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RELEA

UNITED STATES GOVERNMENT
National Labor Relations Board

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Memorandum A:D. 02312

TO : Louis J. D'Amico, Regional Director
Region 5

DATE: September 9, 1987

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

SUBJECT:

Beckley Coal Mining Company	530-5770-2533
Case 5-CA-18821-1	530-6083-0100
Kanawha Coal Company	530-6067-4001-1700
Case 5-CA-18821-2	530-6083-0150-5000
Pikeville Coal Company	530-6083-0150-6700
Case 5-CA-18821-3	530-8054-0100
Scotts Branch Company	554-1483-0100
Case 5-CA-18821-4	554-1483-0150
International Union, United Mine	554-5677
Workers of America	554-5688
(Bituminous Coal Operators	775-2500
Association, Inc.)	
Case 5-CB-5698	

These Section 8(b)(3) and 8(a)(5) cases were submitted to Advice on the issue of whether the Union and the Employers (members of the Bituminous Coal Operators Association) were privileged to terminate a multiemployer contract during its term, and to enter into new, single employer contracts. 1/

FACTS

Bituminous Coal Operators Association (herein BCOA) is the Charging Party. The Section 8(b)(3) charge alleges that the Union violated Section 8(b)(3) and 8(d) of the Act by entering into a collective-bargaining agreement on a single employer basis with each of the Respondent Employers. The remaining charges allege that the Respondent Employers violated Section 8(a)(5) and 8(d) of the Act by negotiating and executing, during the term of an existing multiemployer agreement, separate collective bargaining agreements.

The parties do not dispute that the appropriate unit is a multiemployer unit. They also concede that, in a "normal" multiemployer unit, the association is the exclusive representative for management. However, Respondents contend that, in this multiemployer unit, BCOA has permitted individual

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1/ FOIA Exemption 5

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employer bargaining, and that the conduct here is consistent with that practice.

BCOA's purpose, as set forth in its articles of incorporation, is "to promote . . . harmonious industrial relations between its members and their employees; to negotiate, from time to time, basic agreements for its members covering wages, hours and other terms and conditions of employment and to enter into such agreements on behalf of such members with . . . representatives of their employees. . . ." Accordingly, BCOA's constitution and bylaws provides for the creation of a negotiating committee, which negotiates with the Union committee for all collective bargaining agreements. Negotiated contracts are subject to the ratification of BCOA and Union members. Article VIII, Section b. of BCOA's constitution and bylaws recites that "BCOA members will be bound by the terms of the NBCWA as negotiated and ratified. . . . There shall be no separate bargaining for a successor agreement to the NBCWA at any time, by any BCOA Operator Member..."

In addition to contract negotiations, BCOA conducts other activities with the Union during the contract term. Such activities include on-going relationships on various levels, i.e. president of BCOA and the president of the Union; safety and public relations panels from both BCOA and the Union; joint committees established in the areas of health and safety, training, joint interest and parental leave; joint sponsoring of annual seminars for arbitrators, and the appointment of trustees to various funds.

After the contract (referred to herein as the NBCWA) is negotiated, BCOA has no duties in enforcing or interpreting the contract. BCOA has no power to issue binding opinions to its membership concerning the meaning of the NBCWA. When called upon to do so by a member company, BCOA responds that it cannot dictate policy and restricts its advice to informing the company of actions taken by other BCOA companies when faced with the same issue. Although BCOA has often been requested to do so by both member companies and by the Union, BCOA has consistently refused to testify in arbitration as to the meaning or intent of NBCWA provisions. At no time has BCOA been given general authority to pursue or defend litigation arising from disputes over the meaning of provisions of the NBCWA.

Since 1981, when the Arbitration Review Board was discontinued, arbitration decisions under the NBCWA are binding only on the particular company against which the grievance was filed. Arbitrators frequently disagree as to the application of various provisions of the NBCWA, and it is not uncommon for one

interpretation of the NBCWA to be in effect for the employees of one employer, and for a contrary interpretation to apply to the employees of another.

The term of the current NBCWA is October 1, 1984 to January 31, 1988. In June 1986, Trumka, president of the Union, held a meeting with Quenon and Brown, chief executive officers for Peabody Holding Co. and Consolidation Coal Co., respectively. 2/ Trumka proposed that the current contract be modified as follows: (1) seniority rights for recall purposes for laid off employees would be broadened to extend to all new coal mines opened anywhere in the country, whether operated by the signatory operators themselves or by subcontractors, lessees or licensees; and (2) when the 1950 Pension Fund reached the point of "full funding," which was projected to occur about May 1, 1987, the employer contribution would decrease from $1.11 per ton to $0.25.

Trumka stated that the Union was going to get these features in the contract through BCOA or by some other means. Quenon and Brown told Trumka they would have to consider the proposals and get back to him.

About mid-June 1986, Quenon and Brown told Trumka that they rejected Trumka's proposal. Several weeks later, Roberts, Union vice-president, met with Higgins, a manager of Eastern Associated Coal Corporation, a BCOA member, which produced about 6% of the total tonnage produced by BCOA in 1986. Roberts offered Higgins the same proposals that Trumka had offered to Brown and Quenon. Higgins said he would have to consult with his superiors and he would get back to Roberts. Approximately two weeks later, Higgins told Roberts that Eastern would not accept Roberts' proposals.

On February 3, 1987, Brennan, president of BCOA, wrote to the board of trustees of the UMWA Health & Retirement Funds, with a copy to the Union. The letter states in pertinent part:

2/ These two employer-members of BCOA, the largest and second largest, produced almost 45% of the BCOA employers' total output of coal in 1986. BCOA bylaws require the largest and second largest producer to have a representative on the BCOA negotiating committee. Brown was the chairman of the negotiating committee when it negotiated the 1984 NBCWA. The Union claims that it approached the two officials in their capacity as agents of the two operators, and not as agents of BCOA.

> We have been advised that based on current projections determined by the Funds' actuary, the UMWA 1950 Pension Plan is expected to be fully funded prior to June 30, 1987, the close of the current plan year. Consistent with Article XX of the [1984 NBCWA], many BCOA member companies will cease contributing to the 1950 Pension Trust when full funding is reached.
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> In the event that the employers' decisions to cease contributions are challenged, and if it is ultimately held or agreed that the employers continue to be obligated to make contributions to the 1950 Pension Trust after full funding is reached, then any such contributions are hereby allocated to the 1950 Benefit Trust.

On February 17, 1987, the Charged Employers timely withdrew from BCOA.

On February 20, 1987, the Union announced it was entering into the "1987 Employment and Economic Security Pact" (herein the EESP) with Island Creek Company, which was not a BCOA member. The EESP encompassed the various proposals the Union had offered to others without success. On March 1, 1987, the Respondent Employers entered into the EESP with the Union. The EESP is effective until January 31, 1989. It provides, inter alia:

1. The EESP terminates the NBCWA on the date of full funding of the 1950 Pension trust, but no later than May 1, 1987. (By its terms, the NBCWA terminates on January 31, 1988.) The EESP waives the sixty day notice requirement for termination of the NBCWA.

2. It expands the seniority rights of laid off employees of an employer by providing that they enjoy recall rights at any new or nonsignatory mining operation, "whether newly commenced or newly acquired," before any other individual is selected for a job.

3. The EESP further provides that any new operation which is not a relocation shall be treated as an accretion, and that in the event the parties are prevented from so treating the new operation, the signatory will maintain neutrality during any Union organization campaign and recognize the Union if a card check reveals that the Union enjoys majority status.

4. The EESP adds a union standards subcontracting clause which provides that any leasing, subleasing or licensing out of coal lands, coal producing or coal preparation facilities shall continue only where the aggregate labor costs of the lessee-licensee are not less than the labor costs of the Agreement.

5. The EESP adds a clause requiring that lessees and licensees of coal lands must first offer jobs to laid off employees of the Employer, and that the signatory employer will draft its contracts with lessees and licensees in such a way as to enforce compliance.

6. The EESP grants the signatory an option to commence making payments of $0.25 rather than $1.11 into the 1950 Pension Trust.

On April 21, 1987, Brennan, President of BCOA, sent a letter to BCOA members explaining it was anticipated that negotiations with the Union for a successor agreement would commence about May 21, 1987. However, as recently as August, the parties have not commenced negotiations.

Since April 21, Pittston Coal Group, Inc., Old Ben Coal Company, U.S. Steel Mining Co., Inc., Bethlehem Mines Corporation, Midland Coal Company and Price River Coal Company, Inc. have withdrawn from BCOA. None of these employers have negotiated and/or executed an EESP.

The trustees of the United Mine Workers of America Health and Retirement Fund and the Union have filed suit against BCOA and several coal companies, some of which are not members of BCOA, in the United States District Court for the District of Columbia alleging that the employers, who are subject to the 1984 NBCWA, failed to make the $1.11 per ton contribution to the 1950 Pension Fund. The court has dismissed the Union's suit and is proceeding on the trustee's suit. The court has dismissed the suit against BCOA. The court has ruled that the non-BCOA member companies were in violation of the contract and ordered the companies to pay the contributions. No ruling has been made with regard to the BCOA members because these employers are raising a defense that BCOA's position in 1984 at the bargaining table was that when the 1950 Pension Fund reached full funding, employer contributions would cease. In addition, the trustees have filed a suit against employers, not members of BCOA, who entered into the EESP with the Union, and reduced their payments to the trust to $0.25 per ton.

The Charging Party contends the EESP constitutes an unlawful midterm repudiation of the existing multiemployer agreement. 3/ The argument is that the EESP's are effective during the term of the existing multiemployer agreement, they are not interim or temporary, they contain terms which UMWA has sought during past bargaining but was unable to achieve, they modify terms and conditions of employment contained in the multiemployer agreement, and accordingly are inconsistent with, and destructive of, multiemployer bargaining.

ACTION

We concluded that complaint should issue, absent settlement, alleging that the Charged Employers and the Union, by terminating the NBCWA and entering into the EESP, respectively violated Section 8(a)(5) and 8(d), and Section 8(b)(3) and 8(d).

When an employer voluntarily agrees to multiemployer bargaining, the employer is bound by the contract negotiated by the group, and is barred from negotiating a separate agreement with the union. Teamsters Local 378 (Olympia Automobile Dealers Association), 243 NLRB 1086 (1979), remanded 672 F.2d 741 (9th Cir. 1982); Teamsters Local 70 (Granny Goose Foods), 195 NLRB 454 (1972). This ban on separate bargaining is effective during the entire term of the multiemployer contract. The ban is enforceable by the multiemployer association. See Charles D. Bonanno Linen Service, Inc. v. NLRB, 454 U.S. 404, 415 (1982). The Retail Associates 4/ right to withdraw from a multiemployer unit, exercised by the Respondent Employers herein, simply means that these Employers will not be bound to the next multiemployer contract. It does not mean that they are free to ignore the extant multiemployer contract.

The Respondents seek to escape from these principles by arguing that BCOA has tolerated individual bargaining during the life of the NBCWA.

The argument has no merit. Concededly, individual employers and the Union have settled disputes, and such settlements have resulted in terms and conditions of employment that differ from employer to employer. Such settlements have

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3/ The charge does not attack the conduct of employers (e.g. Island Creek) which were bound by the 1984 NBCWA on a "me too" basis and which then executed the EESP.

4/ Retail Associates, Inc., 120 NLRB 388 (1958).

been under the aegis of Article XXIII(c) of the NBCWA. 5/ However, there is no precedent for an individual employer and the Union to abrogate the contract in its entirety and to replace it with a different contract which contains substantially different economic terms, which terms place the individual employers at a decided economic advantage vis-a-vis the employers who continue to adhere to the extant contract. Nor does Article XXIII(c) contemplate such conduct. In this latter regard, even assuming, without deciding, that Article XXIII(c) covers the dispute concerning pension funding, that would not permit discussions which ventured into wholly different areas, including the abrogation of the contract.

Finally, the fact that there may have been economic exigencies which prompted the conduct herein provides no excuse for prematurely modifying a valid contract. See Oak Cliff-Golman Baking Co., 207 NLRB 1063 (1973), enfd. 505 F.2d 1302 (5th Cir. 1974), cert. denied ____ U.S. ____, (October 6, 1975).

In sum, we conclude that while BCOA may have permitted some kinds of individual employer bargaining, it has not clearly and unmistakeably waived its right to forbid the kinds of individual bargaining involved herein. Thus, such bargaining and the resultant EESP are violative of the Section 8(a)(5) and 8(b)(3) obligation to bargain in the multiemployer unit and the 8(d) obligation to honor the extant multiemployer contract. 6/

H.J.D.

5/ Article XXIII (c) reads:

> Should differences arise between the Mine Workers and an Employer as to the meaning and application of the provisions of the Agreement, or should differences arise about matters not specifically mentioned in this Agreement, or should any local trouble of any kind arise at the mine, an earnest effort shall be made to settle such differences at the earliest practical time.

6/ Although not crucial to the result, the Region should argue that the Union approached Quenon and Brown as BCOA officials in June, 1986. See n. 2, supra. The Union told these officials that it would secure contract modifications "through BCOA or by some other means." Failing to secure modifications through BCOA, they secured them from individual employers.