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UNITED STATES GOVERNMENT
National Labor Relations Board

Memorandum A.D. 01730

TO Roy H. Garner, Director
Region 28

DATE June 16, 1986

RELEASE

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

SUBJECT United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union No. 469, AFL-CIO
(Schneider, Inc. of Arizona)
Case 28-CE-38

584-1275-6700
584-1275-6733
584-2588
584-3701
584-4300

This case was submitted for advice as to whether a purported work preservation clause in the parties' collective bargaining agreement aimed at preventing "double-breasted" operations violates Section 8(e); and whether Union efforts to enforce the clause violated Section 8(b)(4)(ii)(A).

FACTS

Schneider, Inc. of Arizona (the Employer) is a wholly owned subsidiary of Schneider, Inc., which is itself owned by brothers Frank and Edward Schneider. Frank Schneider, in turn, owns at least 20% of a third corporation, Southern Industries, Southern Group, Inc. (SI).

The Employer apparently was established to complete an extensive construction project in Arizona. Work on this project commenced in 1982 and was performed pursuant to a collective-bargaining agreement 1/ which contained the following clause:

II
UNION RECOGNITION

> In order to protect and preserve, for the employees covered by this Agreement, all work heretofore performed by them, and to prevent, whether by direct or indirect methods, the practice of "double-breasted companies" as that term is used and commonly understood in the industry, it is agreed that:

1/ In November 1979, the Employer signed a memorandum agreement binding it to the terms of a then existing Pipe Trades Agreement and all successor agreements, the most recent of which runs from August 14, 1985 to February 13, 1988.

> A. 1. Contractors shall not directly or indirectly exercise any degree of common ownership, management, control or supervision with any business entity engaged in work of the type covered by this Agreement, unless such work is performed under the terms of this Agreement.
>
> A. 2. Contractors shall not in any manner, or through any subterfuge or design, directly or indirectly, be a party to (a) the operation of any business entity engaged in work of the type covered by this Agreement, unless such work is performed under the terms of this Agreement, or (b) any agreement, plan or understanding whereby the Contractors refrain from seeking to perform work of the type which they normally perform under the terms of this Agreement, or (c) any other agreement, plan or understanding which would have the effect of allowing work, by double-breasting as that term is commonly used in the construction industry, which would otherwise be performed in conformance with this Agreement to be performed contrary to the terms and conditions of this Agreement.
>
> A. 3. The term "Contractor" as used in the preceding provisions of this section shall include officers, directors, owners, partners, spouse or minor children, and stockholders holding ten percent (10%) or more of the outstanding shares of a Contractor.

. . . .

The Arizona project was completed in 1985, and the Employer apparently will be dissolved in December 1986 at the expiration of the warranty period. No unit work has been performed and no unit employees have been employed on the project since October 1985. SI, a nonunion company, has performed pipefitting construction work in Arizona comparable to the work covered by the Employer's collective-bargaining agreement since June 1985. SI does not apply the contract's terms to its employees.

On January 23, 1986, the Union filed a grievance alleging that SI was a double-breasted company with the Employer as defined in the collective-bargaining agreement and that the Employer breached Article II through SI's performance of unit work without applying the contract's terms. On or about March 4, a joint grievance committee sustained the Union's grievance based

upon Frank Schneider's 20% ownership share in SI. The arbitral award ordered the Employer to, inter alia, cease and desist from violating Article II and to require SI to "refrain from further doing business" covered by the contract within the Union's jurisdiction. The Union now plans to seek judicial enforcement of the arbitral award.

ACTION

Complaint should issue, absent settlement, alleging that Article II, Section A of the collective-bargaining agreement violates Section 8(e). Allegations that the Union violated Section 8(b)(4) by resorting to the contractual grievance-arbitration mechanism and by threatening to seek court enforcement of the resulting arbitral award should be dismissed, absent withdrawal.

For the reasons set forth in International Brotherhood of Painters & Allied Trades (Mangnaro Corp. of Maryland), Cases 5-CB-4687 et al., General Counsel's Minute dated September 24, 1985, we concluded that complaint should issue, absent settlement, alleging that Article II, Sec. A violates Section 8(e) on its face. Thus, like the "Work Preservation" clause in Mangnaro, the instant provision is secondary on its face, has a cease doing business object and is not saved by the construction industry proviso to Section 8(e). 2/ Apparently, the Region finds that the Employer and SI are separate persons. Thus, the clause is also being applied in an unlawful manner. 3/ Finally, the contract contains a self-help clause (Article VII, Sec. 4) which is independently unlawful, inasmuch as a secondary clause cannot be enforced through self-help. 4/

2/ With respect to the proviso, the clause itself is not confined to job-site work. Further, even if it were, the General Counsel's position in Mangnaro is that clauses like the instant one are not subject to the proviso's protection.

3/ FOIA Exemption 5.

4/ See, e.g., Southern California Pipe Trades District Council No. 16 (Jamco Development Corp.), 277 NLRB No. 128, slip op. at 7-8 (1985).

With respect to the 8(b)(4)(A) allegation, we note that the clause is unlawful on its face because it is broad enough to apply to entities that are persons separate from the signatory. However, it is possible to apply the clause in a lawful way, i.e., to apply it in circumstances where the signatory and the "other entity" are alter egos or a single employer. In the instant case, although the Employer and SI may well be separate persons, the available evidence does not establish that the matter is so clear as to make the Union's contention specious or in bad faith. In these circumstances, there is substantial doubt whether the Union's conduct is violative of Section 8(b)(4)(A). 5/ In any event, the remedy for the Section 8(e) violation would prevent the Union from taking any steps to enforce the agreement in an unlawful way. 6/ Thus, a Section 8(b)(4) allegation does not add materially to the remedy.

H. J. D.

5/ Cf. Teamsters Local 94 (California Dump Truck Owners Assn.), 227 NLRB 269, 272-274 (1976).

6/ See, e.g., Retail Clerks, Local 324 (Ralph's Grocery Co.), 271 NLRB 697, 697, 700 (1984); Jamco, supra, 277 NLRB No. 128, slip op. at 11.