

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

Advice Memorandum

DATE: February 16, 2016

TO: Olivia Garcia, Regional Director
Region 21

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

SUBJECT: Haggen, Inc.
Case 21-CA-158737

530-6050-1601

This case was submitted for advice as to whether the Employer violated the Act by failing to affirmatively disclose to the Union and bargain regarding a provision in the sales agreement between the Employer and its predecessors that restricted the predecessors from re-hiring any unit employee who accepted employment with the Employer. We conclude that, while the Employer's conduct arguably violated Section 8(a)(5) and (1), it would not effectuate the purposes and policies of the Act to issue complaint because the Employer never enforced the no-hire agreement and promptly rescinded it at the Union's request.

FACTS

In late 2014, Safeway and Albertsons, two major grocery store chains, agreed to merge into a single company. The Federal Trade Commission (FTC) ordered Albertsons/Safeway to divest 168 stores in connection with their merger. Haggen, Inc. (Employer) agreed to purchase 148 grocery stores owned by Safeway and Albertsons in Southern California and Nevada. For decades, United Food & Commercial Workers International Union, Locals 135, 324, 770, 1167, 1428, and 8-GS (Union) have been parties to collective-bargaining agreements with Safeway and Albertsons covering virtually all of the Safeway and Albertson employees. The most recent multi-employer agreement is effective from March 3, 2014 through March 6, 2016.

On January 5, 2015,¹ Albertsons/Safeway, the Employer, and the Union met regarding the effect of the divestiture and transfer of stores on the unit employees. The parties agreed that employees at affected Albertsons/Safeway stores would have an opportunity, at least a month before each store was transferred to Haggen, to

¹ All dates hereinafter in 2015.

transfer to another Albertsons/Safeway location by bumping a less senior employee. However, Albertsons/Safeway and the Employer entreated the Union to encourage employees to accept employment with the Employer and stay at their current locations. Neither Albertsons/Safeway nor the Employer disclosed any restrictions on the ability of employees who went to work for the Employer to later return to their predecessor employer. At the same time, the Employer and the Union executed a Letter of Agreement binding the Employer to the current multi-employer collective-bargaining agreement.

On January 21, Albertsons/Safeway and the Union met again and executed a formal agreement reflecting their prior oral agreement regarding employees' rights to transfer to other Albertsons/Safeway stores. Again, Albertsons/Safeway did not disclose the existence of any restrictions on the future employment opportunities of those employees who elected not to transfer to other Albertsons/Safeway stores and instead went to work for the Employer.

Between March and June, the Employer took over operations at eighty-three of the stores it had agreed to purchase from Albertsons/Safeway in the Southern California area. In early July 2015, the Employer notified the Union that its financial situation at the newly acquired stores was quickly deteriorating. On August 14, the Employer announced that it was closing at least nine of those stores. On August 15, the Employer sent WARN letters to affected unit employees.

On August 20, the Union sent an information request to Albertsons/Safeway and the Employer for "any and all contracts between [Albertsons/Safeway] and [the Employer] which relates in any way to the 2015 sale of the stores in Southern California including but not limited contracts [sic] relating to the prospective hiring of [the Employer's] employees who had been employed by [Albertsons/Safeway] prior to the purchase." On August 26, Albertsons/Safeway proffered to the Union partially redacted portions of the acquisition agreement. The agreement provides, in pertinent part, that "[f]or a period of twelve (12) months following the applicable Closing Date, no Seller shall, and each Seller shall cause its Affiliates not to, directly or indirectly, solicit (or cause to be directly or indirectly solicited) or hire any Transferred Employee[.]"

On September 2, the Union and the Employer met regarding the store closures and the newly discovered no-hire agreement. The Union asked the Employer whether it would be willing to cancel the no-hire agreement. The Employer stated that it was looking into lifting the restriction but claimed that the provision was required by the FTC. On September 9, the Employer stated that it would not enforce the no-hire agreement.

On September 26, the FTC approved Albertsons/Safeway's proposal to rescind the no-hire agreement.

ACTION

We conclude that, while the Employer arguably violated Section 8(a)(5) and (1) by failing to disclose and bargain over the no-hire agreement, it would not effectuate the purposes and policies of the Act to issue complaint because the Employer never enforced the no-hire agreement and promptly rescinded it at the Union's request.

Initially, we conclude that the Employer's no-hire agreement with Albertsons/Safeway arguably constituted a mandatory subject of bargaining. The Supreme Court has long held that an employer's dealings with a third party are a mandatory subject of bargaining if it "vitaly affects the 'terms and conditions' of [the employees'] employment."² Further, a union may compel an employer to bargain over a mandatory subject of bargaining even if that term or condition is set by a third-party contractor.³ In addition, non-compete agreements, whereby employers require employees to agree to refrain from subsequently going to work for a competitor for a specified time period, have been found to be mandatory subjects of bargaining.⁴

Furthermore, the no-hire agreement was arguably a mandatory subject of bargaining even though it was entered before the Employer had a bargaining relationship with the Union. The agreement was a benefit that the Employer obtained from Albertsons/Safeway, to protect it against the loss of these employees post-transfer, in exchange for other aspects of the agreement that benefitted

² *Allied Chem. Workers Local 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 179 (1971). *See also Teamsters Local 24 v. Oliver*, 358 U.S. 283, 294–95 (1959) (holding that a collective-bargaining agreement provision fixing a minimum rental rate for vehicles driven by owner-operators rather than the employer's own employees was a mandatory subject of bargaining because the provision was intended to preserve the unit employees' wage rates); *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 213 (1964) (employer's decision to subcontract resulting in the replacement of unit employees with those of an independent contractor to do the same work under similar circumstances was a mandatory subject of bargaining).

³ *See Ford Motor Co. v. NLRB*, 441 U.S. 488, 503 (1979) (upholding Board decision that in-plant food services and prices set by third-party contractor were mandatory subjects of bargaining).

⁴ *Government Employees (IBPO)*, 327 NLRB 676, 684, n.8 (1999), *enforced mem.*, 205 F.3d 1324 (2d Cir. 1999). *See also Bolton-Emerson, Inc.*, 293 NLRB 1124, 1130 (1989) (employer violated Section 8(a)(5) by unilaterally imposing obligation on employees to sign a non-compete agreement).

Albertsons/Safeway. Once the bargaining relationship with the Union was established, the Union could have sought monetary benefits to compensate for the limitation of unit employees' future employment prospects, or could have bargained to limit the Employer's enforcement of the agreement, as it eventually did on September 9.

Second, we conclude that Albertsons/Safeway and the Employer arguably had an affirmative duty to disclose the existence of the no-hire agreement at the outset of bargaining in January 2015,⁵ such that the failure to disclose it violated the duty to bargain in good faith.⁶

Nonetheless, even assuming the Employer's failure to disclose and bargain over the no-hire agreement violated the Act, we conclude that it would not effectuate the purposes and policies of the Act to issue complaint here. The Employer never enforced the no-hire agreement, and there is no evidence that Albertsons/Safeway denied a job to a single unit employee because of the agreement. Additionally, shortly after the Union discovered the agreement, the Employer pledged not to enforce it, and Albertsons/Safeway successfully obtained FTC approval to rescind it.⁷ Finally, there is no evidence that the Employer's conduct has diminished the employees' support for the Union or damaged the Union's bargaining relationship with the Employer.

⁵ Cf. *Waymouth Farms*, 324 NLRB 960, 961-62 & n.7, 968 (1997) (holding the employer bargained in bad faith over plant closure agreement by never informing the union it had purchased new plant only six miles away and repeatedly misleading union into believing it was still considering out-of-state locations), *enforced in relevant part*, 172 F.3d 598, 600 (8th Cir. 1999). See also *Royal Plating and Polishing Co., Inc.*, 148 NLRB 545, 547 (1964) ("seemingly, unsolvable problems can, upon occasion, be solved if the parties to a bargaining relationship confront each other honestly and openly across the bargaining table"), *modified on other grounds*, 152 NLRB 76 (1965).

⁶ Although the Employer asserts that the Union waived its right to bargain over the no-hire agreement by failing to demand to bargain once it was discovered, the record does not support that assertion. Indeed, soon after the Union learned of the agreement on August 26, the Union engaged in bargaining with the Employer over the no-hire agreement at the September 2 meeting over the effects of the Employer's store closings.

⁷ Cf. *Fabrica de Muebles Pureto Rico*, 107 NLRB 905, 905-06 (1954) (dismissing Section 8(a)(5) refusal to bargain complaint on non-effectuation grounds where, after the complaint had issued, the union and employer resumed bargaining and executed a collective-bargaining agreement).

Accordingly, the Region should dismiss the charge, absent withdrawal.

/s/
B.J.K.