

UNITED STATES GOVERNMENT
National Labor Relations Board



Memorandum

TO : Thomas W. Seeler, Regional Director
Region 3

DATE: AUG 19 1986

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

584-5014

SUBJECT: Carpenters District Council of Buffalo,
NY & Vic. (Cleverly C.M. Associates, Inc.),
Case 3-CE-46

This case was submitted for advice as to whether a contractual provision, which forbids the signatory to accept a sub-contract covering jobsite construction work from a contractor who is not a party to the agreement, is violative of Section 8(e).

FACTS

C.K.G. Ceilings and Partitions, Inc. is party to a collective bargaining agreement with Carpenters District Council of Buffalo, New York and Vicinity ("the Union"). The most recent agreement between the Union and C.K.G. contains a standard union signatory subcontracting clause (Art. XIX, §1). In addition, the contract contains the following so-called "contracting up" provision (Art. XIX, §3):

It is further agreed that a contractor, or sub-contractor, a party to, and/or bound by this agreement shall not accept a contract from another contractor or sub-contractor involving job site construction work, which is not a party to, or bound by this agreement.

In June, 1986, C.K.G. submitted a bid for certain drywall and carpentry work to be performed in connection with the construction of two stores at a shopping mall in Hamburg, New York. The shopping mall owners had selected Cleverly C.M. Associates as the general contractor on this job and instructed Cleverly that the work is to be performed by unionized employees. Cleverly has no collective bargaining agreement with any labor organization. Accordingly, Cleverly plans to subcontract all the work to union contractors and does not contemplate using any employees of its own, other than a superintendent, at the site.

On July 10, 1986, Cleverly notified C.K.G. that its bid for the drywall and general carpentry job was the lowest received and asked C.K.G. to sign a contract. Mindful of the "contracting up" clause in the collective bargaining agreement, C.K.G. asked



the Union whether Cleverly was a signatory to the contract. Union president Terrence Bodeweis told C.K.G. that Cleverly was not a signatory and that under Article XIX, §3, of the contract, C.K.G. could not accept the job.

C.K.G. notified Cleverly of the problem and told Cleverly to talk to the Union. Cleverly's owner, Morris Cleverly, called Union president Bodeweis and told him that Cleverly was subcontracting the entire job and that Cleverly would employ only a superintendent at the site. Bodeweis responded that this made no difference and, referring to the "contracting up" clause, Bodeweis said that Cleverly would have to sign the agreement in order for C.K.G. to work there. Cleverly offered to sign a project agreement. Bodeweis said a project agreement was unacceptable and insisted that Cleverly would have to sign the current collective bargaining agreement which expires June 30, 1987.

On July 17, Cleverly filed the instant charge alleging that Art. XIX, §3, the contracting up clause, is violative of Section 8(e).

ACTION

We concluded that the contracting up clause is privileged by the construction industry proviso to Section 8(e) and, accordingly, the charge should be dismissed, absent withdrawal.

The proviso to Section 8(e) exempts from the prohibition on secondary agreements, contained in the body of Section 8(e), agreements between unions and employers in the construction industry "relating to the contracting or subcontracting of work to be done at the site of construction. . . ." The Supreme Court has made clear that this proviso protects such agreements as long as they are made in the context of a collective bargaining relationship. Connell Construction Co. v. Plumbers & Steamfitters Local 100 421 U.S. 616, 633 (1975). In addition, it has been recognized that the proviso protects agreements that deal with the problem of friction between union and nonunion employees on a common construction situs. Id; Woelke & Romero Framing v. NLRB, 456 U.S. 645, 662 n. 14 (1982). The Board has held that in furtherance of the latter interest, a union and an employer in the construction industry may legitimately enter into an agreement that prohibits the employer from doing business at a construction site at which any nonunion employees are employed even though the effect of the clause is felt by employers with

whom the union has no collective bargaining relationship. Local 217 United Assn. of Journeymen, etc. (The Carvel Co.), 152 NLRB 1672, 1675-1677 (1965).^{1/}

In the instant case, Art. XIX, §3 relates to the contracting and subcontracting of work at a construction job site. That is, the clause tells C.K.G. the kinds of contracts and subcontracts it can and cannot accept. Thus, it comes within the literal language of the proviso. Moreover, the clause satisfies the Connell test in that it is part of an agreement between parties to a collective bargaining relationship, i.e. C.K.G. and the Union. Finally, we concluded that the clause serves Union interests protected by the proviso by insuring that employees represented by the Union will not be required to work at a common situs with nonunion employees. The clause has this effect because, Section 3, the "contracting up" clause, operates in tandem with Section 1, the traditional union signatory subcontracting clause. Section 1 forbids C.K.G. to bring non-unionized employees on the site through any subcontracting of its own. Section 3 requires that employers who subcontract to C.K.G. be bound to the contract. Once those employers are bound, they would be obligated under Section 1 to assure that C.K.G.'s fellow subcontractors are bound to the contract. The result is that no contracts will be let or accepted to any but contractors who agree to abide by the agreement.

For all the foregoing reasons, we concluded that the clause is valid and the instant charge should be dismissed absent withdrawal.^{2/}

H.J.D.

^{1/} In Carvel, the Board upheld a clause that forbade the signatory from accepting a contract at a site where non-signatories were working.

^{2/} We recognize that, even without a contract, Cleverly intends to make the job an all-union job. This was the desire of the mall owner. However, the Union understandably wants to make this a contractual guarantee.