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UNITED STATES GOVERNMENT
National Labor Relations Board

Memorandum

TO : Thomas W. Seeler, Director
Region 3

DATE: July 18, 1979

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

584-5042
584-3740-1700

SUBJECT: Laborers International Union Local 210
(Balling Construction, Inc.)
Case 3-CE-31

A.D. 05879

This case was submitted for advice as to whether the subcontracting clause in the collective bargaining agreement between the Laborers and Balling Construction is violative of Section 8(e).

FACTS

Balling Construction, Inc. (Balling) is a general contractor in the construction industry. As a member of the Construction Industry Employers' Association, it is signatory to a collective bargaining agreement with the Laborers International Union Local 210 (Laborers) covering, inter alia, building site plumbing work. Article XI of the agreement is a union signatory subcontracting clause 1/ and Article XII contains a mandatory grievance-arbitration clause. Section 2 of Article XII provides that:

> If the Employer or the Union fails to comply with this procedure and/or fails to comply with the award of the Arbitration committee, then in the case where the Union is at fault as provided herein, the Employer shall be relieved from its no lockout obligation and in the case where the Employer is at fault, the Union shall be relieved from its no cessation or stoppage of work obligations except for violation of Article XI. (emphasis added).

1/ Article XI, Section 1 states in relevant part:

> An Employer, who is a party to and/or is bound by the terms of this Agreement, shall not accept a contract from or subcontract work covered by this Agreement to a firm, person or group where such firm, person or group is not a party to or bound by this Agreement when the subcontracted work begins.

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As the general contractor for the construction of a new automobile dealership, Balling subcontracted with Garaleck Plumbing for the plumbing work, including the installation of a storm drainage system, and with Davis-Ulmer for the construction of a sprinkler system in the building, including the installation of incoming water service for the sprinkler line. Garaleck has a current collective bargaining agreement with Plumbers Local 36, and Davis-Ulmer has an agreement with the Sprinkler Fitters and Apprentices Local 703.

On May 30, the day after construction began, the Laborers telegraphed Balling, asserting that Balling was violating Article I, §4; Article IV, §3; and Article V, §4 and "any other pertinent articles of our present agreement." 2/ The Laborers claimed that the work being done by Garaleck and the Plumbers was work which was to be performed by the Laborers under the current agreement.

Pursuant to a grievance filed under Article XII, a grievance hearing was held on June 5. According to Balling, the Union mentioned the subcontracting clause during the meeting but never stated that it was basing its grievance on any specific clause of the agreement. The Union won the grievance and the Arbitration Committee fined Balling $800 for work which would have been done by the Laborers if the Plumbers had not been employed by Garaleck. Garaleck also was required to sign a collective bargaining agreement with the Laborers and was permitted to remain on the job using a Laborers' member. There was no discussion of Balling's subcontract with Davis-Ulmer.

Shortly thereafter, on its own initiative, 3/ Balling advised Davis-Ulmer of the difficulties it had had with the Laborers and

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2/ Article I, §4 defines building site plumbing as "the installation of all water, sewer, storm and sanitary lines on the building site from a point five feet outside the building to the property line."

Article IV, §3, entitled "Union Rights", covers the role and rights of the Union steward on the jobsite.

Article V, §4, entitled "Working Conditions", states that plumbing laborers work is as defined in Article 1, §4; grants the Employer the right to do masonry work in connection with sewers and other plumbing; and states that the plumbing laborers rate differential is to be paid regardless of the type or classification of the contractor performing said work.

3/ The Laborers have never indicated any interest in work performed by the Sprinkler Fitters. The dispute between the Plumbers and the Laborers for onsite drainage is longstanding.

suggested that Davis-Ulmer work out an arrangement with the Laborers similar to that of Garaleck. Davis-Ulmer has refused to agree to such an arrangement, and the work that it was to perform is being held in abeyance.

ACTION

It was concluded that the Section 8(e) charge should be dismissed, absent withdrawal.

It was initially concluded that the subcontracting clause in the instant agreement is a secondary union signatory clause, but that it is privileged by the construction industry proviso to Section 8(e). 4/ Carpenters Local No. 944, et al. (Woelke & Romero Framing Inc.), 239 NLRB No. 40 (1978). It was also noted that Article XII, Section 2 authorizes the Union to engage in a work stoppage in order to enforce the grievance-arbitration machinery and thus is a "self-help" clause. International Union of Operating Engineers, Local 701 (Pacific Northwest Chapter of the Associated Builders and Contractors, Inc.), 239 NLRB No. 43, slip op. at pp. 12-14 (1978). However, the self-help clause expressly does not apply to the union signatory subcontracting clause. Thus, the protection of the construction industry proviso is not lost as to that clause. Therefore, if the parties' action in limiting Balling's subcontracting to nonunion signatories was pursuant to the subcontracting clause, it was lawful. 5/

Conversely, if the parties acted under any other clause, express or implied, and if that clause were applied so as to require Balling to cease doing business with nonunion contractors, the clause would be unlawful, since the self-help mechanism of Article XII would apply as to that clause. However, it was concluded that there is insufficient evidence to indicate that the Union prevailed in

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4/ Although the clause is not expressly confined to on-site work, it would not be argued that it applies to offsite work in light of the definition of "building site plumbing" and in the absence of any evidence that it was ever intended to apply to offsite work or has been so applied in the past. Los Angeles Building and Construction Trades Council (Fowler-Kenworthy Electric Co.), 151 NLRB 770 (1965).

5/ The fact that a "fine" of $800 was imposed for the breach of contract does not require a contrary result. Such a "fine", based on the extent of damages and secured through the grievance arbitration procedure, is not coercive self-help. Kimstock Division, Tridair Industries, Inc., 207 NLRB 711, 713 (1978); Associated General Contractors of California, 207 NLRB 698 (1978).

its grievance with Balling under any clause other than the subcontracting clause. While other sections of the agreement were initially mentioned in the telegram filing the grievance, these sections were at most only tangentially related to the Union's grievance. Furthermore, only the subcontracting clause was mentioned at the hearing, according to Balling's own account.

FOIA Exemption 5.

H.J.D.

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