

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

Advice Memorandum

DATE: December 18, 2015

TO: Margaret J. Diaz, Regional Director
Region 12

FROM: Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Dodec, Inc. 596-0420-0100
Case 12-CA-148961 596-0420-5500

The Region submitted this case for advice as to whether the Employer provided the Union with actual or constructive notice of its untimely repudiation of the parties' multiemployer collective-bargaining relationship outside the Section 10(b) period such that the Union's Section 8(a)(1) and (5) charge is time-barred. We conclude that the Region should dismiss the charge, absent withdrawal, because the Union had received constructive notice of the Employer's untimely repudiation outside the Section 10(b) period and failed to exercise reasonable diligence to discover the Employer's unfair labor practice.

FACTS

Dodec, Inc. ("the Employer") is a Florida corporation that provides services as a mechanical and general construction contractor. Since 2002, the Employer has maintained a Section 8(f) multiemployer bargaining relationship with Sheet Metal Workers' Local 32 ("the Union"). The Union negotiates its collective-bargaining agreements with various construction contractors in southern Florida through a multiemployer association, Florida Sheet Metal Air Conditioning National Contractors Association, Inc. ("SMACNA").

In August 2000, the Union and SMACNA executed a collective-bargaining agreement with an initial contract term from August 13, 2000 to August 11, 2002 covering certain HVAC and sheet metal work performed in Miami-Dade, Broward, Monroe, Collier, and Lee counties, Florida. Article XIV, Section 1 of this agreement provided that it would continue in force from year to year absent written notice of reopening provided not less than ninety days prior to the expiration date. The collective-bargaining agreement also included an exclusive hiring hall clause and set wage rates and fringe benefit payments for bargaining unit members. Article XIV, Section 5 conditioned a signatory employer's withdrawal from the multiemployer bargaining unit upon written notice to both SMACNA and the Union at least 150 days prior to the expiration date of the agreement. In 2002, the Union and SMACNA

agreed to extend the collective-bargaining agreement for a year, until August 11, 2003.

On November 4, 2002, the Employer became a me-too signatory to the extended contract between the Union and SMACNA. On May 19, 2003, the Employer authorized SMACNA to serve as its exclusive bargaining agent in future negotiations with the Union. The authorization conditioned revocation upon written notice from the Employer to SMACNA no less than 150 days prior to the expiration of the collective-bargaining agreement then in place. After such written notice, the authorization would terminate immediately.

From August 12, 2003 to August 11, 2006 and August 12, 2006 to August 11, 2009, the Union and SMACNA executed successive agreements, and entered one-year contracts thereafter.¹ The language remained largely identical, including the ninety-day notice provision for termination.

In October 2010, the Employer last reported hours worked by bargaining unit members to the Union trust fund administrators. In November 2010, the Employer laid off the last two employees whom it had hired through the hiring hall to perform bargaining unit work. Until October 2013, the Employer sent the Union “no man” notices indicating that the Employer was not performing bargaining unit work.

In October 2013, the Union heard by word of mouth that the Employer had, in fact, been performing bargaining unit work within the Union’s geographic jurisdiction. In a letter dated October 11, 2013, relying on the information it had acquired, the Union notified the Employer of delinquent fringe benefit contributions to the Union’s trust funds. The Employer did not respond. In another letter dated December 12, 2013, the Union again notified the Employer of delinquent fringe benefit contributions. Once again, the Employer did not respond.

On April 2, 2014, the Union trust funds filed a complaint against the Employer in federal district court under the Employee Retirement Income Security Act (“ERISA”). The complaint alleged that the Employer remained bound to the collective-bargaining agreement with the Union, had employed persons for bargaining unit work within the jurisdiction of that agreement, and had failed to make contractual fringe benefit contributions since August 31, 2011. On May 7, 2014, the Employer filed an answer denying being bound to the collective-bargaining agreement or being obligated to

¹ The Union could not clarify whether the parties actually signed new contracts between August 2003 and August 2014, or they permitted the expired 2003 contract to automatically renew under the evergreen clause in Article XIV, Section 1.

make fund contributions, but at the same time acknowledged signing the agreement and implicitly acknowledged that the agreement contained an automatic renewal clause. On June 30, 2014, the district court dismissed the suit without prejudice due to failure to prosecute.

On August 1, 2014, the Union and SMACNA signed a successor collective-bargaining agreement to be effective from August 12, 2014 to August 11, 2015. On August 5, 2014, the Employer sent the Union a letter stating, "Please be advised that Dodec, Inc. does not wish to be associated with this Labor Union." On September 24, 2014, the Union sent a written reply to the Employer stating:

Please find enclosed another copy of the most recent collective bargaining agreement for your signature as a duly authorized agent and officer of Dodec, Inc. You, or another duly authorized representative of your company, are obligated to execute the written version of the collective bargaining agreement reached with Sheet Metal Workers Local Union No. 32.

Dodec, Inc. assigned its bargaining rights to the employer's association, SMACNA, Inc., in Article XIV §5 of the collective bargaining agreement. Your letter of August 5, 2014, is ineffective as either a withdrawal of Dodec from the multiemployer bargaining unit or as a withdrawal of authorization for SMACNA to act as its negotiating agent with Local 32.

Please be aware that a party's failure to sign a written version of the collective bargaining agreement that it has entered is a per se violation of the National Labor Relations Act. Please sign and return a copy of the original executed version of the enclosed agreement within seven (7) days of your receipt of this letter.

In the past, the Union had never requested that the Employer sign a separate copy of the collective-bargaining agreement. The Employer neither responded to this letter nor returned a signed copy of the agreement. In November 2014, the Union initiated an audit of the Employer by an outside accounting firm to determine whether the Employer was employing bargaining unit members for whom it was failing to make fringe benefit contributions. An accounting firm conducted this audit pursuant to the collective-bargaining agreement, which gave the Union the right to conduct such an audit at any time. However, the accounting firm reached its conclusions without the Employer's compliance with the collective-bargaining agreement, relying solely on information available to the public. The audit revealed that the Employer had, in fact, employed workers performing bargaining unit work

and had failed to make the required fringe benefit contributions. In January 2015,² the Union again notified the Employer of its delinquency.

On January 12, the Employer sent a letter to the Union and to SMACNA revoking authorization for SMACNA to bargain on its behalf and repudiating the collective-bargaining agreement. This notice of withdrawal was well within the time frame provided in the agreement. In a letter dated January 28, SMACNA confirmed the Employer's withdrawal from the multiemployer association.

On March 27, the Union filed the instant charge alleging that the Employer had violated Section 8(a)(1) and (5) of the Act by refusing to execute the 2014-15 collective-bargaining agreement it had reached with SMACNA. On May 5, the Union amended the charge to add an allegation that the Employer further violated Section 8(a)(1) and (5) by attempting to untimely withdraw from SMACNA and terminate the collective-bargaining agreement, and by failing and refusing to make contractually required fund contributions on behalf of employees performing bargaining unit work.

ACTION

We conclude that the Region should dismiss the charge, absent withdrawal, because the Union had received constructive notice of the Employer's untimely contract repudiation outside the Section 10(b) period and failed to exercise reasonable diligence to discover the Employer's unfair labor practice.³

² All subsequent dates are in 2015 unless otherwise indicated.

³ The Union's charge alleges that the Employer violated Section 8(a)(1) and (5) based on its untimely repudiation of the parties' contractual relationship. Under *John Deklewa & Sons* an employer cannot unilaterally withdraw from a multiemployer Section 8(f) relationship before contract expiration. 282 NLRB 1375, 1385 (1987), *enfd. sub nom. Ironworkers Local 3 v. NLRB*, 843 F.2d 770 (3d Cir.), *cert. denied* 488 U.S. 889 (1988). Additionally, "a construction industry employer may become bound to successive 8(f) contracts, all enforceable under Section 8(a)(5), if the employer has expressly given continuing consent to a multiemployer association to bind it to future contracts and . . . has taken no timely or effective action, consistent with its own agreement, to withdraw that continuing consent from the association." *Seedorff Masonry*, 360 NLRB No. 107, slip op. at 6 (May 7, 2014). Because we conclude that the charge in this case is time-barred, we do not pass on whether the Employer's contract repudiation was unlawful under these principles.

Section 10(b) of the Act provides that “no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board.” This limitations period commences only when a party has clear and unequivocal notice, either actual or constructive, of a violation of the Act.⁴ When the alleged unfair labor practice is a contract repudiation, it occurs at the moment of the repudiation, and the Section 10(b) period begins to run at the moment the union has clear and unequivocal notice of that act.⁵ The Board will find constructive notice of an unfair labor practice where the “conduct in question was sufficiently ‘open and obvious’ to provide clear notice [or] the filing party would have discovered the conduct in question had it exercised reasonable or due diligence.”⁶ Indeed, a filing party, upon “notice of facts that reasonably engendered suspicion that an unfair labor practice had occurred,” must exercise reasonable diligence to discover the misconduct rather than wait for “divine revelation of clear and unequivocal notice.”⁷ However, constructive notice will not be found where a “delay in filing is a consequence of conflicting signals or otherwise ambiguous conduct.”⁸

⁴ See, e.g., *United Kiser Services, LLC*, 355 NLRB 319, 319-20 (2010).

⁵ See, e.g., *St. Barnabas Medical Center*, 343 NLRB 1125, 1127 (2004). The party raising Section 10(b) as an affirmative defense has the burden of “showing such clear and unequivocal notice.” See *Chinese American Planning Council*, 307 NLRB 410, 410 (1992), *enfd. mem.* 990 F.2d 624 (2d Cir. 1993); see also *Courier-Journal*, 342 NLRB 1093, 1103 (2004) (affirming ALJ’s dismissal of Section 8(a)(1) and (5) allegations based on the employer’s unilateral changes to employee health insurance where union steward had notice of the changes outside the Section 10(b) period).

⁶ *Broadway Volkswagen*, 342 NLRB 1244, 1246 (2004), *enfd. sub nom. East Bay Auto. Council v. NLRB*, 483 F.3d 628 (9th Cir. 2007).

⁷ *Transit Union Local 1433 (Phoenix Transit Sys.)*, 335 NLRB 1263, 1263 fn. 2, 1272-73 (2001) (affirming ALJ’s dismissal of Section 8(b)(1)(A) and 8(b)(2) complaint, relying particularly upon the ALJ’s conclusion that the charging party had constructive notice of the violation where he wrote a letter to the respondent-union outside the Section 10(b) period asserting that he believed it had caused his discharge and then “did absolutely nothing to confirm or refute his belief”).

⁸ *A & L Underground*, 302 NLRB 467, 469 (1991). See also *CAB Associates*, 340 NLRB 1391, 1392 (2003) (not finding constructive notice of contract repudiation based on the employer’s conflicting signals; although the employer did not sign an independent agreement with the union, it still complied with the agreement by employing union stewards at a higher wage rate, deducting dues, and telling the

In *Moeller Bros. Body Shop*, the Board held that Section 10(b) barred the union's allegation that the employer had violated Section 8(a)(5) by unilaterally removing pre-journeymen from the bargaining unit and no longer paying them contractual wages and benefits.⁹ In reaching that conclusion, the Board found that the union had constructive notice of the violation outside the six-month period because it had failed to exercise reasonable diligence to discover the misconduct.¹⁰ In finding a lack of reasonable diligence, the Board noted the employer had acted openly and had the union made even "a minimal effort" to monitor the shop or enforce the collective-bargaining agreement, it could have "much earlier learned of the [employer's] contractual noncompliance."¹¹ Rather, the union never appointed a steward at the facility (although it had the right to do so), rarely visited the employer, and failed to investigate the uncertain status of pre-journeymen under the contract following the deletion of apprenticeship provisions three years prior.¹² The Board concluded that the union had essentially ignored the employer and thus could not "then rely on its ignorance of events . . . to argue that it was not on notice."¹³

stewards that their layoffs were merely due to lack of work and that they would be recalled).

⁹ 306 NLRB 191, 192 & fn. 8 (1992). The Board also held that the union had constructive knowledge of the employer's failure to make contractual fringe benefit payments for journeymen and utility employees and to pay utility employees contractual wages. Because both classes of employees were eligible for a remedy under a continuing violation theory, the union's constructive knowledge merely limited the available remedy to the six-month period preceding the filing of the charge. *Id.*

¹⁰ *Id.* at 192.

¹¹ *Id.* at 192-93.

¹² *Id.* at 192; *cf. R. G. Burns Elec.*, 326 NLRB 440, 440-41 (1998) (finding union had exercised reasonable diligence although it previously had not discovered employer's refusal-to-hire violation where, among other things, it had engaged in surveillance of the employer's worksite and questioned jobsite sources after suspicions that the employer had hired non-union applicants).

¹³ 306 NLRB at 193; *see also United Kiser Services, LLC*, 355 NLRB at 320 (finding charging-party union's charge was time-barred where it had obtained constructive knowledge outside the Section 10(b) period that the employer had granted recognition to and entered a contract with a rival union for employees in positions covered by an existing contract with the charging-party union; charging-party's business agent

Here, the Union similarly received constructive notice of the Employer's untimely contract repudiation both by the Employer's open and obvious conduct and because it failed to exercise reasonable diligence to discover the violation. Initially, the Employer's August 5, 2014 letter stating that it "does not wish to be associated with this Labor Union" should have put the Union on notice of an unfair labor practice. Indeed, the text of the Union's September 24, 2014 response demonstrates it had interpreted the Employer's letter as a repudiation of the parties' contractual relationship because the Union stated that the letter was "ineffective as either a withdrawal of Dodec from the multi-employer bargaining unit or as a withdrawal of authorization for SMACNA." Additionally, despite never having done so in the past, the Union then requested that the Employer sign a separate copy of the contract. Both the language of the September 24th letter and the request to sign a separate copy of the contract indicate that the Union had understood the intent behind the Employer's statement. Even assuming the Union had not understood, these circumstances were surely sufficient to "reasonably engender suspicion" of the Employer's untimely repudiation.

Further bolstering the conclusion that the Union was on constructive notice as of the Employer's August 5 letter is the background of the parties' interactions over the preceding year. Since October 2013, the Union knew of rumors that the Employer had been performing bargaining unit work within their geographic jurisdiction. In fact, as alleged in the April 2014 ERISA lawsuit, the Union trust funds believed the Employer had been performing bargaining unit work and failing to make contractually required fund contributions since August 31, 2011 – for nearly three years. Additionally, the Employer previously had ignored the Union's informal attempts to resolve this alleged delinquency, as evidenced by the Employer's lack of response to the Union's letters of October 11, 2013 and December 12, 2013. Finally, when the Employer *did* respond to the Union in its answer to the April 2014 ERISA lawsuit, it specifically denied being bound to the collective-bargaining agreement. Viewed within this broader context, the Union should have been aware that the Employer's August 5, 2014 letter constituted a repudiation of their contractual relationship.¹⁴

visited the facility outside the Section 10(b) period and saw eleven new employees, beyond the original unit of four, being represented by the rival union).

¹⁴ Since the union was on constructive notice of the violation as of August 5, 2014, the Section 10(b) period concluded on February 5, 2015, seven weeks before the Union filed its charge.

Even if the Union did not have constructive notice of the violation as of August 5, 2014, it at least had sufficient suspicion of the violation so as to require it to exercise reasonable diligence to find out whether the Employer had repudiated the contract, and it did not exercise such diligence. Before the August 5 letter, the Union was on notice that the Employer might not be abiding by the contract, and filed a lawsuit regarding the failure to make fund contributions. That suit was based on the Union's suspicion that the Employer was continuing to employ unit employees and was not providing contractual benefits. At any time, the Union could have conducted an audit, like the one it ultimately conducted in November 2014 (after three years of Employer delinquency). And, even after the Union received the August 5 letter, it waited about seven weeks to follow up, despite the very serious implications of the Employer's statement that it no longer wished to be associated with the Union. If the Union was unsure about what the Employer's August 5 letter meant, it could have simply asked for clarification.

Finally, the Employer gave no "conflicting signals," such as abiding by the collective-bargaining agreement, that may have excused the Union's delay in filing of charge. Instead, the Employer's continual failure to make contractually obligated fund contributions signaled that it was not abiding by the agreements reached between the Union and SMACNA. In its answer to the April 2014 ERISA lawsuit, the Employer not only denied an obligation to make these contributions, but denied being bound to the contract at all. Thus, the Employer's behavior and communications to the Union, however limited, consistently reflected its position. The August 5th letter was only another reflection of this position.

Since the Section 10(b) period for filing a charge over the repudiation ended on February 5, 2015, the Union's charge on March 27 is time-barred. Accordingly, the Region should dismiss the Union's charge, absent withdrawal.

/s/
B.J.K.