

National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: September 3, 1993

TO: Frederick Calatrello, Regional Director Region 8

FROM: Robert E. Allen, Associate General Counsel Division of Advice

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These cases were submitted for advice as to (1) whether the Union violated Sections 8(b)(4)(ii)(A) and (B) and 8(e) of the Act by filing and attempting to arbitrate a grievance seeking to enforce the "union standards" subcontracting provision of its contract with the Employer, and (2) whether the Union's actions were in contempt of a Section 10(l) injunctive order.

FACTS

I. Background

Subcontracting

All work covered under the scope of this Agreement to be performed on the job site shall be subcontracted only to an employer who is a party to a current, written collective bargaining agreement with the union. In such subcontracts, provision shall be made to required [sic] subcontracting to adhere to the conditions of this collective bargaining agreement.

All such work assignable to employees covered under the scope of this Agreement not to be performed at the job site shall be subcontracted only to an employer who observes the wages and benefits of overall labor cost established herein. No such work shall be subcontracted on terms that fail to require subsequent employers to adhere to these conditions.

p. All trucks will be manned by members of [the Union] or applicants hereto. This Agreement [sic] shall not apply to pick-up trucks assigned by the Contractor to engineering or technical employees, clerical employees, timekeepers, superintendents, assistant super-intendents, [sic] supervisors in charge, of any classes of labor or supervisory personnel, and shall not apply to trucks used in greasing or repairing heavy equipment. ("Greasing" or "repairing" as used in this paragraph shall not be construed to include fuel trucks.)

q. All deliveries of materials made from, on, and around a job site, shall be done exclusively by employees of contractors who are a part of the bargaining unit classified herein, including the busing and transporting of men.

At two meetings in 1991 with, inter alia, the Employer, Union representative Tiboni, who was also a trustee of the Fund, complained that the Employer was not contributing for all its employees, but rather was using owner-operators who the Employer alleged were independent contractors. The Employer agreed to pay contributions for owner-operators who were employees, and to submit to an audit to determine which individuals actually were its employees. When the Employer subsequently refused to permit an audit for persons other than those it conceded were employees, Tiboni filed suit on behalf of the Fund for an audit and for payment of such contributions as may be due for those of the Employer's owner-operators who are employees. One of the Employer's defenses was that the subcontracting clause violated Section 8(e). ⁽¹⁾

On August 19, 1992, the Union struck and picketed the Employer, and threatened to continue picketing unless the owner-operator issue was settled. According to the Employer, the Union demanded that owner-operators who transport asphalt for the Employer sign Union contracts and that the owner-operators, or the Employer on their behalf, make payments into the Fund. On September 1, the Union and the Employer executed a settlement agreement providing, inter alia, that the Employer would make Fund contributions pursuant to the contract for all owner-operators and drivers of leased equipment. According to the

Employer, the settlement agreement reaffirmed the subcontracting provisions of Article V.

On November 30, 1992, the Region issued a complaint alleging, inter alia, that the owner-operators were independent contractors, and that the Union had violated Section 8(e) and Section 8(b)(4)(i)(ii)(A) and (B) by picketing and threatening to picket unless the Employer ceased doing business with independent contractors who had not signed Union contracts, and unless payments were made by the Employer or the owner-operators into the Fund. Additionally, the complaint alleged that the execution of the settlement agreement, reaffirming an allegedly unlawful no-subcontracting clause, violated Section 8(e). The case was tried before an ALJ in November 1992 and March and April 1993. (2) A 10(l) injunctive order, issued on March 24, 1993, provides that, in part, the Union "shall not enter into, maintain, give effect to, or enforce Article V, 'Subcontracting' or Article XX of the [contract] to the extent that such provisions in any way violate Section 8(e)" of the Act.

II. The Instant Dispute

In a letter dated April 1, 1993, (3) the Union demanded that the Employer furnish it with "sufficient information with which to determine whether subcontractors expected to be utilized by [the Employer] during the 1993 paving season are observing the wages and benefits of overall labor costs established in the labor agreement." By letter dated April 14, the Employer responded that it did not intend to subcontract the work currently performed by the drivers represented by the Union. Furthermore, because the Union request included some of the issues pending before the ALJ and which were subject to the injunction, the Employer refused to consider the request before the Union provided its contractual and legal basis and the Employer had determined its validity.

In a letter dated April 22, the Union stated that the Employer had a duty to provide the Union with all relevant information regarding the identity and overall labor costs of the subcontractors it used. The Union also asked for the specific contractual provision that the Employer was relying on for the right to subcontract, how these requests concern the same issues which were before the ALJ, and how the requests would cause the Employer to violate the 10(l) injunction. On April 27, in the absence of an Employer response, the Union filed a grievance alleging that the Employer was violating the subcontracting clause by subcontracting with owner-operators who were not observing wages and benefits of overall labor costs as established in the labor agreement. In a letter to the Employer dated April 27, the Union asserted its right to file the grievance and disclaimed any intention to violate Section 8(b)(4)(i)(ii)(A) and (B), Section 8(e) or the 10(l) injunction. The Union stated that the grievance was not at all related to the ULP proceeding pending before the ALJ or to the injunction. The Union specifically noted that the General Counsel and the Employer never presented evidence that the overall labor costs or "union standards" provision on which the Union was relying was invalid.

On May 4, the Employer stated that it was not subcontracting driver work traditionally performed by Union members, that the Union did not represent independent contractors, and that it had no right to control the Employer's use of these subcontractors. On May 10, the Union responded that the contract defined unit work as including dump truck as well as carry-all drivers, and specifically limited the subcontracting of unit work to employers who observe "the wages and benefits of overall labor costs" established by the contract. In a May 11 letter, the Union told the Employer that it would pursue its grievance, file other charges, and strike at the expiration of the contract in 1995, unless the Employer agreed to "settle the secondary boycott case," accepted the Union's position that many contractors are employees, and made contributions on their behalf to the Fund.

On June 25, after the Union had unilaterally demanded arbitration, the parties received from the FMCS a list of seven arbitrators. Apparently, the Union has not engaged in any further action regarding arbitration. On August 9, the ALJ issued his decision in the earlier ULP case and found that the Union and the Employer violated Section 8(e) only by entering into the Union signatory clause in the first paragraph of Article V, "Subcontracting," when they executed the contract in June 1992. (4) Although the ALJ found, after a detailed analysis of the evidence, that all owner-operators with whom the Employer did business were independent contractors rather than employees, he dismissed the complaint allegations regarding the Union's picketing and execution of the settlement agreement.

ACTION

We conclude that a Section 8(e) and Section 8(b)(4)(ii)(A) complaint should issue, absent settlement, only if the Union

continues to pursue its grievance in light of the ALJ's finding that all owner-operators with whom the Employer does business are independent contractors. If the Union drops its grievance, then the instant charges should be dismissed, absent withdrawal. (5)

The Union's grievance herein involves an alleged breach of the second, i.e., "union standards," paragraph of the subcontracting provision in Article V of its contract with the Employer. Since that paragraph is facially lawful, the grievance and pursuit of arbitration are violative of Section 8(e) only if the Union seeks to enforce it regarding work that is not fairly claimable as unit work. (6) For example, if the Union attempts to prevent the Employer from subcontracting to separate employers work which is not "fairly claimable" by unit employees, or attempts to force non-signatory independent contractors to make contributions to the Union's Fund, the Board would find an 8(e) violation. (7) Moreover, in *Elevator Constructors (Long Elevator)*, (8) the Board held that the union violated Section 8(b)(4)(ii)(A) by filing a grievance where the Union's own construction of a contract clause in its grievance was clearly violative of Section 8(e). Thus, the Board found that a grievance seeking to enforce an unlawful contract provision is coercive with an unlawful objective, and that this holding was consistent with footnote 5 of *Bill Johnson's*. (9)

On the other hand, in *Teamsters Local 483 (Ida Cal)*, 289 NLRB 924, 925 (1988), the Board dismissed an 8(b)(4)(ii)(A) complaint alleging that the union filed a grievance and a Section 301 suit to apply the terms of an existing contract to owner-operators, even though the Region had previously dismissed a Section 8(a)(5) charge on the ground that those individuals were independent contractors. In *Ida Cal*, the Board agreed that the owner-operators doing business with the employer were, in fact, independent contractors and not statutory employees. *Id.* at 924. Nevertheless, the Board noted that "there had been no adjudicatory determination at that time, or at the time of the complaint or the hearing, that the owner-operators were independent contractors." *Id.* at 925. The Union there did not strike or picket, and its contention that the owner-operators are statutory employees was not unreasonable Importantly, in determining owner-operator status the Board uses the right-of-control test which depends on the facts of each case, which is not determined by any one factor, and which often presents a close issue of fact.

Id. at 925.

Applying the foregoing principles, the work being performed by the owner-operators herein clearly is not "fairly claimable" by the Employer's unit employees. Thus, for at least fifteen years, the Employer never owned dump trucks, always subcontracted the work of transporting asphalt by dump trucks to owner-operators, and never performed this work with the unit employees represented by the Union. Moreover, if the owner-operators are independent contractors, and the Union is attempting to apply its contract with the Employer to them, then the Union's pursuit of its grievance is violative of Section 8(e). While the Union's grievance seeks as a remedy Fund payments only for owner-operators who it contends are employees this does not validate the grievance because the remedy is based upon an unlawful application of the valid subcontracting clause; i.e., applied to work that is not fairly claimable. (10) However, since 1991, when Tiboni began seeking information to ascertain the status of owner-operators under contract with the Employer, the Employer refused to furnish such information until subpoenaed at the ULP hearing. Over one-third of the ALJ's decision (11) was devoted to an analysis of the evidence and legal principles that resulted in his ultimate finding that all owner-operators herein are independent contractors. As in *Ida Cal*, supra, the Union did not strike or picket to enforce the union standards paragraph, but rather resorted to the grievance-arbitration procedure to obtain an adjudication of the owner-operators' status. Moreover, since the Union lacked most of the facts relevant to this question, we conclude that the Union's pursuit of its grievance was reasonable, at least until the ALJ's decision made clear that the owner-operators are independent contractors.

Accordingly, we conclude that the Union's pursuit of its grievance prior to the ALJ's decision was not unlawful. However, in our view, the facts found by the ALJ regarding owner-operator status make it clear that under Board law, any further pursuit of the grievance would be unreasonable and clearly violative of Section 8(e) and Section 8(b)(4)(ii)(A). (12) We further conclude that even if complaint issues, it should not contain an 8(b)(4)(B) allegation. In this regard, such an allegation would add nothing to the remedy for the 8(b)(4)(A) violation, and there is no reason to litigate the difficult issue whether grievance filing alone, without other evidence of coercion or a determination that the contract clause being enforced is unlawful, violates Section 8(b)(4)(B). (13)

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¹The lawsuit is still pending.

²Only the first paragraph of the subcontracting provision, i.e., the "union-signatory" paragraph, was alleged to be unlawful, and neither the Region nor the Employer presented evidence or argued that the Union was attempting to enforce the second paragraph of that provision, i.e., the "union standards" clause.

³All dates hereafter are in 1993, unless otherwise noted.

⁴The Union did not contend in that case, and does not contend herein, that the off-site work being done by the owner-operators is covered by the construction industry proviso to Section 8(e).

⁵[FOIA Exemption 5

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⁶National Woodwork Mfrs. Assn. v. NLRB, 386 U.S. 612, 644-45 (1967).

⁷See e.g., Bldg. Material & Construction Teamsters No. 216 (Bigge Drayage Co.), 198 NLRB 1046, 1047 (1972) (although contract covered work of hauling prestressed concrete girders, union attempts to apply subcontracting clauses on non-signatory who performed this work were violative of 8(e); signatory employers had never engaged in this type of hauling, but only had hauled dirt, rock and debris, asphalt, etc.). See also Local 814, Teamsters (Santini Brothers), 208 NLRB 184, 198-99 (1974) (union violated Section 8(e) by demanding long distance hauling work covered by the contract, which signatory used to perform but had totally contracted out five years earlier, since work was not "fairly claimable").

⁸289 NLRB 1089 (1988).

⁹Bill Johnson's Restaurants v. NLRB, 461 U.S. 731, 737 n. 5 (1983).

¹⁰Of course, if the dump truck drivers were employees, Fund payments would be owed by the Employer under its collective bargaining contract. In this situation we would find no violation even though the Union's grievance is, erroneously based upon a subcontracting clause.

¹¹JD-162-93, slip op. at 12-19 (August 9, 1993).

¹²Cf. *Ida Cal*, supra, at 925, where the Board dismissed the complaint even though "the complaint language adequately indicates that the [union's] actions are ongoing," i.e., after issuance of the ALJ's decision finding independent contractor status therein.

¹³Compare *Teamsters Local 705 (Emery Air Freight)*, 278 NLRB 1303 (1986), remanded 820 F.2d 448 (D.C. Cir. 1987) (grievance filing violated 8(b)(4)(B) even without determination of legality of contract provision at issue), with *Teamsters Local 25 (Boston Deliveries)*, 282 NLRB 910 (1987), enfd. 831 F.2d 1149 (1st Cir. 1987) (entire course of conduct, including grievance filing, violated 8(b)(4)(B), although the First Circuit went further and found grievance filing alone was unlawful since it had an unlawful object).