

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

# Advice Memorandum

DATE: January 21, 2016

TO: Karen P. Fernbach, Regional Director  
Region 2

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

SUBJECT: Brookfield Property Management, LLC 584-0100  
Building and Construction Trades Council of 584-0140  
Greater New York 584-1200  
Case 02-CE-146693 584-1201  
584-3700  
584-3740  
584-3740-1700-0000  
584-5056

The Region submitted this case for advice on whether the Portfolio Labor Agreement (“PLA”) between Brookfield Properties Management, LLC (“Brookfield”) and the Construction Trades Council of Greater New York (“Trades Council”) is a hot cargo agreement that violates Section 8(e) either on its face or as applied to moving work performed by the International Brotherhood of Teamsters, Local 814 (“Local 814”). The PLA provides that only contractors who are party to a collective-bargaining agreement with members of the Trades Council may perform work on a Brookfield property, either for Brookfield or its tenants. We conclude that the Region should issue complaint, absent settlement, alleging that the PLA violates Section 8(e) as applied to Local 814 moving work because such work does not fall within the construction industry proviso.

## FACTS

Brookfield is a global commercial real estate firm that owns, develops, and manages commercial properties. The Trades Council is comprised of 50 member unions, including Local 814 and the New York City District Council of Carpenters (“Carpenters”). Local 814 has collective-bargaining agreements with employer members of the Greater New York Movers and Warehousemen’s Bargaining Group, comprised primarily of commercial moving and storage companies, some of which also perform interior build-out work.

On March 5, 2014, Brookfield entered into a collective-bargaining agreement with the Trades Council, entitled Portfolio Labor Agreement (“PLA”). The preamble

to that agreement states in relevant part that: “Brookfield has negotiated this Agreement as a construction industry employer within the meaning of the National Labor Relations Act, having substantial control over project management, the selection of Contractors (as defined herein) and labor relations policies for the Brookfield Portfolio.”

Under the terms of Article 2, Section 7 of the PLA, “[o]nly Contractors who are parties to a collective bargaining agreement with a Local Union shall be employed to perform Portfolio Work.” Portfolio Work is defined in Article 2, Section 1 as “all work for construction, alteration and/or repair” performed at any of Brookfield’s properties. Further, Article 2, Section 8 states that: “Brookfield and the Contractors shall not subcontract any Portfolio Work to be done at a Brookfield Building except to a person, firm or corporation who is or agrees to become party to this Agreement.” Article 3, Section 1 extends these requirements to Brookfield’s tenants: “In all lease agreements executed after the date of this Agreement with tenants at any Brookfield Building ... [Brookfield] shall require such tenants and their contractors to use only [Trades Council affiliate unions] for such construction work.”

On February 10, 2015, the Institute for Culinary Education (“ICE”) informed Sher-Del Transfer (“Sher-Del”), a commercial moving company, that the PLA prohibited Sher-Del from bidding on ICE’s forthcoming move to a Brookfield building because Sher-Del does not employ members of Local 814. The moving work for the ICE relocation was awarded to Eagle Transfer, which employs Local 814 members.

The ICE commercial move involved the moving of furniture, work stations, and supplies from one commercial building to another, and was handled by employees represented by Local 814 and employees represented by the Carpenters. The division of work between the Carpenters and Local 814 is governed by a 1983 jurisdictional agreement. At the sending site of the move, the Carpenters are responsible for breaking down workstations (cubicles) and shelving. Local 814 members perform the rest of the work, including packing and loading all of the items onto the truck. At the receiving site, Local 814 members load everything from the truck onto the elevator. From the elevator, members of both Local 814 and the Carpenters receive the items and move them to their designated places. Assembly and final placement of the workstations and shelves are handled by the Carpenters. Carpenters and Local 814 members work in close proximity throughout the move, but Local 814 members never assist the Carpenters with their assembly and disassembly work.<sup>1</sup>

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<sup>1</sup> The division of labor between the Carpenters and Local 814 is the same for both commercial moves and interior build-outs. Interior build-out work involves taking a completely raw space and converting it with a new layout and furniture. In interior build-outs, Local 814 members move materials from the manufacturer’s truck (or truck delivering items from a storage facility) onto the worksite, and the Carpenters

There is no evidence that Brookfield had any involvement in the ICE relocation other than to notify the tenant of the PLA. However, the Charged Parties claim that Brookfield generally exercises significant control over project management, including selecting contractors and designing labor relations policies, as stated in the PLA preamble. Thus, for example, Brookfield is currently seeking to fill a Project Manager position in Los Angeles, reporting to the Brookfield Vice President of Construction, with responsibilities for “assisting with and/or managing new construction, renovation, repair or relocation projects from inception to completion.”<sup>2</sup>

### ACTION

We conclude that the PLA violates Section 8(e) as applied to Local 814 moving work because such work does not fall within the construction industry proviso.

Section 8(e) makes it an unfair labor practice for a union and an employer to enter into any contract or agreement where the employer agrees to cease doing business with any other employer or person, or to refuse to enter into such a business relationship in the first place.<sup>3</sup> However, a contract clause that technically falls within this prohibition will be found lawful if: (1) the clause has a primary objective;<sup>4</sup>

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alone assemble and install the building materials. The differences between interior build-outs and commercial moves appear to be that in interior build-outs, Local 814 members are unloading materials exclusively related to work performed by the Carpenters, and spend a greater percentage of their time working alongside the Carpenters.

<sup>2</sup> See

[http://brookfieldofficeproperties.com/content/careers/project\\_manager\\_construction-32817.html?CID=4262](http://brookfieldofficeproperties.com/content/careers/project_manager_construction-32817.html?CID=4262) (last visited January 20, 2016).

<sup>3</sup> See, e.g., *Heartland Industrial Partners, LLC*, 348 NLRB 1081, 1082-83 (2006) (“The General Counsel can establish the cease doing business element of Section 8(e) by ‘proof of prohibitions against forming business relationships in the first place as well as requirements that one cease business relationships already in existence’”) (citation omitted), *petition dismissed*, 265 F. App’x 1 (D.C. Cir. 2008).

<sup>4</sup> See *Carpenters Local 944 (Woelke & Romero Framing, Inc.)*, 239 NLRB 241, 246-47 (1978) (noting that agreements that prohibit subcontracting to employers that pay less than the “area standards” have a primary objective) (citation omitted), *enforced sub nom. Woelke & Romero Framing, Inc. v. NLRB*, 654 F.2d 1301 (9<sup>th</sup> Cir. 1981) (en banc), *affirmed in relevant part*, 456 U.S. 645 (1982).

or (2) even if secondary in nature, the clause is protected under Section 8(e)'s construction or garment industry provisos.<sup>5</sup> The construction industry proviso exempts agreements between unions and employers "in the construction industry relating to contracting or subcontracting of work to be done at the site of construction, alteration, painting, or repair of a building, structure, or other work."<sup>6</sup> In *Connell Construction Co.*, the Supreme Court added a nonstatutory test, holding that the proviso "extends only to agreements in the context of collective-bargaining relationships," and possibly to agreements aimed at avoiding friction where union and nonunion employees are working side-by-side.<sup>7</sup> The party asserting the construction industry proviso protection bears the burden of proof.<sup>8</sup>

In this case, the PLA has a clear "union signatory clause," which the Board views as having a secondary objective.<sup>9</sup> In essence, union signatory clauses require a general contractor to boycott the services of nonunion subcontractors in order to influence the labor relations policies of the subcontractor.<sup>10</sup> Thus, unless the Respondents can prove that the PLA is protected by the construction industry proviso, the agreement violates Section 8(e).

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<sup>5</sup> See, e.g., *Operating Engineers Local 701 (Pacific Northwest Chapter, Associated Builders & Contractors, Inc.)*, 239 NLRB 274, 276-77 (1978) (construction industry proviso insulated union signatory subcontracting clause), *enforced*, 654 F.2d 1301 (9<sup>th</sup> Cir. 1981) (en banc), *affirmed in relevant part sub nom. Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645 (1982).

<sup>6</sup> 29 U.S.C. § 158(e).

<sup>7</sup> *Connell Constr. Co. v. Plumbers & Steamfitters Local 100*, 421 U.S. 616, 633 (1975).

<sup>8</sup> See, e.g., *Carpenters Chicago Council (Polk Bros.)*, 275 NLRB 294, 296 (1985) ("The burden of establishing that ... [a party is] engaged in the construction industry rests on the Respondent. . .") (citations omitted).

<sup>9</sup> See, e.g., *Woelke & Romero*, 239 NLRB at 246 (union signatory clauses violate 8(e) because they are "viewed as not being designed to protect the wages and job opportunities of unit employees covered by the contract, but as directed at furthering general union objectives and undertaking to regulate the labor policies of other employers").

<sup>10</sup> *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 653 (1982).

The PLA is facially lawful

We conclude that the PLA is lawful on its face because the Charging Party has failed to demonstrate that Brookfield is not an employer in the construction industry, and the language of the union signatory clause only restricts contracting of job-site construction work.

The Board has had few opportunities to address the applicability of the construction industry proviso to employers that are not traditional construction contractors. The Board has made clear, though, that as long as an employer “actually performs construction work,” it may claim protection of the construction industry proviso even if construction is not its principal business.<sup>11</sup> The Board generally considers the degree of an employer’s control of the construction-site labor relations to determine whether it is in the construction industry for purposes of 8(e).<sup>12</sup> Thus, if an employer acts as its own general contractor,<sup>13</sup> or hires a general contractor but retains close control of the project,<sup>14</sup> for instance by choosing subcontractors or

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<sup>11</sup> See *Carpenters Local 623 (Atlantic Exposition Services)*, 335 NLRB 586, 591 (2001) (contrasting the requirements of 8(e) construction industry proviso with the 8(f) requirement that an employer be engaged primarily in the construction industry), *enforced sub nom., Spectacor Mgt. Group v. NLRB*, 320 F.3d 385 (3<sup>rd</sup> Cir. 2003); see also *Los Angeles Bldg. Indust. (Church’s Fried Chicken, Inc.)*, 183 NLRB 1032, 1036-37 (1970) (restaurant chain that acted as its own general contractor held to be in the construction industry).

<sup>12</sup> See, e.g., *Church’s Fried Chicken, Inc.*, 183 NLRB at 1037 (based on the legislative history of 8(e), “it is logical to assume that a company that acts as its own prime contractor, and thus can control the labor relations of its subcontractors” is a construction industry employer for the purposes of the 8(e) proviso); *Carpenters Local 743 (Longs Drug)*, 278 NLRB 440, 442 (1986) (the test of whether an employer is in the construction industry for purposes of 8(e) depends on “the degree of control over the construction-site labor relations it elects to retain”).

<sup>13</sup> See *Church’s Fried Chicken Inc.*, 183 NLRB at 1036-37 (1970).

<sup>14</sup> See *Longs Drug*, 278 NLRB 440, 442 (1986) (even where an employer hires a general contractor, it can still be considered an employer in the construction industry for purposes of 8(e) if it nonetheless “regularly makes decisions, including the selection of subcontractors, normally within the scope of a general contractor’s duties and authority”).

directly supervising the work,<sup>15</sup> the Board will find the employer to be exercising enough control over labor relations at the construction site to be in the construction industry for purposes of Section 8(e). In contrast, the Board will find that an employer is not in the construction industry where it is merely the owner of the premises, and does not make decisions regarding selection of subcontractors or engage in other general contractor duties, or where it directly hires some construction workers but only for very limited purposes such as completing final finishing work on the site.<sup>16</sup>

In this case, we conclude that Brookfield was not in the construction industry for purposes of the ICE commercial relocation. The Charged Parties do not appear to assert that Brookfield acted as a general contractor or otherwise controlled the labor relations on the ICE relocation project. Indeed, there is no evidence that Brookfield had any direct involvement in the move.

However, there is insufficient evidence to extrapolate from the ICE relocation to conclude that Brookfield is never a construction industry employer, and therefore the PLA is facially or *per se* unlawful. The Charged Parties claim that it exercises significant control over project management, including selecting contractors and designing labor relations policies on some covered sites and projects. The current Brookfield job posting for a Construction Project Manager, albeit in Los Angeles, reporting to the Brookfield Vice President of Construction, appears to provide some evidence that Brookfield works in the business of construction. Accordingly, the Region should not allege that the PLA is facially unlawful on this ground unless further investigation reveals that Brookfield is never an employer in the construction industry.<sup>17</sup>

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<sup>15</sup> See *Carpenters (Rowley-Schlimgen)*, 318 NLRB 714, 716 (1995) (finding office designer to be in the construction industry because its employee directly supervised contractor's workers).

<sup>16</sup> See *Longs Drug*, 278 NLRB at 441-42 (employer was not in the construction industry for purposes of 8(e) even though it hired some carpenters for two weeks to install some specified fixtures at the end of an eight-month project); *Columbus Bldg & Const. Trades Council (Kroger Co.)*, 149 NLRB 1224, 1226, 1231-32 (1964) (employer was not in the construction industry because it was merely a prospective leasee, despite its own indirect employment of carpenters and sheet metal workers after the landlord had completed construction).

<sup>17</sup> We note that there currently is also no evidence that the provision fails to meet the requirement in *Connell Constr. Co. v. Plumbers & Steamfitters Local 100*, 421 U.S. at 633, that a union signatory clause be negotiated in the context of a collective-bargaining relationship. Unless the Charging Party presents evidence that the PLA

Moreover, because the union signatory clause of the PLA is clearly limited to “work for construction, alteration and/or repair,” the agreement is facially lawful with regard to the nature of the work covered.

The PLA is unlawful as applied because Local 814 workers do not engage in work “done at the site of the construction” under the construction industry proviso

In order for the PLA to be shielded by the construction industry proviso, it must apply to work “done at the site of construction.”<sup>18</sup> The proviso was not intended to exempt 8(e) agreements “relating to supplies and materials or other products shipped or otherwise transported to and delivered on the site of construction.”<sup>19</sup> The Board has refused to apply proviso protection in a series of cases where the Teamsters simply have delivered materials to a construction site.<sup>20</sup> In contrast, in *Operating Engineers Local 12 (Stief Co)*, the Board found that the construction industry proviso applied where the transportation work was “only an incidental part of the drivers’ duties” because the drivers’ primary work contributed to the actual construction.<sup>21</sup>

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was not negotiated in a collective-bargaining context, the PLA is facially lawful in this regard as well.

<sup>18</sup> 29 U.S.C. § 158(e).

<sup>19</sup> *Int’l Bhd. of Teamsters, Etc. Local 294 (Island Dock Lumber)*, 145 NLRB 484, 491 (1963) (quoting H.Conf.Rept. 1147, 86<sup>th</sup> Cong., 1<sup>st</sup> sess., p. 39, II Leg. Hist. 943), *enforced*, 342 F.2d 18 (2d Cir. 1965).

<sup>20</sup> *See Teamsters Local 957 (Northwood Stone)*, 298 NLRB 395, 398-99 (1990) (hauling reclaimed or recyclable asphalt products to and from construction site is outside of the proviso), *enforced*, 934 F.2d 732 (6<sup>th</sup> Cir. 1991); *Joint Council of Teamsters No. 42 (Inland Concrete Enterprises, Inc.)*, 225 NLRB 209, 216-17 (1976) (delivery of precast pipe by boom truck into ditches and of ready-mix concrete is outside of the proviso); *Local 282, Teamsters (D. Fortunato, Inc.)*, 197 NLRB 673, 677-78 (1972) (transporting tools, materials, and personnel to and from the construction site is outside of the proviso); *Island Dock Lumber*, 145 NLRB at 490-92 (delivery of liquid concrete, even if mixed on-site, is outside of the proviso); *Teamsters Local Union No. 559, Etc. (Connecticut Sand and Stone Corp.)*, 138 NLRB 532, 532, 535 (1962) (delivery of sand, stone, gravel, and ready-mix concrete dumped at construction sites is outside of the proviso).

<sup>21</sup> 314 NLRB 874, 876-77 (1994) (finding the construction industry proviso applied to boom truck drivers’ work because their principal task was repeatedly hoisting, lowering, placing, and removing steel forms integral to constructing barrier walls,

In this case, Local 814 members essentially move furniture and supplies from one site to another. Although Local 814 members work alongside the Carpenters, their only role with respect to the construction work is to pick up the disassembled workstations from the sending site (or from the truck in the case of interior build-outs) and drop them off for the Carpenters at the receiving site. Their work at the construction site is therefore centered on delivery, like in the series of Teamsters cases where the Board found delivery of construction materials to be outside the ambit of the construction industry proviso. This work is plainly distinguishable from the work performed by the drivers in *Stief*, who remained on site to contribute to the actual construction work. We therefore conclude that the work performed by Local 814 is not “work to be done at the site of the construction” within the meaning of the construction industry proviso.

Accordingly, the Region should issue complaint, absent settlement, alleging that the Charged Parties are violating Section 8(e) to the extent that they are applying the PLA to Local 814 moving work.

/s/  
B.J.K.

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through which they are “as much a part of the construction crew as any other member”).