

OFFICE OF THE GENERAL COUNSEL
Division of Operations Management

MEMORANDUM 82-21

June 8, 1982

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

FROM: Joseph E. DeSio, Associate General Counsel

SUBJECT: Pleadings Manual Revision - Notice to Nonrespondent
Employers in Unilateral Subcontracting Cases when
Restoration Remedy is Sought

I. Introduction

In unilateral subcontracting cases, where restoration of the status quo ante is being sought as a remedy, recent cases have raised the question of whether nonrespondent employers who would be affected by the remedial order should be named as parties-in-interest. 1/ A second issue is whether such employers should be advised of the proceeding, and whether and to what extent they should be permitted to participate. As set forth hereinafter, we have concluded that such employers (subcontractors) 2/ should not be named in the complaint as parties-in-interest, absent unusual circumstances. However, they should be given notice of the proceeding by service of a copy of the complaint and should be permitted to participate in the proceeding as amici curiae. Additionally, the complaint should allege that a restoration remedy is part of the relief being sought. Attached are revisions of the Pleadings Manual incorporating these provisions.

1/ See e.g., Hillside Manor Health Related Facility, 257 NLRB No. 134 (1981).

2/ As used hereinafter, the term "subcontractor" identifies the person who performs the subcontract, and the term "employer" identifies the party who lets the subcontract.

II. Subcontractors as Parties-in-Interest

The Board has long been authorized to order a restoration remedy in unilateral subcontracting cases. Thus, in Fibreboard Paper Products Corp. v. N.L.R.B., 379 U.S. 203 (1964), the Supreme Court determined that, even though the respondent's motive in subcontracting unit work was economic, rather than antiunion, nevertheless, the Board's order requiring the respondent to resume its maintenance operations and reinstate its employees with backpay was within the Board's remedial authority. In Mobil Oil Corporation, 219 NLRB 511 (1975), enf. den. 555 F.2d 732 (9th Cir. 1977), a case involving a unilateral change of subcontractors, the General Counsel also sought a restoration remedy, i.e., that the employer should abrogate the extant subcontract and restore the prior one. The Board declined to grant the remedy. In doing so, the Board pointed out that neither the contract termination nor the displacement of unit employees occasioned thereby was alleged as a violation of the Act. It also noted, inter alia, that the extant subcontractor (who would be losing the subcontract under the proposed order) was not named as a party. 3/

Thus, a restoration order was denied in Mobil, in part, because the subcontractor was not named as a party. 4/ However, Hillside Manor subsequently made it clear that party status for those subcontractors is not a prerequisite for a restoration remedy. In that case, the Board ordered reinstatement notwithstanding the fact that the subcontractor which would lose the work, was not a party to the proceeding. It was sufficient that this subcontractor had the opportunity to be present at the hearing and was permitted to participate as amicus curiae.

3/ Since Mobil involved an employer who changed subcontractors, the restoration order had an impact on the subcontractor who would be reacquiring the work as well as on the subcontractor who would be losing the work. By contrast, this memorandum focuses on the more typical situation involving an employer who subcontracts work which it previously performed. However, in cases like Mobil, the Region should apply the principles discussed below to the "losing" subcontractor and the "reacquiring" subcontractor. In this regard, it was noted that the Board's refusal to grant the restoration order in Mobil was based, in part, on the fact that the "reacquiring" subcontractor was not represented at the hearing.

4/ The factor of nonrepresentation at the hearing is discussed infra.

Based upon the foregoing, we have concluded that it is not necessary to name the subcontractor as a party-in-interest in the Complaint, absent unusual circumstances.

III. Notice to Subcontractors of the Proceeding and Extent of Participation

A. Notice

As set forth above, in Mobil, the Board, in denying the restoration remedy, noted that the subcontractor was not represented at the hearing. In Hillside Manor, the Board, in granting the remedy, noted that the subcontractor had an opportunity to be present at the hearing and was permitted to participate as amicus. Thus, the subcontractor should be given notice of the proceeding. Further, if the subcontractor appears at the hearing, he should be given an opportunity to be present and to participate as amicus. Consequently, subcontractors should be served with a copy of the complaint and the complaint should contain a specific prayer for relief. ^{5/} The attached revisions of Sections 605.2(f) and 1000 of the Pleadings Manual incorporate these requirements.

B. Extent of Participation

The Administrative Procedure Act (hereinafter referred to as the APA) provides in pertinent part:

(c) The Agency shall give all interested parties opportunity for -

(1) submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit. ^{6/}

^{5/} It should be noted, however, that the respondent is not denied due process if the remedy sought is not alleged in the complaint. See Local 964, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, (Contractors and Suppliers Association of Rockland County, New York, Inc.), 184 NLRB 625, 626 (1970).

^{6/} 5 U.S.C. Section 554.

Thus, if the subcontractor simply wishes to be present at the hearing and to participate as amicus, counsel for the General Counsel should not oppose this level of participation. Such participation would be for the limited purpose of adducing evidence tending to show that the remedy would impose an inequitable burden on it. See, Mobil Oil Company, supra, and Hillside Manor Health Related Facility, supra.

On the other hand, if the subcontractor wishes to intervene, it should so move under Section 102.29 of the Board's Rules and Regulations which provide in pertinent part:

Any person desiring to intervene in any proceeding shall file a motion in writing or, if made at the hearing, may move orally on the record, stating the grounds upon which such person claims an interest....The regional director or the administrative law judge, as the case may be, may by order permit intervention in person or by counsel or other representative to such extent and upon such terms as he may deem proper.

Counsel for the General Counsel should oppose any such motion, except as noted, infra, on the following grounds: First, the subcontractor is not faced with the prospect of a remedial order against it. Second, the cases do not require that intervention be granted. Third, it does not appear that a subcontractor is an "interested party" within the meaning of the APA. 7/ Fourth, even if the subcontractor is an "interested party" under the APA, this fact does not require intervention under Section 554 (c). 8/ Finally, it should be argued that the subcontractor's interest is only with respect to the remedy and that interest can be protected by participation as amicus.

7/ Cf. Camay Drilling Company, 239 NLRB 997 (1978).

8/ As set forth above, while Section 554 (c) requires agencies to permit interested parties to participate in the proceeding, it does not mandate that intervenor status be accorded to such parties.

Any questions concerning the foregoing should be addressed to your Assistant General Counsel.


J. E. D.

Attachments

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Respondent engaged in the acts and conduct described above in paragraph(s) _____, 1/ (without prior notice to the Union) (and) without having afforded the Union an opportunity to negotiate and bargain as the exclusive representative of Respondent's employees with respect to (such acts and conduct) (and) (the effects of such acts and conduct). 2/

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- 1/ Precede this allegation with a recitation of the actual changes in employment conditions of, or affecting, unit employees.
- 2/ When the unilateral action involves the subcontracting of unit work and the General Counsel is seeking a restoration remedy, the following paragraph should be included in the complaint:

WHEREFORE, as part of the remedy for the unfair labor practices alleged above in paragraphs(s) _____ and _____, the General Counsel seeks an order requiring the Respondent, inter alia, to reinstitute its _____ [insert description of illegally subcontracted work] operation as it existed on _____. [insert date the work was illegally subcontracted]

A copy of the complaint should also be served upon the subcontractor who would be losing the work under the proposed order.

As previously indicated (see Introductory Statement, supra) a complaint should, inter alia, advise a respondent as to the specific nature of its alleged unlawful conduct. Since the remedy for most unfair labor practices is a traditional one, it is generally not necessary for a complaint to include a specific prayer or request for remedial relief. However, in those limited circumstances where the remedy being sought is novel or unique, the complaint will not afford a respondent adequate notice of the relief being sought. Therefore, the complaint should contain a separate prayer or request for specific remedial relief. 1/ While such a prayer or request need not specify all of the remedial relief which is traditional or appropriate, in order to avoid such contentions as "estoppel," "waiver," or "lack of due process," the General Counsel's right to subsequently seek, and the Board's right to ultimately provide, any other appropriate remedy should be specifically preserved.

1/ The Regions should, of course, continue the longstanding practice of advising respondents of the relief being sought during all precomplaint settlement discussions and, where appropriate, during counsel for the General Counsel's opening statement at trial.

The samples preceding this section contain language dealing with the need for a remedial bargaining order in Trading Port situations (see sec. 605.2(a), supra) and pleading a restoration remedy in unilateral subcontracting cases (see sec. 605.2 (f), supra). The preceding sections also contain suggested language dealing with the status of a strike as an unfair labor practice strike (see sec. 600.1(b) supra). 2/ Additional samples of specific prayers or requests for relief which have arisen in cases where the remedy was novel or unique are contained in the following illustrative, but not all inclusive, examples:

2/ As previously noted, allegations with regard to the status of a strike as an unfair labor practice strike are to be included in a complaint even though the respondent has not discriminated against any of the strikers by discharging or refusing to reinstate them. Furthermore, in these cases the complaint should also request an open-ended order requiring the reinstatement, upon application therefor, of all qualified strikers.