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UNITED STATES GOVERNMENT
National Labor Relations Board

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Memorandum

TO : William T. Little, Regional Director
Region 25

DATE: March 31, 1986

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

584-1250-5000
584-5056

SUBJECT: Sheet Metal Workers International Association, Local 20 (Tonn and Blank)
Case No. 25-CE-32-1-2

This case was submited for advice on the issues of whether an "arbitral" award converted a facially valid subcontracting clause into a violation of Section 8(e) by applying the clause to off-site construction work and whether the no-strike and contract cancellation provisions constitute "self-help" clauses.

FACTS

The Employer is a general contractor which executed a collective bargaining agreement (herein the Gary agreement) with the Union outside the Section 10(b) period. This contract is effective from June 1, 1985 to May 31, 1986. The Gary agreement, which covers a limited geographic area, provides that, when working in a sister local's jurisdiction, "the employees shall receive the wage scale and working conditions" of the sister local. In the instant case, the Employer acts as "construction manager" and has subcontracted sheet metal work to non-Union contractors at three different Indiana locations, each governed by a different collective bargaining agreement between the Union and the area employer association. 1/

The Gary agreement, the only contract to which the Employer is signatory, contains a no-subcontracting clause applicable to on-site construction work (Article 14, Sections 2 and 3). The other three agreements also contain no-subcontracting provisions applicable to on-site construction work (Article 2, Section 1) and area standards clauses applicable to subcontracts for prefabricated material (Article 2, Section 2).

As part of the grievance procedure, all four agreements contain a no-strike provision applicable during the pendency of the grievance-arbitration process, and provide that decisions of the National Joint Adjustment Board shall be final and binding. Additionally, as part of the grievance procedure

1/ The Frankfort construction project is subject to the "Lafayette agreement," the Greencastle project is subject to the "Terre Haute agreement," and the Shelbyville project is subject to the "Indianapolis agreement". Only the Terre Haute agreement was executed within the 10(b) period.

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under the Gary and Indianapolis agreements, after a final decision by the National Joint Adjustment Board, "a Local Joint Adjustment Board, Panel, or any party to the dispute may . . . request the National Joint Adjustment Board to cancel the involved agreement . . . Unless otherwise decided by a unanimous vote, the National Joint Adjustment Board shall cancel such agreements if it finds the involved party to be in non-compliance with the decision . . . . "

As to the Employer's subcontracting at the Greencastle location (Terre Haute agreement) the Union filed a grievance on October 16, 1985 alleging that the Employer violated the no subcontracting clause (Article 2, Section 1) by using non-Union subcontractors. On October 24, the Local Joint Adjustment Board decided that the Employer had violated the contract and had to pay $18,000 in damages for the number of hours lost to the Union as a result of the subcontracting. Included in the Union estimate of hours lost was about 86 hours for items which the Employer had purchased and which were prefabricated elsewhere. The Employer appealed the Local Joint Board's decision to the National Joint Adjustment Board, claiming that the award was excessive because, inter alia, it included hours for off-site work. On December 9, the National Joint Adjustment Board summarily denied the appeal. The Employer has not complied with the award.

On October 30, 1985, the Union filed a grievance over subcontracting at the Frankfort project (Lafayette contract) which involved only job site work. On December 5 the Local Board found that, because the Gary agreement bound the Employer to the Lafayette contract, the Employer had violated Art. 2, Sec. 1 as well as Art. 14, and had to pay over $14,000 in damages for lost hours and wages. The National Joint Adjustment Board has not yet ruled on the Employer's appeal.

On November 5, 1985, the Union filed a grievance over job-site subcontracting at the Shelbyville site (Indianapolis contract). On November 26, that Local Joint Adjustment Board ruled against the Employer and ordered payment of $2,000 in damages. The Employer's appeal in that case is pending.

ACTION

We concluded that the Union violated Section 8(e) by applying Art. 2, Sec. 1 to off-site work at Greencastle. We further concluded that the Union violated Section 8(e) by applying the Gary and Indianapolis agreements since those agreements contain "self-help" provisions, i.e. they are enforceable through strikes or cancellations of contract.

Article 14 of the Gary agreement and Article 2 of the other agreements by their terms apply only to work performed at a construction site. Here, however, the National Joint Adjustment Board affirmed the Local Board's decision that Article 2, Section 1 of the Terre Haute contract is applicable to off-site work. This decision, which is tantamount to a final and binding arbitral award, constituted a bilateral reaffirmation and an "entering into"

of an 8(e) agreement within the 10(b) period. 2/ Therefore, the clause has lost the protection of the proviso and thus violates Section 8(e) insofar as it has been applied to off-site work.

Finally, the Gary and Indianapolis contracts contain self-help provisions. That is, the secondary provisions are contractually linked to the grievance-arbitration procedure, which prohibits strikes only during the pendency of the grievance and arbitration procedures. Thus, the contracts improperly sanction strikes to ensure compliance with the no-subcontracting provisions if, for example, the grievance procedure terminates short of a final award. Southern California Pipe Trades District Council No. 16 (Jamco Development Corporation), 277 NLRB No. 128 (1985). In addition, a breach of the secondary provisions can lead to a cancellation of the contract. A unanimous decision by the National Joint Adjustment Board is required to reject a Local Joint Adjustment Board's recommendation to cancel an agreement because of noncompliance with a final decision. The Union apparently is permitted to have a representative on both the Local and National Boards, and could potentially control such a decision. In effect, this permits the Union to cancel unilaterally its collective bargaining agreements with the Employer. Therefore, the contract cancellation provisions as well as the strike provisions constitute self-help. Ets Hokin, 154 NLRB 839, 842-843 (1965), enfd. 405 F.2d 159 (9th Cir. 1968), cert. den. 395 U.S. 921 (1969); Construction and General Laborers Union, Local 185 (West-Cal Construction, Inc.), 255 NLRB 53, 61 (1981). These self-help measures remove the protection of the construction industry proviso. Without that protection the secondary clauses violate Section 8(e). That the Union has refrained from using the economic sanctions does not warrant a different conclusion. Jamco Development, supra.

In sum, a complaint should issue, absent settlement, alleging that the Union violated Section 8(e) by applying the secondary no-subcontracting clause in the Terre Haute agreement to off-site work, and by entering into and maintaining the self-help measures in the Gary and Indianapolis contracts.

H. J. D.

2/ See, e.g., Los Angeles County District Council of Carpenters (Coast Construction Co., Inc.), 242 NLRB 801, 804 (1979) enfd. 97 LC ¶ 10248 (9th Cir. 1983); Retail Clerks-Union Local 770 (Hughes Markets, Inc.), 218 NLRB 680, n.11 (1975); District No. 9, IAM (Greater St. Louis Automotive Association, Inc.), 134 NLRB 1354 (1961), enfd. 315 F.2d 33 (D.C. Cir. 1962). See also International Union, United Mine Workers of America (Westmoreland Coal Co.), 117 NLRB 1072 (1957).