.[8] In that case, the union claimed that there were special problems with the single employer that were not receiving proper attention in multi-employer negotiations.[9] The Board held that because it permits individual employers to withdraw from multi-employer

---

[3] *Retail Associates, Inc.*, 120 NLRB 388, 393 (1958).

[4] *Id.* at 395.

[5] *Id.* at 394.

[6] *See, e.g., Brotherhood of Teamsters, Local No. 70*, 214 NLRB 902, 909-10 (1974) (finding union's withdrawal not unequivocal where union sought benefits of national master agreement after timely notice of withdrawal with respect to four employers).

[7] *Pacific Coast Association*, 163 NLRB 892, 895 (1967). *See also The Evening News Association, Etc.*, 154 NLRB 1494, 1496-97 (1965) (employer violated Section 8(a)(5) by refusing to bargain on an individual basis after union gave timely and unequivocal notice of its desire to conduct negotiations for new contracts on an individual employer basis), *enforced* 372 F.2d 569 (6th Cir. 1967); *Plumbers Local 669 (Lexington Fire Protection Group),* 318 NLRB 347, 347-48 (1995) (finding union violated Section 8(b)(3) by refusing to bargain on an individual basis with employer who timely and unequivocally withdrew from multi-employer bargaining).

[8] 163 NLRB at 894.

[9] *Id.*

units, there should be "a correlative union right" to withdraw only as to an individual employer.[10] So long as the union gives timely and unequivocal notice of withdrawal, the Board will give effect to that notice.[11]

Here, the Union gave timely notice to the Association, prior to beginning negotiations for a successor contract and within the time required by the Agreement, that the Union did not consent to the Employer's participation in multi-employer bargaining and wished to bargain with it separately. The Union's withdrawal was unequivocal; it has not taken any inconsistent action subsequently and instead bargained to a collective-bargaining agreement with only the other members of the Association. Accordingly, as in *Pacific Coast*, the Union was privileged to withdraw from the multi-employer unit as to only the Employer and therefore did not violate Section 8(b)(1)(B) or 8(b)(3) by doing so.[12]

B. The Union's Disclaimer

To be effective, a disclaimer of interest in representing an employer's employees must be unequivocal and not a "sham."[13] A union's "bare statement" of disclaimer is insufficient to establish that a union abandoned its claim to representation if the surrounding circumstances indicate otherwise.[14] In deciding whether a disclaimer

---

[10] *Id.* at 894-95.

[11] *Id.* at 895-96. *Accord Belleville News Democrat, Inc.*, 185 NLRB 1000, 1001 (1970) (finding local union lawfully withdrew from multi-employer bargaining as to a single employer).

[12] *Compare Brotherhood of Teamsters, Local No. 70*, 214 NLRB at 910 (dismissing Section 8(b)(1)(B) allegation and finding union did not restrain or coerce employers in selection of bargaining representative by merely seeking to bargain with them individually since employers could maintain their membership in the multi-employer association and have the association as their bargaining representative), *with Teamsters Local 282 (E.G. Clemente Contracting)*, 335 NLRB 1253, 1256 (2001) (explaining, in dicta, that compelling an employer to be in a multi-employer unit compels the employer to use the multi-employer association as its bargaining representative and thus would violate 8(b)(1)(B)).

[13] *Retail Associates, Inc.*, 120 NLRB at 391-92.

[14] *Id.* at 392. *See L & L Shop Rite*, 285 NLRB 1036, 1040 (1987) (stating that Board normally does not simply accept at face value a union's disclaimer of interest and instead examines union's overall conduct in determining whether disclaimer is valid or whether union had organizational or recognitional objective) (Member Babson, concurring).

was a "sham," the Board looks at whether the union engaged in contemporaneous or subsequent conduct that was inconsistent with its disclaimer.[15] The Board does not otherwise inquire into the Union's motivation for disclaiming interest in representing a group of employees.[16]

Here, there is insufficient evidence to find that the Union's disclaimer of the Employer's employees was a sham. The Union unequivocally notified the Employer in writing on April 5 that it was disclaiming interest in representing its employees. Thereafter, the Union did not respond to the Employer's request for drivers and proceeded to negotiate a successor contract only with the other employers still in the Association. The fact that the employees remain members of the Union, and that the Union continues to refer them to other employers is not sufficient in itself to defeat the effectiveness of an otherwise unequivocal disclaimer.[17] Moreover, even if it was appropriate to prohibit the Union from disclaiming representational rights as part of a strategy designed to increase pressure on the other Association employers to accede to its demands in the upcoming negotiations, the Union also has proffered a legitimate reason for its disclaimer – that the Employer was a chronic violator of the collective-bargaining agreement. And there is no evidence that this explanation is

---

[15] *See, e.g., International Brotherhood of Electrical Workers (Texlite)*, 119 NLRB 1792, 1799 (1958) (finding sufficient evidence that union's purported disclaimer was a tactical maneuver and offered in bad faith where thereafter employees remained members of local union, union restrained employees from striking, union continued to receive contributions from employer for welfare fund, and union agent testified union was willing to sign contract with employer if employer agreed to enlarged work scope clause), *enforced* 266 F.2d 349 (5th Cir. 1959); *IBEW, Local #58*, 234 NLRB 633, 634 (1978) (finding effective disclaimer of commercial-work employees where there was no evidence that union thereafter attempted to represent employer-association's employees doing commercial work).

[16] *See Hartz Mountain Corporation*, 260 NLRB 323, 325 (1982) (stating it is "axiomatic" that union cannot be compelled against its will to be the collective bargaining representative of a unit of employees and may choose to disclaim interest), *enforced* 738 F.2d 422 (3d Cir. 1984).

[17] *See Sheet Metal Workers, Local No. 11*, 192 NLRB 32, 34 (1971) (rejecting Trial Examiner's argument that union's continuing to treat employer's employees as members and accepting employer contributions for employee benefits was inconsistent with good faith disclaimer), *petition for review denied sub nom. Corrugated Asbestos Contractors, Inc. v. NLRB,* 458 F.2d 683 (5th Cir. 1972).

pretextual.[18] Therefore, the Union did not violate Section 8(b)(3) because its disclaimer is a sufficient defense to a refusal to bargain allegation.[19]

Accordingly, the Region should dismiss the charge, absent withdrawal.

/s/
B.J.K.

[18] *See Sheet Metal Workers, Local No. 11*, 192 NLRB at 33-34 (finding good faith disclaimer where union concluded that representing the employer's few employees would lead to numerous work jurisdiction disputes and therefore was not worth the trouble).

[19] *See id.*; *Joint Council of Teamsters 3, 28, 37, 42 (Lanier Brugh Corp.)*, 339 NLRB 131, 132 (2003) (holding that local union had no statutory duty to bargain after it disclaimed interest with consent of employer and union joint representative).