

A.D.

05883 RELEASE

Digest

UNITED STATES GOVERNMENT
National Labor Relations Board



Memorandum

COPIES PLEASE

TO : Abraham Siegel, Regional Director
Region 31

DATE: July 31, 1978

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

584-2577-3300
584-3740-1700
584-3755
584-5042
584-8700

SUBJECT: International Union of Operating Engineers
Local 12 (No Employer Named)
31-CE-100

This case was resubmitted to Advice on the issue of whether an 8(e) complaint should issue as to Appendix J, Article XI of the Master Labor Agreement of IUOE Local 12 (the "Union"), Section R of which pertains to owner-operators of backhoes. 1/

FACTS

On July 1, 1977, within the 10(b) period of the original charge, the Union and 4 other labor organizations entered into a master labor agreement (MLA) with 4 Employer associations. This agreement covers a wide range of construction-related workers, including in Appendix J both incorporated and unincorporated backhoe owner-operators. 2/

The Region has found that certain backhoe owner-operators to whom the agreement, including Appendix J, has been applied are independent contractors rather than employees. It is clear from the evidence that the Union has attempted to apply the terms of the agreement to all owner-operators. In this regard, the Union business representative has allegedly told a major state-wide contractor that "all backhoe operators were to be put on the payroll," and that non-compliance could result in a fine and liability for backpay running to the operator on the top of the Union out-of-work list. Another contractor has stated that he understood the contract to require him to put all backhoe owner-operators on the payroll and has so applied the contract.

1/ In the original Advice Memorandum dated February 28, 1978, the Region was authorized to issue an 8(e) complaint regarding the subcontracting clauses. However, the Region was instructed not to issue complaint regarding Appendix J since there was no evidence to show that the clauses therein had been applied to independent contractors.

2/ The Region has determined that all of the owner-operators involved in this case are unincorporated.



FOIA Exemptions b and 7(c).

Finally, union business agents informed one backhoe operator that the Union had to do something to get rid of the owner-operators, and that by enforcing the contract terms they hoped to make it so expensive for the signatory employers that they would cease utilizing the owner-operators.

ACTION

It was concluded that, since the evidence shows that backhoe owner-operators are independent contractors, Section 8(e) complaint should issue as to any of the following provisions which are found to be violative of the Act.

APPENDIX J, ARTICLE XI WORKING RULES

R. Owner-Operator

1. Whenever "Owner-Operator" is used in this paragraph it means Operating Engineer equipment Operator-Employee only. The classification of Heavy Duty Repairman/Welder or a Lubrication and Service Engineer of equipment (generators, welding machines, fixed drills, grease trucks, lube trucks) are covered elsewhere in this Agreement. Nothing in this paragraph shall apply to any person or equipment except where the owner of the equipment operates the equipment in the performance of work, covered by this Agreement for an individual Employer.
2. An Owner-Operator is a person who has legal or equitable title to his equipment, and operates the equipment himself on work covered by this Agreement, and he shall operate only that equipment to which he has legal or equitable title. An Owner-Operator shall have proof of ownership of the equipment being operated in his possession at all time, and shall produce such proof of ownership upon request by the Union or the Contractor. It is further agreed that at any time an individual Owner-Operator has more than one piece of equipment, on any given job or project, the provisions of this Paragraph R will not apply to the additional equipment, rather, Article IV of the Basic Agreement shall become applicable.

It was concluded that subsection 1 does not, in itself, violate Section 8(e) of the Act since it merely defines the owner-operator covered by this Article. Subsection 2 further defines an owner-operator as one who has title to the vehicle and in addition requires that the owner-operator be able to produce proof of ownership to the Union or the Contractor. It was concluded that this provision is ambiguous ^{3/} and cannot be a violation unless there is extrinsic evidence to show that the proof of ownership provision imposes a substantial change in the Employer's way of doing business with the owner-operator so as to amount to an unlawful restriction on the signatory Employer's right to do business with owner-operators. ^{4/}

3. The Owner-Operator shall not be subject to the provisions of Paragraph D, subparagraphs 2(a)(b) and (c), Article II of this Appendix, provided that the Owner-Operator has signed a W-4 form and becomes a bona fide employee of the Employer prior to going to work, and the Union shall be notified of the name and Social Security Number of the Owner-Operator within twenty-four (24) hours after the Owner-Operator is hired, such notice to be given to the Dispatch Office in the district in which the work is being performed, and confirmed in writing within twenty-four (24) hours thereafter. A copy of the notification shall be furnished by the contracting Employer to the Owner-Operator and this copy shall be in the possession of the Owner-Operator at all times, so long as he remains on the job or project. This notice must be produced upon request by the Union. Failure of the Owner-Operator to produce a copy of the aforementioned notification and proof of ownership of the equipment being operated shall be cause for his removal from the job or project until the Owner-Operator and the Employer have complied with the requirements of this paragraph.

3/ General Teamsters Local 982 (J.K. Barker Trucking Co.),
181 NLRB 515, 517.

4/ NLRB v. Local 825, Operating Engineers (Burns & Roe), 400
U.S. 297 (1971)
FOSA Exemption 5,

It was concluded that the first portion of subsection 3 is violative of Section 8(e) on its face as it applies to unincorporated owner-operators found by the Region to be independent contractors who are required to become employees under subsection 4(a), as discussed infra. 5/ Therefore, as to those unincorporated independent contractors, subsection 3 manifests a cease doing business intent. 6/

However, it was concluded that the latter portion of subsection 3, which provides for removal of an owner-operator from the job for failure to produce the requisite notification after he has become an employee, is not unlawful on its face since there is a possibility that it might be applied only to bona fide statutory employees as opposed to owner-operators who are independent contractors. Nevertheless, if the Region determines through extrinsic evidence that this provision is intended to be applied, or was in fact applied, to owner-operators regardless of whether they are statutory employees, then this latter portion of the provision would be argued to be also secondary. 7/

Furthermore, the secondary clauses in question are outside the protection of the construction industry proviso to Section 8(e) because the definition of the work covered is overbroad. Thus, Appendix J, Article I, provides as follows:

- A. In addition to the Basic Agreement coverage, this Agreement shall also include: work in the Contractors' yards and shops, field survey work, asphalt, screening, soil cement, and crushing plants and operations, forest fires, flood and emergency work.

5/ See page 6, infra. Subsection 4(b) classifies incorporated owner-operators as subcontractors rather than employees. These incorporated owner-operators are therefore covered by the subcontracting provisions in the MLA and are therefore not involved in this analysis of Appendix J, Section R.

6/ For a detailed discussion of the secondary nature of such clauses requiring independent contractors to become employees and union members, see Section 1302 of the Advice Memorandum in Joint Council of Teamsters #42 et. al. (Associated General Contractors of California), Case Nos. 21-CE-196 and 197, dated July 31, 1978 (copy attached). This memo will hereinafter be referred to as Joint Council of Teamsters #42.

7/ See analysis of the Union clearance function in the discussion of Section 1303 of the agreement involved in Case 21-CE-196 (Joint Council of Teamsters #42, supra).

It is clear that some or all of the above work, which might possibly be done by backhoe owner-operators, is non-construction or non job-site work. Thus, in view of the legislative history indicating that the proviso is to be narrowly construed, 8/ it was concluded that the work covered in Appendix J, Article I, Section A is so broad as to defeat any inherent lawful presumption with respect to jobsite work 9/ and to remove the secondary clauses in Appendix J from the protection of the proviso to Section 8(e).

In addition, the secondary clauses in Appendix J are not proviso-protected because of the reasons enunciated in Connell. 10/ First, none of the clauses are limited to those times and sites when and where the Employer employs unit members represented by the Union. 11/ Also, the clauses in Section R of Appendix J clearly manifest a particular union intent; i.e. it is not enough that backhoe owner-operators be members of a union in the generic sense--they must be members of this Local. 12/

4. (a) The Owner-Operator who is not incorporated shall become a bona fide employee of the Contractor, as defined in this Agreement, upon reporting for work and, as a condition of continued employment as an employee, the Owner-Operator shall notify his local Union prior to going to work, and confirmed in writing by the Employer within twenty-four (24) hours. Such employee status to be effective from the first hour of work performed on the job or project.

(b) An incorporated Owner-Operator shall, for the purposes of this Agreement, be designated and recognized as a subcontractor and, as such, shall provide the Contractor, Union, and the Trust Funds, with bona fide information to the effect of such incorporation.

(c) Failure to conform with any of the provisions contained in Paragraph 4(b), above, shall cause the Owner-Operator to revert to employee status and on the Contractor's payroll.

8/ International Union of Operating Engineers, Local Union No. 12 (Robert E. Fulton), 220 NLRB 530, 536. See also International Brotherhood of Boilermakers (Bigge Drayage Co.), 197 NLRB 281.

9/ Cf. Fowler-Kenworthy Electric Co., 151 NLRB 770.

10/ Connell Construction Co. v. Plumbers Local 100, 414 U.S. 616 (1975).

11/ See General Counsel Memorandum 76-57, "Guidelines for Handling Section 8(e) Construction Industry Proviso Cases Under the Supreme Court's Connell Decision," dated Dec. 15, 1976, at pp. 8-10.

12/ Id., at 11-16.

It was concluded that subsection 4(a) is a union signatory clause since it requires that independent contractors become employees of the general contractor and, through the union security clause in the MLA, union members. 13/ Thus, this section has a cease doing business effect when applied to independent contractor backhoe owner-operators. 14/

Subsection 4(b), on the other hand, was not deemed to be clearly unlawful on its face as it defines incorporated owner-operators as subcontractors. However, if the Region discovers extrinsic evidence to show that the provision requiring documentation of incorporation is being used by the Union to restrict subcontracting to owner-operators who will submit to becoming employees of the General Contractors and members of the Union, then further proceedings would be warranted as to 4(b) as well.

As to 4(c), that provision was viewed as secondary on the theory that it requires an Employer to cease doing business with an incorporated owner-operator who does not furnish the information required by subsection 4(c). This provision is clearly unlawful on its face because it mandates that an incorporated owner-operator, clearly recognized in 4(b) to be an independent contractor, must become an employee. The "reversion" contemplated by this clause thus does not result from any legitimate change in the nature of the owner-operator's business or in the manner of control of his work and only serves the Union's organizational interest in having as many independent contractor owner-operators as possible become employees and members of the Union.

5. Separate checks shall be issued to such Owner-Operator for:
 - (1) employee's wages, as defined in Paragraph B of Article VI in the Basic Agreement and,
 - (2) for his equipment.

It was concluded that subsection 5 does not violate Section 8(e) unless it amounts to such a substantial change in the Employer's way of doing business with owner-operators as to be tantamount to a cessation of business with said operators. 15/

13/ MLA, Article II, Paragraph D.

14/ See analysis of Section 1302 in the attached memo.

15/ See footnote 4, supra.

6. All hours worked or paid for under the terms of this Paragraph R, shall be reported to, and payments made to, the Operating Engineers Trust Funds, as provided for in this Agreement.

Subsection 6, when read together with subsection 4(a), was deemed to be a secondary clause in that the Employer can deal only with those independent contractor owner-operators who become employees and who are reported to the trust funds.

7. The individual Employer will not devise or put into operation any scheme to defeat the terms of this section of this Agreement.

It was concluded that subsection 7 is secondary for the reasons enunciated in the discussion of Section 1314 in Joint Council of Teamsters #42, Case 21-CE-196.

8. If a Contractor, through the grievance procedure, is found violating any portion of this Article, the Contractor shall immediately pay compensatory damages in the amount of one day's pay at the Group 9 rate for each day or portion thereof that the violation occurred, such damages to be made payable to the Operating Engineers Health and Welfare Fund.

Subsection 8 was considered to be a penalty provision for the same reasons set forth in the analysis of Section 1319 in Joint Council of Teamsters #42, supra, Case 21-CE-196.

As all of the secondary provisions of Article XI of Appendix J, discussed supra, are not within the ambit of the 8(e) proviso, 16/ Section 8(e) complaint as to those provisions is warranted, absent settlement.

H.J.D.
H.J.D.

16/ See discussion bearing on subsection 3, supra.