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UNITED STATES GOVERNMENT
National Labor Relations Board

Memorandum

TO : Francis E. Dowd, Regional Director
Region 12

DATE: April 7, 1986

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

518-2001-8300
518-4001
518-4020
584-5028
584-5056
590-2525-6700
590-2550-5000

SUBJECT: Miami Building and Construction Trades Council and Bayside Center Limited Partnership
Case 12-CE-40

and

Bayside Center Limited Partnership; H.C.B. Contractors; C.C.C. Electric of Georgia, Inc.
Case 12-CA-11863 (1-3)

These cases were submitted for advice on whether the Respondents' conduct and certain provisions of their project agreement violated Section 8(e) and/or Section 8(a)(2) of the Act.

FACTS

The City of Miami (the City) awarded to the Bayside Center Limited Partnership (the Developer) a contract to build the Bayside Specialty Center (the Project), a shopping center and parking complex in downtown Miami. A condition of the contract was that the Developer undertake as part of a Minority Participation Agreement, to make good faith efforts to set aside thirty-five percent of the total contract price, excluding tenant contracts, for Minority Business Enterprises (MBE's), and to fill fifty percent of the total job openings with minorities. The Developer has contracted with HCB contractors (HCB) and CCC Electric of Georgia (CCC) to be its prime contractors on the Project. As such, they are responsible to the Developer for the construction of the Project, which they can perform with their own employees or through the use of subcontractors. The Developer, however, remains ultimately liable to the City for the completion of the Project and can withdraw any or all of the work from HCB and/or CCC, performing that work instead either with its own employees or by reassigning it to different subcontractors.

In the spring of 1985, the Developer, HCB, and CCC (collectively referred to as "the Employer") began negotiating with the Miami Building and Construction Trades Council and the Teamsters (collectively, "the Unions") for a collective-bargaining agreement to cover the Project. As of the time of these negotiations, work had already begun at the Project site, the Developer having hired a non-union contractor to perform tree-removal work with a crew of laborers. While negotiations were ongoing, the Developer, HCB, and CCC held

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meetings with various subcontractors for the purpose of soliciting bids. At least one nonunion MBE, Independent Enterprises International, Inc., met with a representative of HCB during the summer and was asked to submit a bid. Independent submitted a bid in August, but was informed in September that it had not been awarded the contract because it (Independent) was nonunion. At least one other nonunion MBE, Mayo Electric Co., attended a meeting held by the Developer in June to solicit bids. The Developer told the MBE's who attended the meeting that it was not yet clear whether the Project would be union. Mayo Electric expressed interest in a sub-subcontract, but was informed by the subcontractor in July that the project was going to be union. 1/

On November 29, 1985, the Developer, HCB, CCC, and the Unions signed a Project Agreement, setting forth the terms and conditions of employment for the unit defined in Article I, Section 4, infra, and covering:

> all construction work performed by Developer, its contractors, subcontractors, and sub-subcontractors and by HCB Contractors and CCC Contractors and their subcontractors to be performed in the construction of a specialty retail shopping complex to be known as the "Bayside Specialty Center" and its adjacent parking garage, as well as related on-site and off-site improvements (the "Project") located in, and adjacent to, Bay Front Park, Miami, Dade County, Florida. 2/

Under Article I, Section 4, the Developer and the Employer recognize each of the Unions as the exclusive bargaining representative for all hourly construction employees within the respective Unions' trades, working for the Employer or Developer at the Project, [excluding, inter alia, employees of MBE's; employees of contractors performing work for tenants; and the Developer's security, supervisory, and operational personnel]. Article I, Section 5 of the Project Agreement proscribes the Developer, HCB, and CCC from contracting or subcontracting "construction work to be performed at the Project" to contractors who have not agreed "to be contractually bound by this Project Agreement." Article I, Section 4, the recognition clause, specifically excludes employees of MBE's, as defined in the Minority Participation Agreement, from the bargaining unit covered by the agreement. Thus, MBE's are not required to execute the Project Agreement or to be bound by the union signatory subcontracting clause. However, Article III, Section 3 provides that bids submitted by nonunion MBE's must conform to union standards and that if a union and a nonunion MBE submit "bids of equal scope and value", the union MBE will be awarded the contract.

1/ The question of whether the Project would be union evidently remained undecided up until execution of the Project Agreement in November. Thus, although the City had decided as early as December 1984 that the Project would be union, a representative of the Developer told the City Commission on September 12, 1985, that it was his understanding that the Developer was not officially required to do the project with all union labor, and that at that point the Developer had not yet been able to negotiate an agreement with the Unions.

2/ Article I, Section 1.

Although construction work for tenants is specifically excluded from the ambit of the Project Agreement, the Developer is to provide the Unions with the names of contractors expressing interest in the tenant work and give the tenants union promotional literature and the names of union contractors. Article I, Section 7 of the Project Agreement further provides that the Developer will "set aside a reasonable period of time at tenant coordinator meetings for Union representatives to discuss the availability of Union contractors and labor."

Finally, the agreement's no-strike clause, Article VII, permits the Unions to resort to economic action if "the Employer and Developer refuse or fail to abide with [sic] a final arbitration decision under the grievance procedure of this Agreement." The grievance-arbitration mechanism of the project agreement applies, inter alia, to the union signatory clause, Article I, Section 5.

At the time the Project Agreement was executed, none of the Employers had hired any employees who would be covered by the Agreement. However, both HCB and CCC have said that, while their goal is to subcontract out all of the work, based on past experience they expect to have to hire employees at some point during the construction due to one or more of the following circumstances: a default by a subcontractor; an unsatisfactory or incomplete performance by a subcontractor; a need to perform minor jobs for which subcontracting bids would not be worth soliciting; or work that they decide they could do more cheaply with their own employees. Also, the Developer is not precluded from hiring employees to perform any or all of the construction work itself.

The Gold Coast Chapter of the Associated Builders and Contractors, Inc. (the Charging Party) filed the instant charges on December 20, 1985, alleging that the parties to the project agreement have violated Section 8(e) and Section 8(a)(2), by virtue of both the provisions in the Project Agreement itself and conduct engaged in prior to the agreement's execution which had the effect of unlawfully assisting the Unions.

ACTION

Complaint should issue, absent settlement, alleging that the self-help provision of Article VII, Section 1, violates Section 8(e) of the Act insofar as it applies to the union signatory provision of the Project Agreement. The remaining Section 8(e) and the Section 8(a)(2) allegations should be dismissed, absent withdrawal.

I. The Restrictive Subcontracting Provisions

A contractual provision "to cease doing business with any other person," with the secondary objective of affecting the labor relations of persons or employers not party to the contract, 3/ is unlawful under Section

3/ National Woodwork Manufacturer's Association v. NLRB, 386 U.S. 612, 638-39 (1967); Colorado Building Trades Council (Utilities Services Engineering), 239 NLRB 253 (1978). See also Orange Belt Painters District Council 48 v. NLRB, 328 F.2d 534, 538 (D.C. Cir. 1964), remanding 139 NLRB 383 (1962).

8(e) unless protected by one of that Section's provisos. To be protected by the construction industry proviso, the secondary provision must involve an employer in the construction industry 4/ and must relate to work to be performed at the site of construction. 5/ In addition, the clause must have been negotiated in the context of a collective-bargaining relationship. 6/ The Board has held, with judicial approval, that a Section 8(f) pre-hire agreement voluntarily entered into satisfies the requirement of a collective-bargaining relationship. Los Angeles Building and Construction Trades Council (Donald Schriver, Inc.), 239 NLRB 264, 269-70 (1978), enfd. 635 F. 2d 859, 105 LRRM 2818 (D.C. Cir. 1980), cert. denied 451 U.S. 976 (1981); A.L. Adams Construction Co. v. Georgia Power Co., 557 F.Supp. 168 (1983), affd. 733 F.2d 853 (11th Cir. 1984).

In the instant case, it is undisputed that the union signatory provision, Article I, Section 5, violates Section 8(e) unless it comes within the construction industry proviso. As for Article III, Section 3, we note that such union standards clauses, although generally found to be primary and lawful, 7/ may in certain circumstances have the prohibited secondary objective "of aiding and assisting union membership generally." 8/ However, we need not address this issue because we would find, contrary to the Employer's contentions, for the reasons discussed below, that, even assuming arguendo that the union standards clauses are secondary, both the union signatory and union standards clauses are protected by the construction industry proviso.

Initially, we note that the Project Agreement was negotiated with at least two employers - HCB and CCC -that are clearly in the construction industry. 9/ We would also argue that the Developer, by virtue of its extensive control over, and final responsibility for the Project, is similarly engaged in construction at this particular site. Thus, the Developer directly hired a contractor to perform tree-removal work at the site. Moreover, being responsible under its contract with the City for the completion of the Project, the Developer is in effect the guarantor of all the work performed or contracted out by HCB and/or CCC. If any of that work is deficient in any way, the Developer retains the right to reclaim the work in question from HCB and/or CCC. In these circumstances, the Developer meets the definition of an employer in the construction industry within the meaning of the proviso. See, Church's Fried Chicken, Inc., supra; Zidell Explorations, Inc., 175 NLRB 887 (1969) (an employer not generally in the construction industry can meet the more stringent

4/ Los Angeles Building & Construction Trades Council (Church's Fried Chicken, Inc.), 183 NLRB 1032 (1970).

5/ Acco Construction Equipment, Inc., 204 NLRB 742, enfd. in relevant part 511 F.2d 848 (9th Cir. 1957).

6/ Connell Construction Co. v. Plumbers & Steamfitters, 421 U.S. 616, 633 (1975) (footnote omitted). See also Woelke & Romero Framing v. NLRB, 456 U.S. 645 (1982).

7/ General Teamsters Local 386 (Construction Materials Trucking, Inc., 198 NLRB 1038 (1972).

8/ Utilities Services Engineering, 239 NLRB at 255.

9/ See United Brotherhood of Carpenters and Joiner of America (Long Drug Stores, Inc.), 278 NLRB 62 (January 31, 1986).

"engaged primarily in the building and construction industry" of Section 8(f) by virtue of its engaging in construction work at a specific site). Cf. Construction, Building Materials & Miscellaneous Drivers, Local 83, 243 NLRB 328, 331 (1978); Hoover, Inc., 240 NLRB 593, 597 n. 17 (1979). But even if the Developer were considered to fall outside the strict definition of an employer in the construction industry, the fact that it is a signatory to the Agreement, in our view, would be insufficient to remove the agreement from the scope of the proviso, where it was also entered into with two contractors unquestionably in the construction industry.

We also view the Project Agreement as being limited to on-site work. Concededly, Article I, Section 1, read literally, purports to cover "off-site improvements." But the provision, read as a whole, indicates that the off-site improvements referred to are "located in, and adjacent to, Bay Front Park": the site of the Project. The Board has found similar clauses covering work adjacent to the job-site to be protected by the proviso. 10/ Moreover, the Board has held that ambiguous clauses will not be presumed unlawful. 11/ Thus, as long as the agreement is not applied to work traditionally done away from the site, 12/ or work done at some location remote from the site, 13/ the clause is to be given a lawful interpretation. Similarly, the bare fact that the Teamsters are a party to the Project Agreement is not enough to establish that the Agreement is or will be applied to off-site work.

We concluded that the restrictive subcontracting provisions were negotiated in the context of a collective bargaining relationship in that the Project Agreement is a valid pre-hire agreement, hence the source of a collective-bargaining relationship sufficient to satisfy Connell and Donald Schriver. In that regard, we note that this is not a situation like that in Connell, where the union had no past relationship with the employer and did not seek to establish one, and where the union sought an agreement dealing exclusively with the subject of subcontracting and specifically disavowed any recognitional intent. 14/ The Unions in the instant case, rather than specifically disavowing interest in organizing the employees of HCB, CCC, or the Developer, clearly seek to represent as many Project employees as possible, given the dictates of the Minority Participation Agreement. This is evident from the Project Agreement which extends recognition to the Unions as the exclusive bargaining representative for all craft employees at the Project, be they hired by the Developer, HCB, or CCC and establishes terms and conditions

10/ Woelke & Romero Framing, 239 NLRB 241, 243, 247-48 (1978), affd. 456 U.S. 645 (1982); Cf. International Union of Operating Engineers, Local Union No. 12 (Robert E. Fulton), 220 NLRB 530, 532 (1975).

11/ General Teamsters, Local 982 (J.K. Barker Trucking Co.), 181 NLRB 515, 517 (1970).

12/ See Acco Construction Equipment Inc., 204 NLRB 742, enfd. in relevant part 511 F.2d 848 (9th Cir. 1975).

13/ See Cardinal Industries, Inc., 136 NRB 977, 988 (1972)(work in contractor's shops and yards found to be off-site); Bigge Drayage Company, 197 NLRB 281, 287-88 (1972)(operations remote from the site of construction not protected by the proviso).

14/ Connell Construction, 421 U.S. at 620.

of employment for all such employees. To be sure, both HCB and CCC have thus far subcontracted all of the work covered by their respective construction contracts with the Developer, and apparently intend to further subcontract as much of the work as possible. But both have averred, though counsel, that they can reasonably foresee, and indeed anticipate, a need to hire employees of their own before the project reaches completion. Thus, the Unions clearly are not strangers with no interest in representing any Project employees except those of the subcontractors. On the contrary, the Unions are willing to represent such employees of the signatory contractors as both anticipate will in fact be hired and in this sense can be said to be seeking to establish full collective-bargaining relationships with the two signatory contractors at the Bayside Center Specialty Project. Inasmuch as the Unions clearly sought and succeeded in establishing a collective-bargaining relationship with HCB and CCC, the Project Agreement should not lose it protection under the proviso simply because the Developer, which does not appear to have any craft employees on the site, is also a signatory to the Agreement. In short, the present situation falls within the scope of the construction industry proviso as delineated by Connell, Woelke & Romero, and Schriver.

The Charging Party argues that, even if the Project Agreement could constitute a sufficient collective-bargaining relationship, the Employers and the Unions here in fact agreed to the restriction on subcontracting several months before the Agreement was executed, and, therefore, before the establishment of the collective-bargaining relationship. Hence, the Agreement was not entered into in the context of a valid collective-bargaining relationship, but rather before such a relationship came into existence. We find no merit in this contention since in our view the Employers were privileged to notify potential bidders of the terms and conditions to be embodied in the contemplated agreement. 15/ Thus, since we find that the restrictions on subcontracting in the Project Agreement itself are protected by the construction industry proviso, it follows that the Employers did not violate Section 8(e) by implementing those restrictions in anticipation of, albeit prior to, the Agreement's ultimate execution.

II. The Charging Party's Remaining Arguements

The Charging Party contends that such a collective-bargaining relationship as was established between the parties was tainted by Employer conduct which served to assist the Union in organizing the Union subcontractors. According to the Charging Party, this Employer conduct not only independently violated Section 8(a)(2) but also invalidated the 8(f) relationship between the parties, thereby removing the secondary provisons of the Project Agreement from the protection of the construction industry proviso to Section 8(e). The conduct the Charging Party asserts is violative of Section 8(a)(2) is as follows:

(1) Article I, Section 5 of the P.A., the Union signatory subcontracting provision, requiring that Project work be subcontracted only to contractors under contract with a Union.

15/ Operating Engineers Local 71 (Pacific Northwest Chapter, Associated Builders), 239 NLRB 274 (1978), enfd. 654 F.2d 1301 (9th Cir. 1981)(en banc), affd. in relevant part sub nom. Woelke & Romero Framing v. NLRB, 456 U.S. 645 (1982).

(2) The Employer gave preference to Union subcontractors over nonunion MBE's when awardng work on the Project.

(3) Article I, Section 7, allows the Unions access to the Poject's tenants, and to the names of nonunion subcontractors expressing interest in the tenant work.

As to (1), it is only reasonable to conclude that if a clause falls within the ambit of the construction industry proviso and, as such, is privileged under Sec. 8(e), it cannot be said to be invalid under another Section of the Act, for to do so would be to write the 8(e) proviso out of the Act. Having found Article I, Section 5 to be protected by the Section 8(e) proviso, it follows that it is also privileged under Section 8(a)(2).

The Charging Party's argument under (2) is a restatement of the first argument, for even assuming that the evidence establishes that union subcontractors were in fact given preference over Union subcontractors in awarding work on the Project, this would be consistent with the enforcement of the subcontracting provision and would accomplish nothing more than what is permissible under that clause.

As to (3), there is nothing to show that enforcement of Article I Section 7 would "assist [the Unions] in obtaining majority status" within the meaning of Section 8(a)(2). 16/ Moreover, there is no indication that the Developer would deny similar access to nonunion contractors and representatives of the Charging Party. In fact, the Developer contends that it repeatedly told the Unions that they were not being given the exclusive rights of access to the tenants, but rather were being given the same rights that would be made available to nonunion contractors or trade associations, and that the Charging Party would, upon request, be given similar opportunities. In any event, it is well established that not all forms of assistance are unlawful under Section 8(a)(2). Indeed, the Board has drawn a line between unlawful employer assistance to a labor organization which would interfere with the Union's autonomy, as the employee's bargaining representative, and lawful cooperation, which would not have that effect. 17/ Enforcement of Article I, Section 7 should be regarded as lawful cooperation rather than unlawful assistance.

II. The Self-Help Provision

The Board has held, with judicial approval, that contractual provisions authorizing the use of economic self-help to enforce secondary subcontracting clauses are not protected by the proviso to Section 8(e). 18/ In the instant case, the union signatory provision (Article I, Section 5) is subject to binding arbitration. Article VII, the no strike provision,

16/ Bear Creek Construction Co., 135 NLRB 1285, at 1294 (1962).
17/ BASF Wyandott Corp., 274 NLRB No. 147 (March 15, 1985); Duquesne University, 198 NLRB 891 (1972); Coamo Knitting Mills, Inc., 150 NLRB 579 (1964).
18/ Southern California Pipe Trades District Council No. 16 (Jamco Development Corp.), 277 NLRB No. 128 (December 26, 1985).

authorizes the Unions to engage in self-help, i.e. a strike if the Developer, HCB, or CCC fails or refuses to abide by a final arbitration decision. Thus, complaint is warranted, absent settlement, on the view that the self-help provision of Article VII violates Section 8(e) of the Act insofar as it applies to the union signatory provision of the Project Agreement. In all other respects, however, the charges herein should be dismissed, absent withdrawal.