

***National Labor Relations Board***  
**OFFICE OF THE GENERAL COUNSEL**  
**Advice Memorandum**

August 11, 1989

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International Brotherhood of Painters and Allied Trades of the United States and Canada, Local 6, AFL-CIO (LaMarca Corporation), Cases 6-CC-1767, 6-CE-33

584-2593-6700, 584-5000

These cases were submitted for advice as to the appropriate processing of charges attacking a Manganaro 1 contract clause that is arguably enforceable through economic self-help.

FACTS

Prior to purchasing LaMarca, Burtoft informed the Union that he planned to continue to operate Telco as a nonunion company. The Union replied that it had no objections so long as Burtoft signed a collective-bargaining agreement covering the LaMarca employees; Burtoft signed such an agreement in 1986. In August, 1988, LaMarca and Local 6 executed a subsequent agreement, effective from June 1, 1988 to May 31, 1991, which contains the following provision:

ARTICLE XXII - Preservation of Work Clause

Section 1. To protect and preserve, for the employees covered by this Agreement, all work they have performed and all work covered by this Agreement, and to prevent any device or subterfuge to avoid the protection and preservation of such work, it is agreed as follows: If the Employer performs onsite construction work of the type covered by this Agreement, under its own name or the name of another, as a corporation, company, partnership, or other business entity, including a joint venture, wherein the Employer, through its officers, directors, partners, owners, or stockholders, exercises directly or indirectly (including but not limited to management, control or majority ownership through family members [ ]) management control, or majority ownership, the terms and conditions of this Agreement shall be applicable to all such work.

Section 2. All charges of violations of Section 1 of this Article shall be considered as a dispute and shall be processed in accordance with the provisions of this Agreement on the handling of grievances and the final and binding resolution of disputes. As a remedy for violations of this Article, the Joint Trade Board or Arbitrator shall be able, at the request of the Union, to require an Employer to pay 1) to affected employees covered by this Agreement, including registered applicants for employment, the equivalent of wages those employees have lost because of the violations, and 2) into the affected Joint Trust Funds to which this Agreement requires contributions any delinquent contributions that resulted from the violations. The Joint Trade Board or Arbitrator shall be able also to provide any other appropriate remedies, whether provided by law or this Agreement. The Union shall enforce a decision of the Joint Trade Board or Arbitrator under this Article only through arbitral, judicial, or governmental (for example, the National Labor Relations Board) channels.

The Region has concluded that the above provisions are essentially identical to the provisions that the General Counsel attacked as unlawful in Manganaro. In addition, the contract contains the following "self-help" provisions:

ARTICLE IX - Insurance and Welfare

Section 14. If an Employer fails to make contributions to the insurance and welfare fund within twenty days after the date required by the Trustees, the Union shall have the right to take whatever steps are necessary to secure compliance with this Agreement, any other provisions hereof to the contrary notwithstanding, and the Employer shall be liable for all costs for

collection of the payments due together with attorney's fees and such penalties as may be assessed by the trustees. The Employer's liability for payment under this Article shall not be subject to or covered by any grievance or arbitration procedure or any "no strike" clause which may be provided or set forth elsewhere in this Agreement. 2

### Article XIII - Duration of Agreement

Section 3. This Agreement shall not destroy the power of Painters' Local Union No. 6 to call a legal strike in any shop or job for any justifiable reason....

In a letter dated February 8, 1989, 3 the Union informed LaMarca that a grievance had been failed against it alleging, inter alia, that LaMarca had violated Article XXII. On March 7, LaMarca filed charges in Cases 6-CC-1761 and 6-CE-32. These charges, which are similar to the instant ones, were withdrawn pursuant to a non-Board settlement on March 23, whereby the Union agreed to hold the grievance in abeyance pending a Board Manganaro decision.

The Union subsequently learned that the Manganaro ALJD has been pending before the Board since 1986 and that it was impossible to predict when the Board decision will issue. The Union then informed LaMarca, in a letter dated May 5, that it would not adhere to the non-Board settlement and would continue to process the grievance. On June 6, the Joint Trade Board, which was composed of equal numbers of Union and employer representatives, determined that LaMarca had violated Article XXII by failing to apply the Union-LaMarca contract to Telco.

The Union has taken no economic action to enforce the award. The Union has informed both LaMarca and the Region that it will seek enforcement of Joint Trade Board or arbitration decisions regarding Article XXII only through judicial means.

### ACTION

The Region should issue complaint, absent settlement.

[FOIA EXEMPTIONS 2 & 5 ]

Moreover, the presence of the self-help provisions (Articles IX, X and XII) in the contract is another reason to litigate the instant cases. 4 It is well-established that a contract clause that permits a union to strike to enforce a Section 8(e) clause is unlawful. See Muskegon Bricklayers Union No. 5 (Greater Muskegon General Contractors Association), 152 NLRB 360 (1965). We note that the Union has asserted to LaMarca and to the Region that it would use judicial means, rather than a strike, to obtain LaMarca compliance with the Joint Trade Board award. Moreover, Article XXII, Section 2 refers to judicial enforcement of Joint Board awards. However, given the ambiguity and potential for conflict between Article XXII, Section 2 and the self-help provisions cited above, and given the conclusion in Greater Muskegon that the mere maintenance of a self-help provision together with a Section 8(e) clause is unlawful, litigation of the instant cases is appropriate at this time.5

H.J.D.

1 Painters and Allied Trades District Council No. 51 (Manganaro Corporation), Cases 5-CC-1036 et al., JD-313-86, pending before the Board on exceptions filed by the General Counsel.

2 Article X - Pension Fund and Annuity Fund - contains similar language.

3 All subsequent events occurred in 1989.

4 The contract in Manganaro did not contain similar self-help provisions.

5 See also Southern California Pipe Trades District Council No. 16 (Jamco Development Corp.), 277 NLRB 1281, 1283 (1985)(In finding that contractual self-help provisions for enforcement of a Section 8(e) clause were unlawful, the Board

noted, "That...[the respondents] have refrained thus far from economic action, is of no consequence.").