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

Advice Memorandum

DATE: April 14, 2014

TO: Allen Binstock, Regional Director
Region 8

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

SUBJECT: International Union of Operating Engineers, Local 18 (Construction Employers Association)
Case No. 08-CB-110103

542-0100
542-0125-9000
542-6725-3300
554-1433-6725
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596-8433-2500

This case was submitted for advice as to whether the International Union of Operating Engineers, Local 18 ("the Union"): (1) violated Section 8(b)(3) by unilaterally altering the scope of the bargaining unit and breaching the terms of the current collective-bargaining agreement between the Union and the Construction Employers Association ("CEA") when the Union negotiated with the Association of General Contractors of Ohio ("AGC") for overlapping jurisdiction in four counties currently covered by the CEA agreement; (2) violated Section 8(b)(1)(B) by interfering with employers' choice of bargaining representative; and (3) violated Section 8(b)(1)(A) and (3) by bargaining to impasse and threatening to strike over a nonmandatory subject of bargaining during negotiations with the AGC. We conclude that: (1) the Union did not violate the Act by negotiating a collective-bargaining agreement with the AGC that contains overlapping jurisdiction because the scope of the CEA bargaining unit was not altered by the AGC agreement; (2) the Union has not coerced any employer in its choice of bargaining representative; and (3) the Union did not bargain to impasse over a nonmandatory subject, and that its threat to strike was over the agreement as a whole and demonstrated hard bargaining by the Union, not a threat to strike over a permissive subject. Therefore, the charge should be dismissed, absent withdrawal.

FACTS

The CEA is an association of employers in the building construction industry in the Cleveland, Ohio area. It exists primarily for the purpose of bargaining on behalf

of its members with construction unions. For years, the CEA has been signatory to collective-bargaining agreements with the Union. Article I of the current collective-bargaining agreement between the parties, effective May 1, 2012 through April 30, 2015, outlines the geographical scope as consisting of the following eight Ohio counties: Ashtabula, Cuyahoga, Erie, Geauga, Huron, Lake, Lorain, and Medina. Article II addresses the respective parties' status as exclusive bargaining representatives within that geographical area:

> Recognition – The Association hereby recognizes the Union as the exclusive collective bargaining agent for all Operating Engineers (within the territory stated in Article I), and the Union recognizes the Association as the exclusive bargaining agent for all Employers of the Operating Engineers (within the territory stated in Article I), and it is mutually acknowledged that each has acted as such agents continually for more than the past twenty (20) years, and that now and over such period each has been so recognized by appropriate departments or agencies of both federal and state governments.

The Union and the AGC, another employer association in the building and construction industry, have also negotiated collective-bargaining agreements for many years. The previous contract expired on April 30, 2013.[1] The geographical scope of the agreement between the AGC and the Union covered substantially all of the counties in Ohio other than the eight counties specified in the CEA agreement. The Union and the AGC began negotiations for a successor agreement on May 14, at which time the Union presented written proposals, including a proposal to expand the geographical jurisdiction to include the eight counties covered by the CEA agreement. The parties reached agreement on numerous issues, but the AGC rejected the Union's proposals on wages and the expansion of jurisdiction. The Union advised the AGC that unless an agreement was reached by May 17, a strike order would be placed for Monday, May 20.

After negotiations on May 14, the AGC sent an email to inform the CEA that the parties had reached agreement on all issues except wages and the Union's proposal to expand the AGC jurisdiction into areas currently covered by the CEA agreement. The CEA responded that the Union was trying to win a jurisdictional dispute with another trade union by changing associations from the CEA to the AGC. On May 17, the AGC and the Union held their second, and final, bargaining session. The Union explained its wage proposal and further outlined its proposal to expand the geographical jurisdiction. The Union stated that the eight requested counties would remain in the CEA agreement as well as being included in the AGC agreement as an addendum. Existing signatory contractors would still be represented by the CEA, but new

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[1] Herein all dates are 2013 unless otherwise noted.

companies seeking to sign an agreement would be given a choice of the two agreements. Accordingly, wages and fringes contained in the CEA agreement would not be affected and would remain the same as currently scheduled. The AGC responded that it did not want to agree to a wage proposal tied to the expansion of jurisdiction to include the eight additional counties. After a caucus, the Union proposed that four, rather than eight, of the counties be added to the AGC agreement, reiterating that the parties' failure to reach agreement would lead to a strike. The AGC agreed to add the four counties where the least amount of construction takes place, with the understanding that those counties would still be in the CEA agreement and that new contractors would have a choice to work under either agreement. Further, the AGC explained that the expanded jurisdiction would be in exchange for a compromise on the Union's wage proposal. The Union accepted the AGC proposal and the parties agreed to add the counties in an addendum to the contract.

The AGC informed the CEA of the new agreement, including the wage and jurisdiction agreements, noting that a potential work stoppage had been averted by the parties coming to agreement before the Union's deadline. The AGC explained that the expanded jurisdiction meant that new (currently nonsignatory) contractors would be given a choice of agreements (either the CEA agreement or the AGC agreement) in the four overlapping counties. The AGC agreement, which the AGC members approved in June and the Union ratified in July, contains a recognition clause identical to the Article II recognition clause found in the CEA agreement.

Although the parties agreed to expanded jurisdiction, it does not appear that an addendum was ever attached to the AGC agreement, and there is no evidence that any employers have become party to the agreement between the AGC and the Union in the four overlapping counties.

The CEA filed a charge on July 30 alleging that the Union violated Section 8(b)(3) by bargaining in bad faith with the CEA by reaching an agreement with the AGC, after bargaining to impasse, to cover the four overlapping counties. An amended charge was filed on November 27, alleging that the Union's conduct violated Section 8(b)(1)(B) because it attempted to coerce employers' selection of bargaining representative. It further alleged that the Union violated Section 8(b)(1)(A) and (3) by threatening to strike over the scope of its representation. The CEA argues that by negotiating overlapping jurisdiction, the Union changed the scope of the unit, breached the contract, and effectively withdrew recognition from the CEA. The AGC never filed an unfair labor practice charge over the May negotiations with the Union.

The Union contends that it did not alter the agreement because the CEA is the exclusive bargaining agent for employers only to the extent that those employers are members of the CEA, have assigned their bargaining rights to the CEA, and have become signatories to the CEA agreement. Therefore, the jurisdiction language in the

AGC agreement does not change the provision within the CEA agreement making the CEA the exclusive representative of its members for collective-bargaining with the Union. The Union further notes that the CEA agreement itself contains language on its signatory pages entitled "Acceptance of Agreement" which permits a contractor to work under the terms of the CEA agreement without assigning its bargaining rights to or becoming a member of the CEA. The Union also denies that it coerced any employer in the selection of its bargaining representative because the AGC agreement does not alter the relationship between the CEA and its signatory members. Finally, the Union denies that it bargained to impasse with AGC, and the Union further maintains that impasse is immaterial to the CEA's allegations because the AGC agreement does not breach the agreement between CEA and the Union.

ACTION

We conclude that the Union did not violate the Act as alleged. The AGC agreement applies only to new contractors and, thus, did not change the scope of the bargaining unit as articulated in the CEA agreement. Further, the overlapping jurisdiction gives new employers a choice of representation rather than restraining employers in their choice of collective bargaining representative. Additionally, the Union did not bargain to impasse over its jurisdictional proposal, and its threat to strike related to resolution of the contract as a whole, which is lawful under the Act. Therefore, the charge should be dismissed absent withdrawal.

The Union's conduct in negotiating overlapping jurisdiction in the AGC and the CEA agreements did not alter the scope of the bargaining unit.

A party may not unilaterally change the scope of the bargaining unit.[2] A change in the scope of the bargaining unit alters the representational rights of the affected unit employees.[3] In the present case, no evidence was presented demonstrating that there was a change in the scope of the bargaining unit; thus, the Union has not

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[2] *See Steel Workers Local 14693 (Skibeck, P.L.C., Inc.)*, 345 NLRB 754, 755 (2005) (union unlawfully altered the scope of the bargaining unit by disclaiming interest in representing certain employees in the contractual unit and implying that the collective-bargaining agreement would no longer apply to those employees); *Arizona Electric Power*, 250 NLRB 1132, 1133 (1980) ("[I]t is well established that the integrity of a bargaining unit cannot be unilaterally attacked, and that once a unit is certified, it may be changed only by mutual agreement of the parties or by Board action.") (internal citations omitted).

[3] *See Storer Communications*, 295 NLRB 72, 78-79 (1989) *aff'd*. 904 F.2d 47 (D.C. Cir. 1990) (scope of the bargaining unit is a question of who is represented).

breached the CEA agreement. First, no employees were added to or removed from the unit, changing their representational status. All employees covered by the CEA agreement prior to the agreement between the Union and the AGC are still covered by the CEA agreement. Second, no employer belonging to the CEA was removed from the employer association. The AGC agreement contemplates new contractors having a choice between the AGC and the CEA, but it does not affect the status of contractors who are presently members of the CEA. Finally, the CEA's argument that the Union breached the contract by unilaterally changing the scope of the bargaining unit rests upon the assumption that the parties contract could lawfully be read to require all employers in the CEA's jurisdiction to bargain through the CEA, even absent their consent to do so. However, the CEA is the exclusive bargaining agent only for those employers who are members of the CEA, have assigned their bargaining rights to the CEA, and have become signatories to the CEA agreement. And, as explained below, a reading of the CEA agreement that would require employers to bargain through the CEA absent consent is unlawful under the Act, and we decline to read the contract's language in a way that violates Section 8(b)(1)(B).

The Union's conduct did not coerce any employer in the selection of its collective-bargaining representative.

A union violates Section 8(b)(1)(B) if its conduct restrains or coerces an employer in the selection of its representative for collective bargaining or grievance adjustment.[4] A primary concern of Congress in enacting Section 8(b)(1)(B) was to "prevent unions from trying to force employers into or out of multi-employer bargaining units."[5] Generally this "has been treated as a prohibition against a union coercing an employer into forgoing the employer's choice of its representative for *future* collective bargaining."[6] A violation can take many forms, including a threat of violence against a supervisor for his interpretation of the contract,[7] internal union discipline of supervisors who are also union members,[8] or a union's attempt to

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[4] *See generally NLRB v. IBEW Local 340 (Royal* E*lectric)*, 481 U.S. 573 (1987); *Teamsters Local 507 (Klein News)*, 306 NLRB 118, 120-21 (1992).

[5] *See Florida Power & Light Co. v. IBEW Local 641*, 417 U.S. 790, 803 (1974).

[6] *Teamsters Local 705 (Kankakee-Iroquois)*, 274 NLRB 1176, 1180 (1985) *enfd*. 825 F.2d 1091 (7th Cir. 1987).

[7] *See Teamsters Local 507 (Klein News)*, 306 NLRB at 120.

[8] *See San Francisco-Oakland Mailers' Union 18*, 172 NLRB 2173 (1968) (union violated 8(b)(1)(B) by issuing citations and fines to employer representatives who

negotiate for the termination of a disfavored manager.[9] Here, there is no evidence that the Union coerced any employer in its choice of bargaining representative. The AGC agreement offers employers a choice of representative, but it does not require any employer to sign the agreement or to assign its bargaining rights to AGC. Furthermore, there is no evidence that the Union has enforced the AGC agreement against any contractor in order to force them into or out of the AGC or the CEA.

The Union did not bargain to impasse.

The Board considers negotiations to be in progress, and that no genuine impasse exists, until it is clear that further bargaining would be futile or that there is "no realistic possibility that continuation of discussion. . .would [be] fruitful."[10] The Board does not lightly infer the existence of an impasse, and the burden of proving it rests on the party asserting it.[11] The Board will not find an impasse unless both parties to negotiations believe that they are "at the end of their rope" and are unwilling to compromise.[12] In the instant case, the CEA asserts that the Union unlawfully negotiated to impasse with the AGC over a permissive subject of bargaining, i.e., jurisdiction.[13] Thus it is the CEA's burden to prove that an impasse

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were also its members in order to influence them to take prounion positions when interpreting the collective-bargaining agreement).

[9] *See Food and Commercial Workers (Awrey Bakeries, LLC)*, 360 NLRB No. 11, slip op. at 5 (November 26, 2013).

[10] *Saint-Gobain Abrasives, Inc.*, 343 NLRB 542, 556 (2004) *enfd*. 426 F.3d 455 (1st Cir. 2005). *See also Cotter & Co.,* 331 NLRB 787 (2000) *enf. denied in rel. part Truserv Corp. v. NLRB*, 254 F.3d 1105 (D.C. Cir. 2001) (no impasse where parties still willing to compromise in order to reach agreement); *Castle Hill Health Center*, 355 NLRB No. 196, slip op. at 29 (September 28, 2010) (citing *Cotter & Co.*) (same).

[11] *See Sacramento Union*, 291 NLRB 552, 556 (1988) *enfd*. 888 F.2d 1394 (9th Cir. 1989); *Saint-Gobain Abrasives, Inc.*, 343 NLRB at 556.

[12] *Saint-Gobain Abrasives, Inc.*, 343 NLRB at 556 (citing *PRC Recording Co.*, 280 NLRB 615, 635 (1986) *enfd*. 836 F.2d 289 (7th Cir. 1987)); *Grinnell Fires Protection Systems Co.*, 328 NLRB 585 (1999) *enfd*. 236 F.3d 187 (4th Cir. 2000) (no impasse despite the fact that the employer asserted that it had reached its final position and the union had not offered specific concessions because the evidence demonstrated that the union was still willing to compromise).

[13] Although the CEA was not a party to the negotiations between the AGC and the Union, the CEA may bring a charge in this regard. The Board administers public

existed. It has failed to do so. There is no evidence that the parties negotiated until it became futile to continue discussions. Neither party believed it was at the end of its rope and neither party reached a point at which it refused to make further compromises. Rather, both the AGC and the Union continued to negotiate, each making concessions that reflected the concerns expressed by the other party, until a contract was reached. Thus, no impasse was reached during negotiations on any subject.

The Union did not unlawfully threaten to strike over a permissive subject of bargaining.

Employees and their unions may not use economic weapons to compel employers to take action on permissive subjects of bargaining.[14] Thus, a union may not strike to pressure an employer to bargain over a nonmandatory subject.[15] It is not unlawful, however, to include a nonmandatory proposal in a bargaining package and bargain, even to the point of impasse, over that package when the parties voluntarily engage in bargaining over such a proposal.[16] In the instant case, the Union advised the AGC that unless an agreement was reached by May 17, a strike order would be placed for Monday, May 20. At the time, the Union and the AGC had not reached agreement on the issue of wages or the Union's proposal for expanded jurisdiction. Thus, the Union did not threaten to strike—nor did it ever actually strike—in order to induce the AGC to negotiate over a nonmandatory subject of bargaining. Rather, the AGC engaged in negotiations over the Union's jurisdictional proposal voluntarily. Additionally, any threat by the Union to strike was in reference to reaching an overall agreement, not simply in support of its proposal for expanded jurisdiction. So, to the extent that the Union engaged in hard bargaining, including the threat of a strike, over outstanding issues in negotiations, those issues were part of an overall bargaining package including mandatory and nonmandatory issues, about which the parties were bargaining of their own volition. Thus, the Union's strike deadline was not unlawful.

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policy and its processes may be invoked by any person who believes such policies have been violated. *See Castle Hill Health Center*, 355 NLRB No. 196, slip op. at 35-36 (September 28, 2010) (anyone may file a charge with the Board); *NLRB v. Indiana & Michigan Electric Co.*, 318 U.S. 9, 17-18 (1943) (same).

[14] *See Nassau Insurance Co.*, 280 NLRB 878, 878 n.3 (1986) (violation where union engaged in strike to support unlawful insistence on nonmandatory subjects during collective-bargaining negotiations).

[15] *Id.*

[16] *KCET-TV*, 312 NLRB 15, 15 (1993) (citing *Good GMC, Inc.*, 267 NLRB 583 (1983)).

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

/s/
B.J.K.