

RELEASE

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UNITED STATES GOVERNMENT
National Labor Relations Board

Memorandum **A.D.** 02025

DATE: March 31, 1987

TO : Roy H. Garner, Regional Director
Region 28

584-1250-5000
584-5056

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

SUBJECT: Local No. 83, Affiliate of the International Brotherhood of
Teamsters, Chauffeurs, Warehousemen and Helpers of America
(The Tanner Companies Construction Division)
Case 28-CE-39

This case was submitted on the issue of whether the Union violated Section 8(e) by filing a grievance and requesting an arbitration seeking to apply the parties' facially lawful subcontracting clause to off-site construction work.

FACTS

The Employer is engaged primarily in the construction of urban freeways, highways, bridge structures, underground utilities, and metropolitan streets. The Employer and the Union are parties to a collective bargaining agreement (the Agreement) which is effective by its terms from February 1, 1986, to May 31, 1988. The Region has concluded that the Agreement contains a facially lawful subcontracting clause and an arbitration clause. 1/

1/ Article 1-Coverage of Agreement, Section 103-Subcontractor Coverage, states in part:

A Contractor or subcontractor is defined as any person, firm, corporation, broker or developer who performs, subcontracts, or is responsible for all or any part or portion of the construction work as described in Article 2 of this Agreement, at the site of construction.(emphasis added)

Section 103.2 reads as follows:

The Contractor agrees, that he and his subcontractors on the job site will not subcontract any construction work to be done at the site of construction, alteration, painting or repair of a building, structure or other work, as described in Article 2 hereof, except to a person, firm or corporation, party to an appropriate, current labor agreement, with the



In May 1986, 2/ the Employer was awarded a contract to build a highway and interchange in Arizona. On July 8, it entered into a contract with nonsignatory hauling contractor REB Transportation, Inc. (REB), for the removal of dirt from the job site. Under that contract, REB's dump trucks and drivers arrive at the job site and are loaded with dirt by a loader operated by one of the Employer's employees. The REB trucks and drivers then proceed to the Employer's water truck where an Employer's employee hoses down the top of the dirt; after the trucks leave the job site they take the dirt to and unload it at an REB landfill location outside of the Employer's job area. The REB drivers do not get out of their trucks at the Employer's job site.

On September 11, the Union filed a grievance alleging that the Employer violated the Agreement by subcontracting work to various nonsignatory companies, including REB. The Union requested that the matter be submitted to an arbitrator pursuant to the Agreement, and that as a remedy, in part, the Employer be prohibited from violating Article 103. After the Union filed suit to compel arbitration, the Employer agreed to arbitrate the underlying grievance. At the January 1987 arbitration, the parties stipulated that the issues included whether the parties intended that Section 103 include hauling dirt from the job site, whether an attempt to enforce Section 103 to include the hauling of dirt would be within the ambit of Section 8(e), and whether such an interpretation would remove the clause from the protection of the construction industry proviso. The Union argued before the arbitrator that historically the parties had looked upon hauling dirt from a job site as "on-site" construction work under Section 103. The Employer presented

appropriate Union or subordinate bodies
signatory to this Agreement....

Article 2-Work Covered, Section 201-Work Description states in part:

The construction of, in whole or in part, or the improvement or modification thereof, the assembly, operation, maintenance or repair of all equipment, vehicles and other facilities used in connection with the performance of the aforementioned work and services....

2/ All dates refer to 1986, unless otherwise specified.

evidence showing that in the past the Employer had used nonsignatory contractors to haul dirt from its work sites. Briefs were submitted to the arbitrator on March 9; no decision has yet been rendered.

ACTION

We concluded that the charge should be dismissed, absent withdrawal, because there is no mutual agreement to apply a facially valid 8(e) clause unlawfully to include off-site work.

The Region has concluded that Section 103 is a facially valid subcontracting clause. Therefore, Section 8(e) would be violated only if there is a bilateral agreement that it be applied unlawfully; such mutual or bilateral affirmation occurs or is deemed to occur either where the employer has assented to the unlawful application, or where an arbitration award unlawfully construes the contract provision. 3/

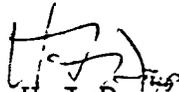
Subcontracting clauses which on their face include the hauling or removal of materials away from the construction site have been held to be outside the construction industry proviso and violative of Section 8(e). 4/ Here, the Union is attempting to apply the subcontracting clause to REB's transportation of dirt away from the Employer's construction site. Thus, this

3/ See, e.g., Los Angeles County District Council of Carpenters (Coast Construction Co., Inc.), 242 NLRB 801 (1979), enf'd. 709 F.2d 532 (9th Cir. 1983); Retail Clerks Union Local 770 (Hughes Markets, Inc.), 218 NLRB 680, 683, n. 11 (1975); Boilermakers, Local 92 (Bigge Drayage Co.), 197 NLRB 281, 288 (1972); District No. 9, Machinists (Greater St. Louis Automotive Association, Inc.), 134 NLRB 1354, 1359-1360 (1961), enf'd. 315 F.2d 33 (D.C. Cir. 1962). Where an arbitration award applies a valid clause in an unlawful manner, it is repugnant to the Act and cannot be deferred to under Spielberg Manufacturing Co., 112 NLRB 1080 (1955). See, e.g., Retail Clerks Union Local 324 (Ralph's Grocery Company), 235 NLRB 711, 713 (1978).

4/ Cf. Teamsters, Local 83 (Cahill Trucking Company), 277 NLRB No. 133, at ALJD p.9 (1985). See also, Operating Engineers, Local Union No. 3 (Stukel Rock & Paving), 271 NLRB 921 (1984); Joint Council of Teamsters No. 42 (California Dump Truck Owners Association), 248 NLRB 808 (1980), enf'd. in relevant part 671 F.2d 305 (9th Cir. 1981).

interpretation would not be protected by the proviso and would violate Section 8(e).

However, in the instant case, the Employer has consistently resisted the Union's interpretation so that the Union's grievance and arbitration demands merely constitute unilateral efforts to apply Section 103 unlawfully. The Union's demand is now pending before an arbitrator. Thus, since there has been no mutual agreement to interpret or apply Section 103 unlawfully to REB's off-site work, the Union's conduct has not ripened into a Section 8(e) violation. 5/ Accordingly, the instant 8(e) charge should be dismissed, absent withdrawal. 6/


H.J.D.

5/ See "Enforcement of Unlawful 8(e) Clauses," General Counsel Memorandum 78-26, dated May 17, 1978, p. 2 and cases cited; Puget Sound District Council, Lumber & Sawmill Workers (U.S. Plywood Corp.), 153 NLRB 547, n. 1 (1965).

6/ If an arbitrator were to uphold the Union's position, this would constitute a bilateral affirmation (an "entering into"), and a new charge could be filed within six months of that event. See, e.g., United Mine Workers of America (Westmoreland Coal Co), 117 NLRB 1072, 1075 (1957); Compare Port Chester Nursing Home, 269 NLRB 150 (1984), with IATSE Local 695 (Vidtronics Co.), 269 NLRB 133 (1984).