FORM NLRB-5026
(4-80)

UNITED STATES GOVERNMENT
National Labor Relations Board

Memorandum

A.D. 04729 COPIES PLEASE RELEASE

TO : W. Bruce Gillis Jr., Regional Director
Region 27

DATE July 2, 1986

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

SUBJECT: Gordon Sign Company
Case 27-CA-9481
27-CA-9481-2
27-CA-9481-3

530-4040-5090
530-4040-7500
530-4850-6700
530-5770-1200
530-5770-2583
530-6083-2033-4000
530-6083-2033-8000

This Section 8(a)(5) case was submitted for advice on the following issues: (1) whether a union's reopener letter to members of a multi-employer association tolls the period during which an employer-member may withdraw from the multi-employer association; and (2) whether a reopener clause, which sets forth a specified number of days and a fixed date, carries over unchanged into an automatically renewed contract.

FACTS

Gordon Sign Co. ("the Employer" or "Gordon") became part of a multi-employer group consisting of electrical sign companies in Pueblo, Colorado on July 8, 1977. It did so by signing a "Letter of Assent - A", a form provided by IBEW, Local 12("the Local" or "the Union"), the labor organization which had a collective bargaining relationship with the multi-employer association for many years prior to that time. The multi-employer association ("Sign Contractors" or "Electrical Sign Companies") has no known legal status, and has been very loosely structured. It has no known membership requirements, officers, representatives, or administrators. Sign Contractors has simply been a group of employers who have met jointly with Local 12 for the purpose of negotiating collective bargaining agreements. Each of the employers, however, has had its own spokesperson at the negotiations and has each agreed to, and signed, the same collective bargaining agreements. The practice has been for each of the employers to sign on the same page of the contract as the Union.

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In 1977 when Gordon joined the multi-employer association, it consisted of four other sign contractors. The last signed contract became effective on January 1, 1981, and had a termination date of December 31, 1983, with a 120 day reopener clause. Section 1.02 of the Agreement states:

> Either party desiring to change, amend or terminate this Agreement must notify the other in writing at least One Hundred Twenty (120) days prior to January 1, 1983. 1/

That agreement was signed by only two employers, Gordon and Ralph's Electric (Ralph's), the only two remaining members of the Electrical Sign Companies. There is no evidence that prior to 1985 any participant withdrew or attempted to withdraw from the multi-employer association.2/ There are a total of six employees in the multi-employer bargaining unit. Three of the employees are employed by Ralph's and three are employed by Gordon.

On November 1, 1982, Gordon was purchased by CGI Sign Company (CGI), who retained Gordon's name and all of its personnel. The Region has found that CGI is a Burns 3/ successor to Gordon. No overt action was taken by CGI at the time of the sale to withdraw the purchased Gordon facility from the multi-employer association. And Gordon, under CGI's ownership, continued to abide by the terms of the existing collective bargaining agreement. Further, Gordon was a party to an amendment to the multi-employer agreement which became effective January 1, 1983. The exact date this amendment was signed by the Employer, Ralph's and the Union is not known since the signatures are undated and none of the parties to the agreement have a precise recollection of the signing date. It is clear, however, that the signing took place sometime between September 3, 1982, the date of the Union's letter to the multi-employer association requesting to reopen the agreement for amendment, and December 22, 1982, the date the International Office of the Union approved the agreement. Although it is possible that the sale of Gordon had not yet taken place when the amendment was signed by

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1/ The Region found that this date in the reopener clause is erroneously stated in the contract as January 1, 1983 rather than the intended date of January 1, 1984.

2/ The other members of the multi-employer association reportedly went out of business.

3/ NLRB v. Burns Int'l Security Services, Inc., 406 U.S. 272 (1972).

Gordon, the evidence clearly establishes that when a dispute arose about one of the terms of the amendment after CGI purchased Gordon, 4/ Gordon acquiesced to the Union's demand that it honor the terms of the amendment.

In August of 1983, the Local sent a letter to the members of the multi-employer association reopening the contract. The Local cannot find a copy of its reopener letter and has no recollection of the precise date on which it was sent. However, the owner of Ralph's recalls that the reopening request was made on August 31, 1983. Gordon has no recollection of receiving such a request. After Gordon failed to respond to the Union's August reopener letter, the Union sent two additional letters to Gordon requesting negotiations, dated December 20 and 21, 1983. Again Gordon did not respond to the Union's requests. The Union then temporarily dropped the matter because of a change in business managers. It is the position of the Union and of Ralph's, that the contract renewed itself in both 1984 and 1985 in accordance with Section 1.01 of the expired agreement. 5/ Gordon takes the position that it was no longer a part of the multi-employer association when the collective bargaining agreement automatically renewed itself, but Gordon does not deny that it was abiding by the terms of the expired agreement.

On June 3, 1985, 6/ the Union sent a letter to both Gordon and Ralph's, requesting that three sections of the multi-employer agreement be reopened for negotiations. The Union specifically requested that Section 1.01 of the multi-employer agreement be amended to change the effective date of the reopener provision from January 1, 1985 to December 31, 1986. In addition, the Union requested that Section 9.01 be amended to delete the vacation deduction. With respect to the section of the multi-employer agreement concerning minimum wages, Section 5.06, the Union proposed that there be a "moderate increase". The owner of

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4/ The dispute concerned the amount to be paid for each employee into the health benefit trust.

5/ Section 1.01 of the expired agreement states in pertinent part:

> "It [the contract] shall continue in effect from year to year thereafter, from January 1 through December 31 of each year unless changed in the way later provided herein."

6/ All dates hereafter are in 1985 unless otherwise indicated.

On December 12, the Union met with Ralph's and signed a new collective bargaining agreement. This agreement states that it is between the Electrical Sign Companies and the Union.

On December 18, the Union advised Gordon that it considered Gordon to be bound by the new agreement. Gordon has not responded to this letter and, as of the end of December, Gordon has discontinued making payments into the trust funds as required under both the old and new contracts. 8/

ACTION

We have concluded that a union's reopener letter to members of a multi-employer bargaining association does not toll the period during which an employer-member of the association may withdraw from the multi-employer group, if the reopener letter attempts to initiate negotiations prior to the date set by the parties in the collective bargaining agreement. We have further concluded that a reopener clause which sets forth a specified number of days and a fixed date does not automatically carry over unchanged into an automatically renewed contract; rather these literal terms of the new contract should be interpreted to reflect the intent of the contracting parties. Finally, we have concluded that a Section 8(a)(5) complaint should issue, absent settlement, alleging that the Employer's attempt to withdraw from the multi-employer association was untimely and therefore its refusal to honor the 1985 multi-employer collective bargaining agreement was unlawful.

The Board has never required that a multi-employer bargaining group be formally organized or have a single designated representative. The Board has held that there is sufficient evidence that a multi-employer bargaining association exists where a group of employers have historically bargained together, each with its own representative, but have agreed to and signed the same contract. 9/ Under this standard, the Electrical Sign Companies was deemed to be a multi-employer bargaining association in that the members of that multi-employer

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8/ The new collective bargaining agreement signed by the Electrical Sign Companies and the Local no longer provides for a vacation deduction made directly from the employees' earnings.

9/ Town and Country, 136 NLRB 517 (1962); Weyerhaeuser, 166 NLRB 299 (1967).

group have historically bargained together and have agreed to and signed the same contract.

The Board has held that a successor employer may become bound by its predecessor's collective bargaining agreement if it adopts or assumes the terms and conditions of employment specified in the predecessor's contract. 10/ In the instant case, Gordon, as a successor-employer, 11/ assumed its predecessor's contract by continuing to abide by the terms and conditions of employment stated in the predecessor's collective bargaining agreement after CGI purchased the Pueblo facility. Further evidence of the Employer having assumed its predecessor's contract is shown by the fact that when a dispute arose concerning the contract's January 1983 amendment, the Employer acquiesced to the Union's demand that the Employer comply with the requirements of the amendment by paying specified amounts of money for each employee into a health benefit trust fund. Thus, we conclude that Gordon assumed the multi-employer collective bargaining agreement after CGI purchased the Pueblo facility. And, in assuming the multi-employer collective bargaining agreement, Gordon also assumed its predecessor's membership in the multi-employer association.

With respect to whether January 1, 1984, the fixed date which is part of the original reopener provision in the last signed multi-employer agreement, becomes the new reopener date in the contract, which atuomatically renewed on January 1, 1985, the Board has decided in a similar case, Farm Crest Bakeries 12/, that when there are errors in the parties' collective bargaining agreement, the intent of the parties will prevail. In Farm Crest, the original contract clause provided that the parties give 60-days notice prior to the expiration of the contract. In the parties' newly negotiated agreement,the contract expiration date was misstated so that an 81-day notice requirement rather than a 60-day notice requirement was indicated. The ALJ, affirmed by the Board, decided that the parties intended to

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10/ Stockton Door Co., 218 NLRB 1053, 1054-55, (1975); Eklund's Sweden House Inn, Inc., 203 NLRB 413, 418 (1973).

11/ As noted above, the Region has concluded that Gordon is a successor employer.

12/ 241 NLRB 1191, 1197 (1979).

require the 60-day notice and that there was no evidence of an intent to extend the notice to 81 days. Thus,the 60 days was held to be the contractually valid notice period. 13/

In the instant case, it is clear that the parties intended to retain the 120 day reopener period and to, in effect, update the fixed date in the reopener provision from January 1, 1984 14/ to January 1, 1986 in the contract which atuomatically renewed on January 1, 1985. 15/ There is no evidence to suggest that the fixed date of January 1,1984, was intended to be the correct fixed date for the contract which automatically renewed on January 1, 1985. Accepting this date as the correct one in the new agreement would have the effect of eliminating the reopener period by requiring the parties to adhere to a date which had already passed at the time that the new contract automatically renewed. Thus, under Farm Crest, the 120 day notice requirement would remain valid and the correct fixed date of January 1, 1986 would be read into the reopener provision of the contract which automatically renewed on January 1, 1985.

13/ In his decision in Farm Crest the ALJ, in attempting to ascertain the intent of the parties, noted that: "[f]ollowing the requirement of Sec. 8(d)(1) of the Act, such contracts commonly require 60 days' notice to terminate or modify bargaining contracts." The ALJ's reference in Farm Crest to the 60 day notice period under Section 8(d)(1) of the Act was not construed as indicating that the Board will find that the contractual notice period is 60 days in the event that the language of the contract is unclear. Rather the ALJ's discussion of Section 8(d)(1) was viewed as merely an attempt by the ALJ to determine the intent of the parties in that case by noting the common practice of parties entering into labor agreements of adopting the 60 day notice period of Section 8(d)(1).

14/ As noted above the parties inadvertently misstated this date in the prior contract as January 1, 1983 rather than January 1, 1984.

15/ Based on our above conclusion, that Gordon was still bound by the multiemployer-Union contract scheduled to expire in December 1983, and given the Union's and Ralph's assertion that this contract automatically renewed twice, we find that Gordon was bound by the 1983 contract and that this contract automatically renewed on January 1, 1984 and then on January 1, 1985.

With respect to the Employer's September 25 notice of its intent to withdraw from the multi-employer association, we conclude that it is clearly untimely under the standards stated by the Board in Retail Associates. 16/ Under Retail Associates, an employer may withdraw from multi-employer bargaining provided that it gives adequate written notice prior to the date set by the contract for modification, or prior to the agreed-upon date on which the multi-employer negotiations are to begin. 17/

In the instant case, the latter qualification for withdrawal was not met. The Employer's withdrawal was untimely, under Retail Associates, because it was sent to the Union after the commencement of contract negotiations. The commencement of negotiations is considered to be September 17 rather than June 4. Although the Union initiated contract negotiations on June 4 by sending each employer of the multi-employer group a letter designating the sections of the contract that the Union wished to renegotiate, this date is almost three months prior to the date set by the contract for withdrawal from the multi-employer association. Since the contract negotiations were initiated by the Union much earlier than required under the contract the Employer could raise the defense that it did not anticipate that negotiations for a new multi-employer contract would begin as early as they did. Thus, the Employer could argue that through no fault of its own, it was taken by surprise by the early commencement of negotiations and was unable to file a timely notice of withdrawal. 18/ Moreover, if the June 4 date for the commencement of negotiations is accepted, it would cut off the Employer's right of withdrawal earlier than the time period specified in the contract and would thereby seriously contravene the Employer's right of withdrawal provided for in the parties' collective bargaining agreement. 19/

16/ 120 NLRB 388 (1958).

17/ Id. at 395.

18/ See I.B.E.W., Local 292 (Nordquist Sign Co., Inc.) Case 18-CB-1391, Advice Memorandum dated March 30, 1984.

19/ We find The Carvel Company, 226 NLRB 111 (1976), is not dispositive of the instant case. In Carvel the Board examined the question of the timeliness of the employer's withdrawal attempt from a multi-employer association. The Board held that negotiations commenced at the latest on the date the association acknowledged receiving the union's letter containing proposed changes even though no bargaining sessions had been held. In Carvel negotiations began 14 days

We further note that in light of the fact that parties to a multi-employer association are viewed as one entity and not as separate parties, Ralph's appearance at the September 17 negotiating meeting would be sufficient to bind Gordon to the agreement. Ralph's was, in effect, acting as the agent of the multi-employer association and so of Gordon in appearing at the September 17 bargaining session, even though Gordon failed to respond to the Union's second letter requesting bargaining. Moreover, by September 17, the Employer had received at least two notices of the imminent onset of negotiations, and September 17 clearly falls within the 120 day notice period for withdrawal under the contract. We conclude ,therefore, that September 17, rather than June 4, should be used as the date on which negotiations commenced thereby foreclosing the Employer's right to timely withdraw from the multi-employer association. Therefore, under either argument, since the Employer's notice of withdrawal was dated September 25 it was untimely and the Employer's failure to bargain with the Union and honor the newly

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after the contractual date for reopening negotiations had passed. Here, however, the issue is presented as to whether an employer member of a multi-employer group can have its right to withdraw abridged by a union's early initiation of contract negotiations prior to the contractual date for reopening negotiations. See also the ALJ's dicta in Ruan Transport Corporation, 234 NLRB 241, 248 (1978) where the ALJ distinguished Carvel, on the above basis and then stated:

> If a union may preclude withdrawal by any member of the multi-employer group as long as more than 4 months before the expiration date of a contract, as would be the case were the complaint to prevail here, may it also accomplish that foreclosure objective by publishing its demands 5 months before the end of the contract period? 6 months? 8 months? Maybe more? Would the Board hold that either party to such a contract could bind all the others after a one-shot arrangement so long before normal renewal practices in industrial relations?

negotiated multi-employer collective bargaining agreement violates Section 8(a)(5) of the Act.

H. J. D.