

United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: December 5, 1994

TO : John D. Nelson, Regional Director
Region 19

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

SUBJECT: Plumbers Local 290
(Western Engineers, Inc.)
Cases 36-CB-1881 and 36-RC-5550

530-6083-0150
530-6083-2067-0112
554-1483-2067-0100
590-7575

This case was submitted for advice as to whether the bargaining relationship between the parties is an 8(f) or a 9(a) relationship.

FACTS

The Union and the Employer have had a bargaining relationship since 1938 whereby the Employer has signed a series of compliance agreements binding it to the terms of the Area Master Labor Agreement. The most recent compliance agreement signed by the Employer was in July 1987 shortly after the Deklewa¹ decision. For the first time, the compliance agreement contained the following statement:

The Employer represents that prior to the signing of this compliance agreement, he has determined by objective factors that a majority of the employees that will be covered by this compliance agreement have authorized the Union to represent them for purposes of collective bargaining.

Both the Employer and the Union assert that the Union never provided objective evidence as to majority status. However, the Employer states that he knew the Union represented a majority of employees because all of his employees, including himself, were members of the Union. He, therefore, did not question majority status.

¹ John Deklewa & Sons, 282 NLRB 1375 (1987), enfd. sub nom. Iron Workers Local 3 v. NLRB, 843 F.2d 770 (3d Cir. 1988).

Thereafter, the Employer signed, on a single-employer "me-too" basis, a multiemployer collective-bargaining agreement which extended from June 1, 1989 to May 31, 1993. By letter dated March 31, 1993, the Employer notified the Union of its intent to modify the contract, and that it wished to bargain separately. The letter contained copies of notices, also dated March 31, that the Employer had posted to the National Mediation and Conciliation Service and to its Oregon counterpart. During April and May 1993, the Employer engaged in separate convenience bargaining with the Union. On May 20, the Union and the multiemployer association agreed on a new contract effective from June 1, 1993 through March 1, 1997. On June 14, the Employer informed the Union that it could not bargain because of fears that the bargaining would impact on bargaining elsewhere between the Employer and a sister local of the Union. The Union then threatened to strike unless the Employer either agreed to be bound as a me-too signatory to the multiemployer agreement or entered into an interim agreement with the Union. The Employer refused to be a me-too signatory to the master agreement and the parties agreed to enter into a six month interim agreement.

On June 21, after some bargaining, the parties executed an agreement. That agreement is labeled "interim agreement." It recites that: it is effective from June 1, 1993 through December 31, 1993; the parties agreed to be bound by the master agreement and all amendments thereto, except that wages would be about \$2.40 per hour more than wages under than master agreement; and in the event the parties were unable to reach agreement on a new contract by September 1, 1993, either party could terminate the agreement by giving 48 hours written notice to the other, in which event the premium wages would no longer be paid. The Employer engaged in no bargaining before September 1. Sometime in September, the Union gave the Employer the 48 hour notice of termination. The Union proposed that the Employer sign either the Association contract or a me-too equivalent. The Employer declined to do so. The Union then proposed that the parties remove the 48 hour termination provision from the June agreement. The effect of the removal of the termination provision would be to lock the Employer into a high wage contract until December 31 and to further induce the

Employer to enter into a long term contract resembling the association contract. However, the removal of the termination provision did not have its intended effects; the Employer entered into no discussion with the Union until December 28. Discussions between the parties on that date achieved no agreement on contract terms. On December 30, the unit employees voted to strike for a contract. The strike commenced on January 3, 1994, and continues to date. At the same time, the Union filed a petition seeking Section 9(a) certification in Case 36-RC-5550.

On January 7, 1994,² the Employer filed a blocking 8(b)(3) charge alleging that the Union had failed to bargain in good faith by insisting that the Employer sign the industry agreement. The Employer asserted that it "is primarily engaged in the construction industry and it has historically maintained a Section 8(f) bargaining relationship with Local 290 for an appropriate unit of its employees." That charge was withdrawn on January 31. On February 3, the Employer refiled the charge (36-CB-1848) with slightly different language alleging that the Union was insisting that the Employer become a member of the Plumbing and Pipefitting Council and/or accept the Council's contract in violation of Section 8(b)(3). There was no mention of the 8(f) status in this second charge. The Region dismissed the charge in 36-CB-1848 without mentioning either 8(f) or 9(a) status. However, in sustaining the Region's dismissal on appeal, the Office of Appeals stated that the parties had a Section 8(f) relationship which either party could repudiate upon expiration of the contract.

On May 6 and 9, 1994, the Region conducted a representation election in Case 36-RC-5550. The Employer challenged the ballots of the striking employees and the Union challenged the ballots of the strike replacements.

On May 9, 1994, the Employer filed Section 8(b)(3) and (d)(1), (2), (3) and (4) charges (36-CB-1881) against the Union alleging that the Union struck on January 3 without providing the Employer or the services the notices required

² All dates hereinafter are in 1994.

by Section 8(d) of the Act. The Region found merit to that charge and issued complaint on July 29. In its answer to the complaint, the Union declined to admit the 9(a) status as alleged.

On June 10, the Union filed charges in 39-CA-7331 alleging that the Union is the exclusive bargaining representative of apprentices, journeymen and foremen of the Employer and that the Employer violated Sections 8(a)(1) and (5) by, inter alia, refusing to negotiate with the Union so long as it has a labor dispute with another Plumbers' local in Seattle. The Region dismissed the charge due to insufficient evidence; the Office of Appeals sustained that dismissal on October 6, on the grounds that there was insufficient evidence, with no mention of the Union's 8(f) or 9(a) status. In August 1994, the Union sent 8(d) notices to FMC and its Oregon counterpart.

ACTION

We conclude, based on the contract language in the July 1987 compliance agreement, that the Union is the 9(a) representative of employees. However, the instant complaint should be withdrawn and the Section 8(b)(3) charge herein should be dismissed, absent withdrawal, on the grounds that the Section 8(d) notices filed by the Employer in March 1993, satisfied all the requirements of Section 8(d) and therefore, privileged the Union's subsequent strike.

1. The relationship of the parties herein is governed by Section 9(a) and not by 8(d).

In Decorative Floors, Inc.,³ the Board relied on contractual language alone to establish that the parties had a 9(a), instead of an 8(f), relationship. In that case, the voluntarily entered into contract provided that "the Union represents a majority of [the Respondent's] eligible employees in an appropriate unit and..., pursuant to Section 9(A) [sic]...the Union[is] the sole and exclusive bargaining

³ 315 NLRB No. 25 (Sept. 30, 1994).

representative." *Id.*, slip op. at 2. The Board specifically rejected the Respondent's argument that extrinsic evidence, in addition to contract language, is needed to demonstrate a 9(a) relationship.⁴

In the instant case, the compliance agreement contains recognition language similar to that in Decorative Floors, *supra*. Thus, the contract provided that:

The Employer represents that prior to the signing of this compliance agreement, he has determined by objective factors that a majority of the employees that will be covered by this compliance agreement have authorized the Union to represent them for purposes of collective bargaining.

In these circumstances, we conclude that the Union is the 9(a) representative of unit employees.

2. The Section 8(d) notices filed by the Employer in March 1993, satisfied all the requirements of Section 8(d).

"The Board has held that the obligation to give notices required in Section 8(d)(3) reside with the party who first moves to reopen the existing contract, and this obligation does not shift to the other party to the contract regardless of the positions taken by the parties in the negotiations." Mar-len Cabinets, 243 NLRB 523, 535 (1979), *enfd. in part and remanded*, 659 F.2d 995 (1981), *on remand* 262 NLRB 1398 (1982). Where the initiating party has failed to file appropriate notices with the Federal Mediation and Conciliation Service and the appropriate state counterpart, there is no duty for the other party to do so. In United Artists Communications, 274 NLRB 75 (1985), *review denied sub nom. IATSE v. NLRB*, 779 F.2d 552, 121 LRRM 2237 (9th Cir. 1985), *cert. den.* 477 U.S. 904 (1986), the union sent timely notice of its intent to terminate the contract to the employer but failed to send 8(d) notices to both the FMCS

⁴ The Board majority did not rely on the 6-month time limit on construction industry employers' challenges to 9(a) status. See Casale Industries, 311 NLRB 951 (1993).

and to its state equivalent. Almost ten months after the expiration of the old contract, the employer implemented its last offer. The Board held that the burden of filing 8(d) notices with the federal and state agencies falls exclusively on the party which initiated the changes in the old collective-bargaining agreement, there the union, and that the employer had committed no violation of law. It follows that where the initiating party has filed 8(d) notices with the federal and state agencies, the other party need not do so.⁵

Further, where the parties have entered into an interim contract, the Board has not required a second set of 8(d) notices to terminate the interim contract, if appropriate notices were given prior to termination of the old contract. In The Boeing Co., 80 NLRB 447, 450-451, (1948), the parties entered into an interim contracts before Section 8(d) became effective. The Board said:

In our view, where the parties on [the effective date of Section 8(d)] were already engaged in the very contract negotiations that Section 8(d) was designed to encourage, no useful purpose would be served by requiring compliance with the notice and waiting provisions of that section of the Act.⁶

⁵ Further, the Board has held that a noninitiating party's filing of 8(d) notices with the federal and state agencies does not relieve the initiating party of its duty to notify the services. See Mar-Len Cabinets, Inc., 243 NLRB 523 (1979). The Court of Appeals for the Ninth Circuit, however, held that inasmuch as the objective of filing the 8(d) notices with the appropriate federal and state agencies is to give those agencies a chance to mediate the dispute, there is no need for both parties to file. On remand, 262 NLRB 1398 (1982), the Board accepted the court's decision as the law of the case, but concluded on other grounds that the noninitiating party's notice to the services did not excuse the initiating party's failure to do so.

⁶ The D.C. Circuit reversed, 174 F.2d 988 (1949), on the grounds that the contract was not an interim contract.

Thereafter, in Lumber & Sawmill Workers, Local 2647 (Cheney California Lumber Co.), 130 NLRB 235 (1961), affd. 319 F.2d 375, 53 LRRM 2598 (9th Cir. 1963), the union reopened the contract and sent notices to the appropriate federal and state agencies. The parties agreed to extend a portion of the contract for a year, and left open the subjects raised by the reopener. Six months later the union struck both about issues encompassed by the reopener and two not raised therein. The Board held that the union was not required to send a second set of notices to the appropriate federal and state agencies.

There is a substantial policy reason for not requiring a second set of 8(d) notices (and/or a second 60 day waiting period) before termination of an interim agreement. In NLRB v. Lion Oil Co., 352 U.S. 282 (1957), the Supreme Court dealt with the impact of Section 8(d) on midterm reopeners. It cautioned, pp. 288-289, against reading Section 8(d) in a narrow, literal way that would be inconsistent with the provisions of the whole statute, its object and policy. The Court rejected a construction of 8(d) which would bar strikes during midterm reopeners because that construction would discourage unions from entering into longterm contracts with midterm reopeners. Further, the Court recognized longterm contracts as a practice that would effectuate the goals of the statute. Since interim contracts during bargaining often obviate the necessity of strikes and lockouts, interim contracts also effectuate the goals of the statute. Indeed, the Board has recognized the value of interim contracts in the context of multiemployer bargaining. In Joseph J. Callier, 243 NLRB 1114, 1117-1118 (1979)⁷, the Board said of interim contracts that they

traditionally have been utilized in multiemployer bargaining to avoid severe economic confrontation while bargaining continues in the absence of an existing contract.... [I]nterim contracts serve the necessary and useful purpose of encouraging movement and compromise.⁸

⁷ Affd. 630 F.2d 595, 105 LRRM 2510 (8th Cir. 1980).

⁸ See also Charles D. Bonanno Linen Service, Inc., 243 NLRB 1093 (1979), affd. 454 U.S. 404 (1982). In that case, the

A construction of Section 8(d) which would require parties who have either entered into interim contracts or extended existing contracts, to file second sets of 8(d) notices (and/or await for a second time the expiration of the 60 and 30 day periods prescribed in the Section) before they engage in self-help would substantially reduce the flexibility of interim contracts in the context of multiemployer bargaining and elsewhere.

In the instant case, the Section 8(d) notices filed by the Employer in March 1993, satisfied all the requirements of Section 8(d). First, the Employer herein, having notified the Union of its intent to modify the contract by letter dated March 31, 1993, is the initiating party. Under United Artists Communications, supra, and Mar-len, supra, the burden of filing 8(d) notices was on the Employer since it wished to modify the agreement. The Employer satisfied its burden. Second, the June 21 agreement is clearly an interim agreement. Thus, it is so labeled; the parties agreed on it because the Employer would not agree to be bound by the master multiemployer association agreement and the parties contemplated further bargaining on its terms; it grants the unit employees premium wages designed to induce the Employer to bargain a longterm agreement more favorable to itself; it originally recited that in the event the parties were unable to reach agreement on a new contract by September 1, 1993, either party could terminate the agreement by giving 48 hours written notice to the other; and its short duration contrasts dramatically with the four year duration of the master contract.

As the Union was under no duty to file a second set of 8(d) notices, the Complaint alleging that the Union violated the Act by striking prior to filing 8(d) notices should be withdrawn and the charges dismissed, absent withdrawal.⁹

court noted, p. 414, that "interim agreements often occur in the course of negotiations."

⁹ It follows that the striking employees did not lose their status of employees.

Case 36-CB-1881 et al.

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R.E.A.
