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UNITED STATES GOVERNMENT
National Labor Relations Board

Memorandum

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584-8700

RELEASE

DATE: July 31, 1978

COPIES PLEASE

TO : Wilford W. Johansen, Director
Region 21

FROM : Harold J. Datz, Associate General Counsel
Division of Advice

SUBJECT: Joint Council of Teamsters No. 42 and its affiliated Local Unions, et al. (Associated General Contractors of California, Inc., et al.)
Case 21-CE-196

Teamsters Local Union No. 36 and Associated General Contractors of America, San Diego Chapter, Inc., et al.
Case 21-CE-197

A.D 05880

These cases were submitted for advice as to whether owner-operators of dump trucks are employees under the Act and whether certain contract provisions applying to such owner-operators are violative of Section 8(e) under the Supreme Court's decision in Connell. 1/

FACTS

The charges in these cases were filed by the California Dump Truck Owners Association, herein called CDTOA, in response to a recent decision by the Ninth Circuit Court of Appeals 2/ declaring that owner-operators of dump trucks are independent contractors rather than employees under the Act and refusing enforcement of an order of the Board, grounded on a finding of employee status. 3/ There is no evidence that the status of the owner-operators represented by the Charging Party in the instant cases and that of other owner-operators engaged in the same industry is different in any significant respect from that found in the earlier Court proceeding.

1/ Connell Construction Co. v. Plumbers, Local 100, 414 U.S. 616 (1975).
2/ Associated General Contractors of California, Inc. v. N.L.R.B., 562 F.2d 607, 96 LRRM 3331 (C.A. 9, 1977), rev'g. & rem'g. 201 NLRB 311.
3/ Contractor Members of the Associated General Contractors of California, Inc., 201 NLRB 311. See also Teamsters Local 982 (J.K. Barker Trucking Co., et al.), 181 NLRB 515.

Buy U.S. Savings Bonds Regularly on the Payroll Savings Plan

In Case 21-CE-196, CDTOA alleges that Teamsters Local No. 87, Joint Council of Teamsters No. 42 and its various affiliated locals, and Associated General Contractors of California, Inc., and three other multiemployer associations, herein called the Associations, violated Section 8(e) of the Act by entering into a Master Labor Agreement, herein called the MLA, on or about July 1, 1977. CDTOA specifically alleges that Paragraphs D and H of Article IV and Article XIII of Appendix L of the MLA are unlawful. Paragraph D in Article IV is a standard subcontracting clause, 4/ while paragraph H refers to loading and unloading of equipment by employees. Article XIII of Appendix L contains all the sections of the contract pertaining to owner-operators, including inter alia, those dealing with their status as employees and the requirement of Union membership.

In Case 21-CE-197, CDTOA alleges that Teamsters Local Union No. 36 and Associated General Contractors of America, San Diego Chapter, Inc., along with two other multi-employer associations, herein called the San Diego Associations, violated Section 8(e) of the Act by entering into the Master Labor Agreement for San Diego County, herein called the San Diego MLA, on August 4, 1977. CDTOA alleges specifically that Section 42 of the San Diego MLA is unlawful. Section 42 is designated "Teamster Working Rules" and contains provisions covering owner-operators of dump trucks. These provisions are virtually identical to those contained in Article XIII of Appendix L of the MLA in Case 21-CE-196.

CDTOA presented evidence of enforcement of the various contract provisions, which was similar in both cases. The investigations disclosed that representatives of the various unions have told owner-operators and their representatives that the owner-operators must hold Teamsters membership cards and be placed on the payrolls of the general contractors in order that appropriate health, welfare, and vacation contributions can be made. There is no evidence of any grievances, lawsuits, or job actions in addition to the above-described statements made to the owner-operators themselves. In only one instance was a specific contract provision actually referred to; namely, the 5-mile geographic definition of the jobsite contained in paragraph 1321.1 of Article XIII of Appendix L of the MLA, a copy of which was shown to a CDTOA representative on a jobsite in Cucamonga, California. 5/

4/ A clause identical to paragraph D was found to be unlawful under Connell in an Advice Memorandum dated September 21, 1977 in Carpenters Local No. 944, Carpenters Local No. 235 (Woelke & Romero), Case 21-CC-1922.

5/ At the time of investigation of the original charge, in Case 21-CE-196, the 1300 paragraphs of Article XIII of Appendix L of the MLA were embodied in the 2000 paragraphs of Article XX of the predecessor MLA which was modified by a July 11, 1977 Memorandum of Agreement.

ACTION

Initially, it was concluded that the owner-operators involved in these cases must be viewed as independent contractors rather than as employees under the Act, in accordance with the above-referred-to 9th Circuit decision. Even though that decision dealt with a violation of Section 8(a)(2), it must be viewed as the "law of the case" in the instant matter because of the reach of the court's detailed ruling with regard to the independent contractors. Further, the Board has decided not to seek certiorari, so that the 9th Circuit's view must prevail, at least until such time as the Board issues its decision on remand. Thus, the owner-operators in the instant cases must be considered to be independent contractors rather than employees.

I. Case 21-CE-196

The contract provisions in question in Case 21-CE-196, i.e., Article XIII-Owner-Operator, and the analysis applicable to each are as follows:

1302. The Owner-Operator shall be carried on the payroll of the Contractor as an employee and as such, all the terms and conditions of this Master Agreement and any amendment or amendments thereto, shall be applicable to him except as provided elsewhere in this Article and except that in the event that it is determined that the services of an Owner-Operator were terminated without just cause, any payment for time lost shall be limited to the wage and fringe benefit payments provided in this Agreement, and shall not in any event include any payment with respect to the equipment or the loss of use thereof; and except, further, that Owner-Operator shall not be subject to the provisions of paragraph 201, sub-paragraph 201.1 through 201.7.1 inclusive.

It was concluded that Section 1302 is a union signatory clause violative of Section 8(e) on its face because it requires independent contractors to be carried on the Employer's payroll as employees. As employees, the owner-operators would be required to join the Union under the union security clause in Section 12 of the MLA or be terminated. The Board and the courts have repeatedly held that such union membership requirements imposed on independent contractors are secondary insofar as they are "aimed at regulating the labor policies of other Employers including self-employed persons." 6/

6/ Santini Brothers, 208 NLRB 184, 198; Newspaper and Periodical Drivers' and Helpers Union Local 921 (San Francisco Newspaper Printing Co., Inc.), 204 NLRB 440; A. Duie Pyle, Inc. v. N.L.R.B., 383 F.2d 772 (C.A. 3, 1967), rem'g. 159 NLRB 84; General Teamsters, Local No. 890 (San Joaquin Valley Shippers' Labor Committee), 137 NLRB 641. See also Advice Memoranda in International Union of Operating Engineers Local 612 (Eldon Bell d/b/a Eldon Bell Bldg. Contractor), Case 19-CE-44, dated January 9, 1978; Operating Engineers Local 701 and Associated General Contractors of America (Lease Construction), Case 36-CE-13, dated January 31, 1977;

(cont'd.)

Moreover, it was concluded that Section 1302 is secondary because it mandates that the Employer apply all the terms and conditions of the MLA to the owner-operators, not just the "economic equivalents." 7/ As such, it seeks "to dictate the type of benefits payable" to the owner-operators and goes beyond a primary union standards clause. 8/

Further, this secondary clause is not protected by the construction industry proviso to Section 8(e) for several reasons. First, the work involved here may not be limited to construction work done at the jobsite. The Board has found that delivery of supplies and materials to the jobsite is not construction work, as contemplated by the proviso. 9/ Moreover, even assuming arguendo that the dump truck operators do perform construction work, Section 1302 would still be outside the protection of the proviso when read together with Section 1321, which contains an overly broad definition of jobsite. Thus, in view of the legislative history indicating that the proviso is to be narrowly construed, 10/ it was concluded that Section 1302, when read in light of Section 1321, is not privileged by the onsite exemption to Section 8(e).

6/ (cont'd.) General Drivers, Warehousemen and Helpers, Local Union No. 89 (Ralph Rogers and Company, Inc.), Case 9-CE-36, dated August 4, 1977.

7/ Cf. Construction Materials Trucking, Inc., 198 NLRB 1038.

8/ California Dump Truck Owners Association, 227 NLRB 269; Local 437, International Brotherhood of Electrical Workers (Dimeo Construction), 180 NLRB 420.

9/ International Union of Operating Engineers, Local Union No. 12 (Robert E. Fulton), 220 NLRB 530; Acco Construction, 204 NLRB 742. See also Inland Concrete Enterprises, Inc., 225 NLRB 209; Local 294, International Brotherhood of Teamsters (Clemence D. Stanton, d/b/a Rexford Sand and Gravel Co.), 195 NLRB 378; Teamsters Local Union No. 631 (Reynolds Electrical & Engineering Company, Inc.), 154 NLRB 67; Island Dock Lumber, Inc., 145 NLRB 484.

10/ Robert E. Fulton, supra, at 536. See also International Brotherhood of Boilermakers (Bigge Drayage Company), 197 NLRB 281.

Section 1321 contains the following provisions which define jobsite:

1321. Notwithstanding any other provision of this Agreement, this Article XIII shall be applicable only to Owner-Operators performing (or who, upon their employment, will be performing) work to be done at the site of construction, alteration, painting, or repair of a building, structure, or other construction work.

1321.1 The term 'work to be done at the site of the construction, alteration, painting or repair of a building, structure, or other construction work' as used in the paragraph 1321 shall include all driving to, from and in connection with hauling materials to or from any source or disposal site on the one hand, and a geographical site of construction, on the other hand, in accordance with the following:

1321.1.1 Delivery of materials to or from commercial suppliers or public dumps off the primary location shall always be exempt from the provisions of Article XIII. Any other general exclusions from the construction industry proviso, previously defined by the NLRB or the courts, shall continue to be applicable in interpreting Article XIII.

1321.1.1.1 A public dump is a disposal site available to, and in substantial use by, the public.

1321.1.2 Hauling of materials between a primary location and a secondary location not excluded by paragraph 1321.1.1 above that is located five (5) or less miles by the closest feasible means of access from the nearest boundary of the primary location shall be work to be done at the site, effective August 1, 1977.

1321.1.3 Hauling of material between a primary location and a secondary location located in excess of five (5) miles by the closest feasibly means of access from the nearest boundary of the primary location shall not be work to be done at the site, effective August 1, 1977.

1321.2 Effective January 1, 1978, the mileage outlined in paragraphs 1321.1.2 and 1321.1.3 will be increased to six (6). Effective July 1, 1978, the mileage outlined in paragraphs 1321.1.2 and 1321.1.3 will be increased to seven (7). Effective January 1, 1979, the mileage outlined in paragraphs 1321.1.2 and 1321.1.3 will be increased to eight (8). Effective July 1, 1979, the mileage outlined in paragraphs 1321.1.2 and 1321.1.3 will be increased to nine (9). Effective January 1, 1980, the mileage outlined in paragraphs 1321.1.2 and 1321.1.3 will be increased to ten (10).

1321.5 It is expressly understood that if a haul is covered by the terms of this Section, all time spent on any public road shall be covered as well as all other time spent in connection with such haul.

It was concluded that Section 1321 does not have an unlawful purpose insofar as it attempts to limit the coverage of Article XIII to work done at the site of construction. However, its lawful purpose is defeated by the broad definition of construction work done at the site which is included in subsection 1321.1. 11/ As noted in the analysis of Section 1302 above, the hauling of materials and supplies is normally held to be non-construction work. 12/ But, even if the dump truck owner-operators are considered to be engaged in construction work, subsections 1321.1.2, 1321.1.3, 1321.2, and 1321.5 allow such work to be performed not at the actual jobsite, but at any site within the artificially created "boundary of the primary location." These provisions are so broad as to eventually include within the definition of jobsite any location up to ten miles from the site of construction and thus bear little or no relation to the actual jobsite considerations envisioned by the construction industry proviso. Thus, it was concluded that the broad subsections of Section 1321 clearly evince an unlawful intent on the part of the parties to apply Article XIII to owner-operators wherever they may be working, not just at the actual site of construction. Accordingly, Section 1321 operates to remove Section 1302 and all the other secondary provisions of Article XIII from the protection of the 8(e) proviso.

In addition, Section 1302 and the other secondary clauses discussed infra, do not come within the proviso for the reasons set forth in the Supreme Court's decision in Connell. Thus, even assuming arguendo, that the Union has a collective bargaining relationship with the employer-members of the AGC, as contemplated by Connell, 13/ the clause is operational at all times and sites, even when the employer-member involved has no employees working on the jobsite who are represented by the Union. 14/ Furthermore, since Section 1302 requires that owner-operators be employees of the general contractor, and thus Union members, this Section has a particular union intent. 15/ Thus, it is the particular signatory Unions here, instead of unions in a generic sense, who stand to benefit from the imposition in Section 1302 of employee status and the application of all terms and conditions in the MLA to these independent contractors.

11/ The presumption that a secondary clause is intended to apply to jobsite work, as set forth in Fowler-Kenworthy Electric Co., 151 NLRB 770, was considered to be rebutted in this case by the contract, which contains an overly broad definition of jobsite.

12/ See cases cited in fn. 9, supra.

13/ See General Counsel Memorandum 76-57, "Guidelines for Handling Section 8(e) Construction Industry Proviso Cases Under the Supreme Court's Connell Decision," dated December 15, 1976, at p. 18.

14/ Id., at 8-10.

15/ Id., at 11-16.

1303. Hiring:

The Contractor or subcontractor shall make every reasonable effort to refer to the Local Union with area jurisdiction over the work all Owner-Operators or drivers of equipment for clearance before work begins; and, in any event, the Union shall be notified of the name and social security number of the Owner-Operator within forty-eight (48) hours after the Owner-Operator begins work on that job.

It was concluded that the union clearance requirement is secondary inasmuch as it serves no legitimate primary work preservation purpose. Section 1303 does not proscribe subcontracting to owner-operators, and there is no indication, in any event, that traditional unit work is being performed by owner-operators. The Union clearance requirement appears instead to have been intended to provide the means by which the Union can police contractual provisions requiring owner-operators to be treated as employees and, consequently, to be Union members. Thus, the clearance function can only be construed as a secondary restriction on the Employer's right to do business with the owner-operators. This restriction is akin to the hiring hall restriction in Falstaff Brewing Co., 16/ which the Board found to be violative of 8(e). Moreover, the fact that the command of the Section is couched in relatively nonimperative terms -- i.e., "make every reasonable effort to refer to the Local Union" -- does not vitiate the cease doing business effect of the clearance requirement, 17/ particularly when Section 1303 is read in light of other Sections (1306, 1307, and 1321.6) of the MLA, 18/ which mandate employee status and Union membership as a condition to continued business dealings with owner-operators. Finally, Section 1303 was viewed as outside the construction industry proviso, as detailed in the discussion of Section 1302.

16/ Local 585 of the Brotherhood of Painters, Decorators & Paper Hangers of America, AFL-CIO (Falstaff Brewing Corp.), 144 NLRB 100.

17/ N.L.R.B. v. Local 825, Operating Engineers (Burns & Roe), 400 U.S. 297 (1971). See also District No. 9, International Association of Machinists, AFL-CIO (Greater St. Louis Automotive Association, Inc.), 134 NLRB 1354; Meat & Highway Drivers, Local Union No. 710 (Wilson & Co., Inc.), 143 NLRB 1221.

18/ See, e.g., General Teamsters Local 982 (J.K. Barker Trucking Co.), 181 NLRB 515, 519.

1306. Union Membership:

(a) All employees who are presently members of a Local Union hereunder shall, as a condition of continued employment, maintain such membership in good standing.

(b) As a condition of continued employment, all employees covered by this Agreement shall on the 8th day after commencing employment under this Agreement, or the date of this Agreement, whichever is later, become and remain members of the Local Union in good standing.

1307. Terminations:

The Contractor or subcontractor will terminate the employment of any employee covered by this Agreement after notice by the Union, or the Local Union with jurisdiction in the event such employee shall fail to comply with Section 1306 of this Article; provided that membership in the Union, or the Local Union with jurisdiction was available to such employee on the same terms and conditions generally applicable to other members, and the membership was not denied or terminated for reasons other than the failure of the employee to render the periodic dues, and the initiation fees uniformly required as a condition of acquiring and retaining membership. Such employee shall not be re-employed by the Contractor or subcontractor until the employee has paid or tendered to the Local Union with jurisdiction, any such initiation fee, reinitiation fee or dues accrued to date of termination.

1321.6 The Owner-Operator shall become a bona-fide employee as defined in paragraphs 1301 and 1302 upon reporting for work on the first day on that job, such employee status to be effective from the first hour of work performed.

It was concluded that Sections 1306, 1307, and 1321.6 are inextricably intertwined with each other and evidence a secondary, cease doing business intent with respect to owner-operators (independent contractors) who do not submit to the requirement that they be placed on the payroll as employees and become members of the Union eight days after commencing employment. 19/ Further, as detailed in the analysis of Section 1302, these clauses are not saved by the construction industry proviso to Section 8(e).

19/ See cases cited in footnote 6.

1312. The provisions of this Article have been negotiated and agreed upon by and between the parties for the objects and purposes expressed in Paragraph 1313 of the Article. The parties have not undertaken to negotiate for the employees any profit whatsoever for the leasing and rental of the equipment they drive. On the contrary, compensation for the equipment shall be set by Agreement between the Contractor and the Owner-Operator at a level which will not circumvent or defeat the payment of wages, fringes and conditions of any employee covered by this Master Labor Agreement and which will assure compensation to the Owner-Operator of not less than the actual cost of operation of such equipment.

1313. It is further mutually understood and agreed that the intent of this Article is to assure the payment of wages, fringes, and conditions as provided in the Master Agreement and to prohibit the making and carrying out of any plan, scheme or device to circumvent or defeat the payment of wages, fringes and conditions as provided in this Master Agreement. Any such agreement, contract or arrangement presently in existence shall be abrogated upon the execution of this Agreement.

It was concluded that the first sentence of Section 1312 is an unlawful Union signatory clause when read together with Section 1313, discussed infra. However, it was concluded that the remainder of Section 1312 is primary and lawful. The provision allowing the owner-operator and the Employer to set equipment usage rates at any level which will not circumvent the wages, fringes or conditions of any employee is tantamount to a union standards clause which safeguards the interests of the employees in the primary unit by preventing any use of the equipment usage fee as a device to avoid union standards.

Section 1313 was concluded to be secondary and violative of 8(e) in that "the payment of wages, fringes, and conditions" required by the MLA go beyond economic equivalents and dictate precisely the wages and benefits owner-operators will receive, 20/ leaving them no leeway to negotiate their own agreements as independent contractors. Moreover, the provision requires a cessation of business with any owner-operator who does not agree to abrogate any contrary existing agreements. Finally, Sections 1312 and 1313 are not privileged by the construction industry proviso for the reasons detailed supra.

1314. It is further agreed that the Contractor will not devise or put into operation any scheme, whether herein enumerated or not to defeat the terms of this Article of this Master Agreement, nor shall any Owner-Operator's arrangement with a Contractor be terminated for the purpose of depriving any other employee of employment. In the event that the Contractor has available equipment, the Owner-Operator may be assigned to operate such equipment on the job during the period of the repair of the Owner-Operator's equipment and not to exceed that work shift and so long as no employee is laid off to provide work for such equipment.

20/ California Dump Truck Owners Association, supra; Dimeo Construction, supra.

It was concluded that the first part of Section 1314, ending with ". . . this Master Agreement" is violative of Section 8(e) as it reaffirms those portions of Article XIII, such as Sections 1302 and 1306, which have been found to be violative of Section 8(e). However, the remainder of Section 1314 is a primary work preservation clause which insures that no employee of the general contractor will be laid off because of the use of owner-operators during the period of an equipment repair.

1318. It is recognized that many Owner-Operators have executed "short-form" agreements with the Teamsters Union which incorporate by reference provisions of this Master Labor Agreement. The provisions of such "short-form" agreement shall be applicable to said Owner-Operators only in their capacity as employers, i.e., when such Owner-Operators are employing one or more employees. When Owner-Operators are working on a job covered by this Master Labor Agreement their employment shall be covered by the Owner-Operator clause of this Agreement.

It was concluded that only the last sentence of Section 1318, which refers to owner-operators in their capacity as employees of the general contractor, is secondary and violative of Section 8(e) insofar as it requires observance of all terms of Article XIII, including those found unlawful herein. 21/

1319. If a Contractor through the grievance procedure is found violating any portion of this Article, the Joint Adjustment Board or the Impartial Chairman, as described in Article V, shall require the Contractor to immediately pay compensatory damages for each Owner-Operator with respect to whom the Contractor is in violation in an amount equal to the sum of Health and Welfare and Pension contributions, under the terms of this Agreement, for eight hours for each day or portion thereof the violation occurred, such damages to be made payable to the Construction Teamsters Security Fund by check promptly mailed to the respective Local Union. The Joint Adjustment Board or Impartial Chairman may also grant such further relief as may be deemed appropriate.

1319.1. Notwithstanding any other provision of this Agreement, the sole and exclusive remedy for any violation of this Article XIII shall be sought under the provision of Article IV of this Appendix.

21/ See discussion of Section 1302, supra.

It was concluded that Section 1319 is violative of Section 8(e) as an unlawful secondary clause outside the ambit of the construction industry proviso. The provision requiring immediate payment of compensatory damages into the Construction Teamsters Security Fund was viewed as a penalty clause similar to that involved in Calhoun Drywall. 22/ In that case, a delinquency clause was used to force the Employer to make fringe benefit payments on behalf of the employees of a non-signatory subcontractor, payments which the trustees of the funds could not legally accept. The Board found that the payments required by the clause were "strictly a penalty" imposed upon the Employer for subcontracting to a non-union subcontractor. Similarly, it would be argued that since the Employer and the Union cannot lawfully agree - as they seek to do, for example under Sections 1302 and 1306 of Article XIII - that owner-operators are to become employees, the compensatory damage requirement, which becomes operative upon a breach of those provisions can only be regarded as a penalty assessed against noncomplying employers. Thus, the clause has the secondary effect of forcing Employers either to cease doing business with the owner-operators as independent contractors or to pay what amounts to a monetary penalty to the Union.

Further, Section 1319 serves no primary purpose of protecting the unit employees of the signatory general contractor. First, the section does not protect the unit employees by discouraging subcontracting of unit work; indeed, there is no indication that the work done by the owner-operators has historically been performed by unit employees. 23/ Instead, the clause, as read together with other sections of Article XIII such as 1302, 1306, and 1307, is aimed not at discouraging subcontracting but rather at forcing owner-operators to become employees and members of the Union. This section, thus, contains within it the very evil, i.e., top-down organizing by a Union, which Congress intended to eliminate by enacting Section 8(e). 24/ In addition, the compensatory damage portion of Section 1319 is applicable to violations of all provisions contained in Article XIII, many of which have been found to be secondary, and unlawful, not just to those provisions which may have

22/ Orange Belt District Council of Painters, No. 48, AFL-CIO (Calhoun Drywall Company), 153 NLRB 1196, enf'd. 365 F.2d. 540 (C.A. D.C., 1965). See also Advice Memoranda in Oregon, Southern Idaho and Wyoming District Council of Laborers (R.A. Chambers), Case 36-CE-19, dated October 5, 1977; and Rocky Mountain District Council of Carpenters, et al. (Neilsen & Co.), Cases 19-CC-947, 19-CB-2947, dated August 5, 1977.

23/ Cf. Southern California Pipe Trades District Council No. 16 (Kimstock Division, Tridair Industries, Inc.), 207 NLRB 711, in which a contractual provision assessing damages for the breach of a provision forbidding the subcontracting of traditional unit work was found to be primary.

24/ Connell Construction Company v. Plumbers, supra.

a lawful work preservation object. Finally, the amount of compensatory damages is arbitrarily set without reference to any alleged monetary loss on the part of unit employees. 25/ In Acco Construction, 26/ a similar monetary penalty, which provided for compensatory damages at the rate of one day's pay at the highest journeyman rate for each violation, was found to be coercive under 8(b)(4)(ii)(B) because it did not relate to actual damages flowing from the contract violation. 27/ Accordingly, Section 1319 was deemed unlawful as a penalty clause which has a secondary cease doing business object unrelated to any legitimate interest of unit members and which falls outside the ambit of the construction industry proviso. 28/

1320. Separability:

If any paragraph of this Article XIII should be held invalid by operation of law or by any tribunal of competent jurisdiction, or if compliance with or enforcement of any paragraph of this Article XIII should be restrained by such tribunal pending a final determination as to its validity, the remainder of this Agreement or the application of such Article or paragraph to persons or circumstances other than those as to which it has been held invalid or as to which compliance with or enforcement of, has been restrained, shall not be affected thereby. Should the foregoing eventually arise, the parties agree to negotiate substitute paragraphs or Articles upon sixty (60) days' written notice by one to the other. In the event the parties fail to reach agreement within sixty (60) days following the beginning of such negotiations, either party shall be free to take whatever economic or legal action it may deem necessary in support of its bargaining position, notwithstanding the no-strike provisions of this Agreement; provided, however, that the party initiating such action shall give to the other party a fifteen (15) day written notice of intention to take such action.

25/ Cf. Southern California Pipe Trades District Council No. 16 (Associated General Contractors of California, Inc.), 207 NLRB 698.

26/ Operating Engineers Local 12 (Acco Construction), 204 NLRB 742.

27/ Id., at 757.

28/ See discussion of Section 1302, supra.

Section 1320 was concluded not to be secondary and therefore lawful under Section 8(e). However, it is clear that Section 1320 is to be viewed as a separability clause and not a savings clause since it evinces no intent not to enforce any unlawful provision. The clause merely contemplates the excission of any provisions found to be unlawful by "any tribunal of competent jurisdiction," but would leave unaffected other clauses which may be facially invalid but which have not yet been adjudged unlawful.

II. Case 21-CE-197

The contract provisions in issue in Case 21-CE-197 and the analysis applicable to each are set forth below.

Section 42
Teamster Working Rules

B. OWNER-OPERATOR:

1. The EMPLOYER may obtain trucks or equipment from any source, however, the operators on such trucks or equipment will be properly cleared before starting to work on the second day. The Owner-Operators of such trucks or equipment must furnish proof of legal or registered ownership. In order for the Owner-Operator to be properly cleared, he must present himself and proof of legal or registered ownership at the UNION'S office, and once properly cleared, such clearance is valid in San Diego County until there is a change in the Owner-Operator's equipment status.

* * * *

11. Notwithstanding any other provision of this Agreement, this Section 42 shall be applicable only to Owner-Operators performing (or who, upon their employment, will be performing work to be done under Section 4.

It was concluded that subsection 1 of Section 42.B. is violative of 8(e) for the reasons enunciated in the analysis relating to Section 1303, in Case 21-CE-196. Additionally, while this clause, at first glance, may appear to mandate clearance only for the purpose of establishing legal ownership, the clause was viewed more realistically as setting up a mechanism for identifying owner-operators so as to enable the Union to police contract provisions requiring each owner-operator to become a Union member. In any event, the clause was not viewed as serving any legitimate primary interest, such as preserving unit work or protecting members from working alongside non-union workers.

Further, this clause, as is also true of all other secondary clauses in this Section which are discussed below, was concluded to be outside the protection of the construction industry proviso insofar as it is related to subsection 11, which incorporates Section 4 of the MLA. In an earlier Advice Memorandum in International Union of Operating Engineers, Local 12 (San Diego Building Contractors Association), Cases 21-CE-194 and 21-CE-195, dated March 29, 1978, Section 4 of the MLA under consideration here was concluded to be violative of 8(e) because it "expressly designates non-jobsite and non-construction-related work" as work covered by the contract. See Advice Memorandum at p. 4.

2. The EMPLOYER may procure Owner-Operators from a person, firm, corporation or other business entity which is signatory to an agreement with the Union, and who are making proper fringe benefit payments. Such person, firm, corporation or other business entity will be considered for the purposes of this Agreement to be a subcontractor.

Should any portion of the Owner-Operator language contained in this Agreement be ruled null and void or unenforceable by a court of competent jurisdiction or the NLRB, said ruling effecting that section of the Owner-Operator language shall immediately be deemed to be incorporated into this Agreement until the provision of Section 10 (General Saving Clause) are invoked.

It was concluded that the first paragraph of subsection 2 is a union signatory clause which is unlawful on its face since it requires that the brokers of owner-operators be signatory to an agreement with the Union. It could not be contended by the Union that these brokers are performing or have ever performed unit work. 29/ Nor does the clause proscribe all subcontracting, only subcontracting to a nonsignatory broker. In addition, a broker performs referral services, as distinguished from construction work to be done at the jobsite, thus taking this clause outside the ambit of the 8(e) proviso. Further, this portion of Section 2 is outside the proviso for all three reasons enunciated in Connell; i.e., it is not limited as to times and sites, and it evinces a particular union intent.

29/ For a detailed discussion of the broker system in Southern California, see the Board's decision in Contractor Members of the Associated General Contractors of California, 201 NLRB 311.

In regard to the second paragraph of subsection 2, it was concluded that it is not a valid savings clause and, hence, would not save any of the secondary portions of Section 42.B. This Section does not express the intent to enforce the owner-operator clauses only to the extent permitted by law but merely provides for the incorporation into the contract of any adverse court or NLRB rulings until the applicable separability and re-negotiation provisions of Section 10 can be invoked. Thus, it is possible that unlawful secondary provisions could be enforced until an adverse ruling is handed down. 30/ Indeed, the evidence in this case points to the fact that the Union is attempting to enforce the secondary provisions regarding employee status and union membership even though the provisions are clearly unlawful on their faces under existing Board and Court decisions.

3. The Contractor expressly reserves the right to control the manner, time, means and details of, and by which the Owner-Operator performs his services, as well as the ends to be accomplished, and shall be the sole judge of the capability of the Owner-Operator's equipment to perform the work required to be performed and may, if the Contractor determines that the Owner-Operator equipment is not capable of performing the work required to be performed, terminate such Owner-Operator's services. Failure to work the day or one-half (1/2) day out, as directed, shall terminate the Owner-Operator's employment, and he shall be paid only for actual time worked prior to such failure. The Contractor shall not pay for time spent by the Owner-Operator in repairing, servicing, or maintaining his equipment after termination of employment or before or after his shift or half-shift, as the case may be.

FOIA Exemption 5.

31/

30/ See Advice Memo in International Union of Operating Engineers, Local 12 (San Diego Building Contractors Association), Cases 21-CE-194 and 21-CE-195, dated March 29, 1978, at p. 10. Cf. Advice Memoranda in Ironworkers Union Local 433 (A.G. Tutor Company, Inc.), Case 21-CE-163, dated October 13, 1977; and Carpenters Local 35, et al. (Standard Cabinet Works, Inc.), Case 20-CE-150, dated May 11, 1978.

31/ FOIA Exemption 5.

4. The Owner-Operator shall be carried on the payroll of the Contractor as an employee and as such, all the terms and conditions of this Master Agreement and any amendment or amendments thereto, shall be applicable to him, except as provided elsewhere in this Section and except that in the event that it is determined that the services of an Owner-Operator were terminated, any payment for time lost shall be limited to the wage and fringe benefit payments provided in this Agreement, and shall not in any event include any payment with respect to the equipment or the loss of use thereof; and except, further, that the Owner-Operator shall not be subject to the provisions of paragraphs 1, 2, 3, 4, 4(a), 4(b), 4(c) of Section 26 of this Agreement.

Subsection 4 was deemed to be violative of 8(e) of the Act for the reasons enunciated in connection with Section 1302 in Case 21-CE-196.

9. It is further mutually understood and agreed that the intent of this Section is to assure the payment of wages, fringes, and conditions as provided in this Master Agreement and to prohibit the making and carrying out of any plan, scheme or device to circumvent or defeat the payment of wages, fringes and conditions as provided in this Master Agreement.

It was concluded that subsection 9 is violative of 8(e) for the reasons enunciated in the discussion of Section 1313 in Case 21-CE-196.

12. If the Employer through a three man committee, selected in accordance with the procedure described in the Stewards Clause contained in Section 14, is found violating any portion of this section, the EMPLOYER shall immediately pay for each Owner-Operator with respect to whom the EMPLOYER is in violation, a sum equal to one day's pay at the highest hourly rate covering wage and fringe benefit costs under this Agreement for each day or portion thereof the violation occurred, such money to be made payable to the Leukemia Society, San Diego Chapter, by check and promptly mailed to Teamsters, Local No. 36.

It was concluded that subsection 12 is violative of 8(e) for the reasons enunciated in the discussion of Section 1319 in Case 21-CE-196. In addition, this clause is even more clearly a penalty than the one in the latter case because it does not even provide payment of the compensatory damages into a trust fund for the benefit of unit members. Instead, subsection 12 requires payment to a charitable organization from which employees derive no special benefits, further evidence that this clause clearly is designed not to protect unit members but to discourage subcontracting with owner-operators who refuse to become employees of the general contractor and Union members.

13. When a truck or piece of equipment is driven or operated by its owner and is used on work covered by this Agreement, the Owner-Driver or operator of said truck, or piece of equipment, shall receive a rate of pay not less than that specified in this Agreement and shall be subject to the terms and conditions of this Agreement.

Subsection 13 was viewed as merely a restatement of such union signatory clauses as subsection 4, requiring an owner-operator to be bound by all the terms and conditions of the MLA. Moreover, subsection 13 is not within the ambit of the proviso since it is operative as to all "work covered by this Agreement," some of which is arguably not jobsite work. 32/

Thus, it was concluded that further proceedings were warranted as to those clauses in Cases 21-CE-196 and 21-CE-197 which have been found to be violative of Section 8(e) as hereinabove discussed.

H.J.D.

32/ See discussion of subsection 11, supra, for relevant analysis.