

OFFICE OF THE GENERAL COUNSEL

MEMORANDUM 79-1

January 9, 1979

TO: All Regional Directors, Officers-in-Charge,
and Resident Officers

FROM: John S. Irving, General Counsel

SUBJECT: Effect of Board's Recent Decisions Regarding the
Section 8(e) Construction Industry Proviso

On November 13, 1978, the Board issued four decisions involving the Section 8(e) construction industry proviso. These decisions deal with issues placed before the Board pursuant to General Counsel Memoranda 77-2 and 76-57. See Carpenters Local No. 944 et al. (Woelke & Romero Framing Inc.), 239 NLRB No. 40 (SD 78-47); Colorado Building & Construction Trades Council (Utilities Services Engineering, Inc.), 239 NLRB No. 41 (SD 78-45); Los Angeles Building & Construction Trades Council (Donald Schriver Inc.) (Sullivan-Kelley & Associates), 239 NLRB No. 42 (SD 78-46); Operating Engineers Local No. 701 et al. (Pacific Northwest Chapter of the Associated Builders and Contractors, Inc.), 239 NLRB No. 43 (SD 78-44).

In view of these decisions, it seems clear that secondary agreements (referred to herein as Section 8(e) agreements) between qualified parties in the construction industry are protected by the proviso if:

1. There is a valid collective bargaining relationship between the parties, either under Section 9 or under the provisions of Section 8(f). 1/

1/ See infra for a discussion of what constitutes a "valid" Section 8(f) relationship. The above-cited Board decisions have clearly rejected the arguments advanced in General Counsel Guideline Memorandum 76-57, that an 8(e) proviso agreement in the context of a valid collective bargaining relationship, must be confined to those times and jobsites at which the signatory employer has employees represented by the labor organization, and that the clause would be unlawful if it required that the signatory employer's subcontractor be under contract with a particular union. These arguments should, therefore, no longer be made in cases where the signatory employer and the union have a valid collective bargaining relationship. However, where no such relationship exists, it would be unnecessary to advance the above-mentioned Guideline arguments as further support for the allegations of the complaint. See Utilities Services Engineering, Inc., supra.

2. The clause pertains to work to be done at the site of construction.
3. The contract does not give the signatory union the right to resort to "self-help" to enforce the secondary provisions.

To the extent that Regional Offices are attacking clauses that meet the above tests, they should make appropriate modifications of complaints, briefs, petitions, etc. so as to delete such attacks. Further, future charges which attack clauses that meet the above tests should be dismissed, absent withdrawal.

On the other hand, there are some questions which arguably are left open by the Board decisions. I have listed below at least some of those questions. By so listing them, I am not necessarily indicating that these issues are in fact open; nor am I indicating how I would administratively dispose of them. The listing merely indicates to the Regional Offices that such issues should be submitted to the Division of Advice.

The issues are as follows:

1. Where the Section 8(e) clause is entered into in the context of an asserted Section 8(f) relationship, but that relationship was not entered into voluntarily, is that relationship a valid Section 8(f) relationship? In this regard, is voluntarism a requirement for a valid Section 8(f) relationship? If it is not a valid Section 8(f) relationship, does the requisite collective bargaining relationship exist which would legitimize the Section 8(e) clause under the proviso?

In this regard, there may be a question as to what constitutes an involuntary Section 8(f) relationship. For example, if the 8(f) relationship is the product of unlawful 8(b)(7) picketing, it may well be viewed as involuntary. But would a relationship be viewed as involuntary for these purposes if it was entered into as the result of "coercion" which did not violate Section 8(b)(7) or any other section of the Act? Would it be viewed as involuntary for these purposes if it was entered into as the result of Section 8(b)(7) picketing, but no 8(b)(7) charge was filed, and a charge would be untimely under Section 10(b)?

The Board in Topaz, 239 NLRB No. 42, indicated that a Section 8(f) relationship could legitimize a Section 8(e) on-site clause even though the relationship was the product of 10 days of picketing. See p. 16 of slip op. The Board's rationale was that the 10 days of picketing did not constitute a Section 8(b)(7)(C) violation. However, the Board in Topaz by implication appears to have reaffirmed its decision in R. S.

Noonan, Inc., ^{2/} holding that union picketing for a Section 8(f) contract for longer than 30 days without a valid petition being filed violates Section 8(b)(7)(C). ^{3/} The Topaz decision also seems to suggest that an 8(f) bargaining relationship resulting from such unlawful picketing would not be sufficient to privilege a Section 8(e) proviso clause. On the basis of the foregoing, an argument could be made that Section 8(f) relationships that are created as a consequence of nonviolative "coercion" are sufficient to legitimize a Section 8(e) proviso clause. On the other hand, in view of the legislative history of Section 8(f) showing that "no element of coercion" can be utilized to obtain an 8(f) agreement, ^{4/} an argument could also be made that an 8(f) relationship resulting from non-violative coercion would not privilege a Section 8(e) proviso clause. In this connection, it was noted that the General Counsel did not argue in Topaz that the 8(f) relationship was defective by reason of the fact that it was entered into as a result of picketing. See n. 20 of Board's opinion.

2. If an involuntary 8(f) agreement would not serve to legitimize a Section 8(e) clause, could it follow that picketing for a Section 8(f) contract containing a Section 8(e) clause would violate Section 8(b)(4)(A)? If the employer acceded to the picketing and entered into the contract, that contract would not be a voluntary Section 8(f) contract and hence might not serve to legitimize the Section 8(e) clause contained therein. If the clause violated Section 8(e), picketing to obtain such a clause would violate Section 8(b)(4)(A).

3. Where an employer and a union enter into an asserted Section 8(f) contract containing a Section 8(e) clause, but the employer does not employ unit employees who would be covered thereby and does not intend to do so

^{2/} 142 NLRB 1132, enfd. 331 F. 2d 99 (C.A. 3, 1964), cert. denied 379 U.S. 889; see also Edward L. Nezelek, Inc., 194 NLRB 579, enfd. 473 F. 2d 249 (C.A. 2, 1973).

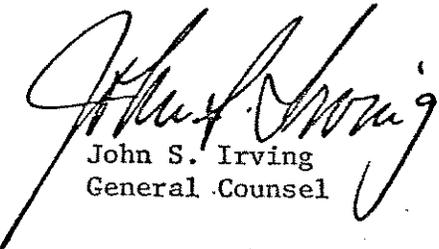
^{3/} Where a union pickets to obtain a Section 8(f) pre-hire contract, i.e., where there are no unit employees, it has been the General Counsel's view that a violation of Section 8(b)(7)(C) is established from the first day of such picketing, since there are no employees to organize and no employees as to whom a Section 9 petition could be filed and processed. The Board's position in Topaz that the 10 days of picketing there did not establish a Section 8(b)(7)(C) violation might be explained by the fact that the picketed employer had some 30-50 laborer and carpentry employees at the time of picketing. These employees presumably constituted a representative complement who could have voted in an expedited election contemplated by Section 8(b)(7)(C).

^{4/} See N.L.R.B. v. Iron Workers Local 103 (Higdon Contracting Co.), 434 U.S. 335, n. 10 (1978); R. S. Noonan, Inc., supra, at 1135, n. 6.

(e.g., he is a general contractor who subcontracts everything), there is a question as to whether the relationship can realistically be considered a collective bargaining relationship, since it does not cover employees and never will. In these circumstances, it is arguable that there is no collective bargaining relationship to legitimize the Section 8(e) clause. 5/

4. Where an employer (e.g., a general contractor) and a union have no collective bargaining relationship, but the union does represent employees of a subcontractor on a particular site, it may be that the union, acting in the interest of the subcontractor's employees, could agree with the general contractor that all subcontractors on that site would be union signatories. See Utilities Services Engineering, Inc., supra, at pp. 9-10 of slip op. and n. 11. 6/

As noted above, pending further notice, the Regions should submit cases presenting these issues to Advice.


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5/ See General Counsel Guideline Memorandum 76-57, at pp. 5-6. On the other hand, if the employer does intend to hire unit employees, the Section 8(e) clause would be valid under the recent Board cases, even though it operates prior to the time such employees are hired. See n. 1, supra.

6/ Moreover, the Board's language in Utilities Services appears to leave open the possibility that a lawful 8(e) proviso agreement could even be multi-site in scope despite the absence of a collective bargaining relationship if limited to those sites, present or future, where the union represents employees and if the restriction is on the subcontracting of all work performed at the site. When investigating such cases, however, Regions should also be alert, where picketing is involved, to the possibility of violations of Section 8(b)(7). See Sam E. Long, Inc., 201 NLRB 321, enfd. 485 F. 2d 680 (C.A. 3, 1973), cert denied 416 U.S. 937.