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RELEASE

UNITED STATES GOVERNMENT
National Labor Relations Board

Memorandum

A.D. 05943

TO Gerald Kobell, Director
Region 6

DATE July 9, 1986

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

Digest Nos. on last page

SUBJECT R.G. Johnson Company
Cases 6-CA-18829, 18849, 6-RC-9657

United Mine Workers of America
(R.G. Johnson Company)
Cases 6-CP-435, 436,6-CD-818

This case was submitted for advice on the issue of whether further proceedings under any one or more of the following Sections of the Act are warranted: 8(a)(5), 8(a)(2), 8(b)(4)(D), and 8(b)(7)(A).

FACTS

At all times since 1969, the Employer has been engaged in coal mine construction work in southeastern Pennsylvania, West Virginia, and environs. The Region has found that at all times the Employer has employed a permanent and stable workforce. In 1969, United Mine Workers of America (UMWA) was certified as representative of the Employer's "production and maintenance" employees. Between 1969 and 1980, the Employer was a signatory to the National Coal Mine Construction Agreement between the Associated Bituminous Contractors (ABC) and UMWA,(hereinafter called the ABC contract), but on a me too single employer basis. In 1982, the Employer joined ABC and by 1985 its employees by operation of law became part of the multiemployer unit. 1/

ABC and the UMWA have been parties to successive collective bargaining agreements for a number of years. Under the terms of the 1978, 1981, and 1984 contracts, the coverage is: coal mine construction "that is performed at or on coal lands . . .for coal mine operators which require such construction work to be performed under the jurisdiction" of UMWA.2/ Until 1980, the contract effectively covered all construction on coal lands where the mine operator had a contract

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1/ See U.S. Pillow Corp., 137 NLRB 584 (1962); Etna Supply & Equipment Co., Inc., 236 NLRB 1578 (1977).

2/ Before 1978, the ABC contract was applicable wherever the contractor performed construction work for a coal operator signatory to the National Coal Wage Agreement.

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with UMWA, because the National Bituminous Coal Wage Agreement (hereinafter called the BCOA agreement), contained a union signatory subcontracting clause, requiring that when construction work is not performed by the operator but is subcontracted, "such work will be under the jurisdiction of UMWA in the manner and to the extent permitted by law." However, in 1980, the 3rd Circuit, in Amax Coal Co., 614 F.2d 872, 103 LRRM 2482, 2493, affirmed the Board's finding that the union signatory subcontracting clause in the BCOA contract was unlawful. In response to the Amax decisions, the BCOA agreement was modified in 1981 to provide that the operator may contract out construction work but only "in accordance with prior practice and custom . . . . [P]rior practice and custom shall not be construed to limit the [operator's] choice of contractors."

Thereafter, BCOA employer-members commenced to subcontract construction work without requiring that it be performed under UMWA jurisdiction and since 1981, ABC and its employer-members have taken the position that the ABC contract is applicable only when the mine operator requires that the construction work be done under UMWA jurisdiction. More particularly, beginning in September 1982, Consolidation Coal Co., (Consol) a signatory to the BCOA contract, began contracting out mine construction work without requiring that the work be performed under UMWA jurisdiction. This practice gave rise to UMWA grievances against the construction contractors under the ABC contract which ultimately led to the issuance of an arbitral award and three separate 1984 Board decisions. 3/ The arbitration involved Roberts & Schaefer Co.(R&S), a signatory to the ABC contract. R&S subcontracted the work to Irey, a contractor with a collective bargaining agreement with the Steelworkers. The arbitrator found that the subcontracting violated the ABC contract, notwithstanding the fact that the operator, on whose coal land the construction was to be performed, had not required that it be done under the jurisdiction of the UMWA. On April 21, 1986, the United States District Court for the Western District of Pennsylvania vacated the award. UMWA has appealed.

In each of the three Board decisions mentioned above, the contractor was a signatory to the ABC contract, but signed a project agreement with the United Service of America International Labor Union (USA), a labor organization with headquarters in Washington, Pennsylvania and a membership of 700.

3/ Lincoln Contracting and Equipment Co., Inc., 273 NLRB No. 144; Gunther-Nash Mining Construction Co., 273 NLRB No. 145; Moutaineer Resources, Inc., 273 NLRB No. 146.

UMWA filed a grievance under the ABC contract and USA threatened to strike if its members did not perform the work. The contractor filed Section 8(b)(4)(D) charges which in each case resulted in a Section 10(k) award in favor of the USA. While there are only minor factual differences between the cases, in each of them the Board discussed the scope of the ABC multiemployer unit and made the following observations:

> "[I]t is the Employer's and area practice to interpret [the ABC contract] to cover projects only where the coal mine operator requires that the work be performed under UMWA jurisdiction . . . [I]t appears that the ABC contract is not applicable [where the operator does not so require]." Lincoln Contracting, Part II. E.1.
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> "UMWA has implicitly recognized that the ABC contract permits use of non-UMWA-represented employees when, as here, the coal mine operator does not require the work to be done by UMWA-represented employees, for it has attempted in these circumstances to gain jurisdiction through execution of special project agreements." Gunther-Nash, Case 5-CD-279, Part II.E.1.4/
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> An employer "which uses UMWA-represented employees when so required by the coal mine operator may also properly rely on USA-represented employees in the absence of such a requirement." Gunther-Nash, Case 5-CD-278, Part II.E.1.
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> "We refuse to find that . . . the ABC contract obligated signatory employers to use UMWA-represented employees in the absence of a requirement by the coal companies that such employees be used." Mountaineer Resources, Part II.E.1.

In 1984, the UMWA attempted to expand the scope of the ABC contract unit by proposing the addition of a provision that the contract also apply to construction work at a mine where the Union was the certified or recognized bargaining representative of the mine employees. While the ABC agreed to the proposal, the new language never was included in the contract because of its

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4/ In late 1983, UMWA began negotiating project agreements with ABC members when the operators did not require that the construction work be performed under UMWA jurisdiction. The project agreements appear to be a little less costly than the ABC agreement, and permit ABC members somewhat more easily to compete with nonunion construction contractors.

rejection by the membership who objected to its being tied to reduced wages and economic benefits.

Returning to the instant case, the Employer, as earlier noted, joined ABC in 1982. Until 1985, it performed all its work under the ABC contract.5/ However, in March 1985, Vesta Mining Co., a signatory to the BCOA contract, awarded the Employer a small construction job requiring about 160 man-days of work without requiring that the job be performed under UMWA jurisdiction. The Employer executed a project agreement with USA and performed the job. Nine of its 13 project employees were permanent employees of the Employer, i.e., UMWA members. Thereafter, in December 1985, Consol invited the Employer to bid on the Margaret Shaft job.6/ The Employer negotiated project agreements with both UMWA and USA, and tendered bids based on each project agreement. Sometime in December, Consol, which again imposed no requirement that the job be performed under UMWA jurisdiction, accepted the bid based upon the USA project agreement. On December 17, a UMWA agent telephoned the Employer and asked whether Consol had awarded the job to the Employer based on the USA contract. Upon receiving an affirmative reply, the UMWA agent said that if the Employer did the job based on the USA contract there would be trouble, UMWA would shut the job down, and the Employer had better not sign a project agreement with USA. A substantially similar conversation took place on January 7.

On January 6, 1986, the Employer executed a project agreement with USA for the Margaret Shaft job, containing a 7-day union security clause. The Employer's UMWA employees got wind of the award and inquired of the Employer about the job. Although the USA project agreement permits the Employer to hire directly, and not through a hiring hall, the Employer directed the employees to the USA office. There is evidence that the Employer told at least one employee that they would have to become USA members. The UMWA employees went to the USA office where they were presented by USA representatives with applications for employment and USA membership cards. All (except for those who had already joined USA during the Vesta Mining job) signed both cards.

5/ Although Johnson bid on work for operators who did not require that it be done under UMWA jurisdiction, and made such bids on the basis of UMWA project agreements, it never was awarded such work. See note 4, supra.

6/ Both Vesta Mining's and Consol's Margaret Shaft jobs were in the territory where the Employer has historically operated.

On January 15, the Employer commenced operations at the Margaret Shaft job with eight employees. On January 21, 17 employees were working on its project, and on that date USA president Rush presented the Employer 17 USA cards, and demanded recognition as the 9(a) representative of the employees. The Employer signed a document explicitly recognizing USA as the 9(a) representative. However, at no time did the Employer employ more than 6-7 unit employees who were members only of USA; the remainder were also members of UMWA--dating back in some cases 10 to 15 years--and all retained their membership in UMWA. By the end of February, the Employer employed 30 employees on the project. The job is expected to last through July 1986.

From January 30 to February 17, UMWA peacefully picketed the job with signs which read "unfair to labor." A UMWA representative told employees that the picketing was for recognition, and asked employees to sign UMWA cards and to sign a petition stating that they had executed USA cards solely to obtain work on the job. Seven employees signed the cards and the petition. Several employees crossed the picket line, although about four refused to do so. The picketing ceased on February 17.

On January 30, the date the picketing began, UMWA filed an RC petition and a Section 8(a)(2) charge against the Employer, and USA filed a Section 8(b)(7)(A) charge against UMWA. On January 31, the Employer filed a Section 8(b)(7)(A) charge against UMWA. On February 7, UMWA filed a Section 8(a)(5) charge and the Employer filed a Section 8(b)(4)(D) charge against UMWA.

ACTION

It was concluded that further proceedings were warranted on the basis of the Section 8(a)(2) charge, 7/ but that all other charges should be dismissed, absent withdrawal.

1. The UMWA Section 8(a)(5) charge

There is insufficient evidence that the Employer had an obligation to recognize UMWA as bargaining representative of the

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7/ In authorizing proceedings on the Section 8(a)(2) charge, we note that the project might be completed before an election can be conducted. In the event the Region, before completion of the project, finds that sufficient time remains for the conduct of an election, it should promptly telephonically inform the Division of Advice.

employees working on the Margaret Shaft project. A contrary conclusion would be warranted, if the instant project were part of the unit covered by the ABC contract or part of the unit for which the UMWA was the certified, or recognized bargaining representative. As to the contractual unit, the Board's decisions in Lincoln Contracting, Gunther-Nash, and Mountaineer Resources foreclose any argument that the contractual unit includes work where the mine operator has not required the work to be performed under UMWA jurisdiction. Thus, as noted, in Mountaineer Resources, the Board said the ABC contract did not obligate signatory employers to use UMWA-represented employees in the absence of a requirement by the coal companies that such employees be used. And, since Consol, the mine operator, did not require the use of UMWA labor at the Margaret Shaft project, it follows that the construction work involved did not constitute unit work for the contract unit.

As for the certified unit, we note that the Employer joined ABC in 1982 and remained part of ABC during the 1984-85 contract negotiating. Under established Board precedent, 8/ this resulted in the Employer's employees becoming part of the multiemployer unit. We would conclude, therefore, that the UMWA cannot rely on its certification as support for its 8(a)(5) allegation.

Nor, contrary to the UMWA's further contention, is there a recognized unit which is broader than the contract unit. The thrust of the Board's Amax Section 8(e) decision was to permit mine operators to contract with employers which were not signatories to UMWA contracts to perform construction work. Since 1981, ABC has taken the position that its members were not required to apply the ABC contract where the mine operator did not require that the work be performed under UMWA jurisdiction. Thereafter, and beginning in the fall of 1982, ABC members began to observe a practice, i.e. the execution of project agreements with Unions other than UMWA, which was inconsistent with continued recognition of UMWA where the mine operator had not required that the work be performed under UMWA jurisdiction. This gave rise to the R&S arbitration, and the Lincoln Contracting, Gunther-Nash, and Mountaineer Resources Board decisions. Except for the arbitral award, which a United States District Court has now vacated, no forum has held that ABC should have recognized UMWA for construction work where the mine operator has not required that it be done under UMWA jurisdiction. Nor do any decisions recite the existence of facts indicating such a practice, and there is no other evidence of such a practice. The fact that ABC contractor members, other than Johnson, have

8/ See note 1, supra.

entered into project agreements with UMWA, where the operator has not required that the work be performed under UMWA jurisdiction, is not in itself sufficient to establish that the contractor had recognized or was otherwise obligated to deal with the UMWA for the work covered by the project agreement before the execution of such an agreement. In addition, as seen above, the UMWA membership in 1984 refused to ratify a contract proposal purporting to expand the scope of the unit but providing for a cut in wages and other economic benefits. The contract ultimately agreed to and ratified provided higher wage rates than those contained in the rejected proposal, but did not increase the scope of the unit. In sum, there is no evidence that the employer-members of ABC were under a duty to recognize UMWA where the mine operator did not require that the construction work be done under UMWA jurisdiction, or that the employer-members who entered into project agreements with the UMWA had extended recognition to the UMWA at the projects prior to the execution of such agreements. With respect to the instant Employer, there is no evidence that it recognized UMWA on a broader basis than did the other employer-members of ABC. Indeed, in March 1985, a date which precedes the Section 10(b) date of the instant charge, the Employer entered into a project agreement with USA for the Kefauver Shaft job, on which the mine operator had not required that the work be performed under UMWA jurisdiction.

For all the foregoing reasons, there is insufficient evidence that the Margaret Shaft job was part of the ABC contract unit, part of the certified unit, or part of any broader unit for which the UMWA was recognized. In these circumstances, Johnnson's failure to deal with the UMWA as the recognized bargaining representative of Johnson's employees at the project is not violative of Section 8(a)(5).

Finally even assuming arguendo that the employees at the project constitute an appropriate single employer single site unit, and assuming further that the UMWA demanded recognition in that unit, the Employer's failure to recognize the UMWA for that unit would not be violative of Section 8(a)(5) for at least two reasons: (1) the Employer executed a Section 8(f) contract with USA before any employees were hired at the project; and (2) the UMWA members who were hired for the project signed membership cards in USA. Thus, given the employees' dual union membership, their membership in UMWA could no more be used to support UMWA's Section 9(a) majority status than their membership in USA could be used to support USA's 9(a) status. 9/

9/ See note 12, infra.

2. The UMWA Section 8(a)(2) charge

The evidence indicates that although the USA contract does not provide for a hiring hall, and although the Employer desired to employ employees it had utilized in the past, the Employer nevertheless referred all applicants to the USA hiring hall, where they were handed by USA representatives applications for work on the project as well as applications for Union membership. There is in addition evidence that the Employer told employees they must become members of USA in order to be hired. Thus, by directing employees to the USA hiring hall where they were given membership application forms, and by suggesting they would have to join USA before being allowed to work, thereby depriving them of their statutory grace period under the project agreement's seven day union security clause, the Employer gave unlawful assistance to USA. 10/

With respect to the recognition agreement of January 21, it is initially noted that the Employer's earlier project agreement with USA was privileged under Section 8(f), since the work involved constituted construction work within the meaning of that provision 11/ and the Employer was under no Section 8(a)(5) obligation to recognize or deal with the UMWA with respect to that work. On the other hand, by entering into the January 21 agreement which purports to confer Section 9(a) status on USA, the Employer engaged in further conduct violative of Section 8(a)(2). Thus, at the time the January 21 agreement was entered into, USA did not enjoy majority status among employees at the project inasmuch as a majority of the employees who signed USA cards were already members of UMWA and remained UMWA members while on the job. 12/ The recognition granted USA on January 21 could not therefore, amount to valid Section 9(a) recognition;13/ yet, by specifically calling it "Section 9(a) recognition," the

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10/ Luke Construction Co., Inc., 211 NLRB 602 (1974) (denial of grace period). Accord: Zidell Explorations, Inc., infra (30 day contractual grace period.)

11/ Indio Paint and Rug Center, 156 NLRB 951, 959 (1966).

12/ An employee who has signed cards for two unions has designated neither as his bargaining representative. E.g., Windsor Place Corp., 276 NLRB No. 51, fn. 1 (1985).

13/ International Ladies' Garment Workers' Union v. NLRB, 366 U.S. 731 (1961).

January 21 agreement accorded the USA "unwarranted prestige"14/ and conveyed to the employees the message that support of another union would be futile at least for an extended period of time in the future. Accordingly, the Employer unlawfully assisted USA by purporting to recognize USA as the Section 9(a) representative of the project employees. 15/

3. The Employer's Section 8(b)(4)(D) charges.

As more fully described above, in mid-December, UMWA threatened the Employer that UMWA would shut down the job if the work involved were performed under the USA contract, and repeated the same threat on January 7. On January 6, the Employer and USA entered into an 8(f) agreement. Thereafter, on January 21, the Employer and the USA entered into a purported Section 9(a) relationship. On January 30, UMWA commenced picketing, with signs reading "unfair to labor." A UMWA representative told Johnson's employees that the Union was seeking recognition and asked them to sign UMWA cards.

Based on the above facts, it was concluded that the instant charge should be dismissed absent withdrawal, for insufficient evidence of an unlawful object. In the first place, there is evidence of a recognitional or organizational object, which is the antithesis of an 8(b)(4)(D) object. 16/ Moreover, there is no clear showing that UMWA is seeking to displace USA members from the job and replace them with UMWA members. 17/

14/ Scherrer and Davisson Logging Co., 119 NLRB 1587, 1589 (1958).

15/ Although the Employer engaged in unlawful assistance of USA, as set forth above, such conduct occurred after USA was lawfully recognized under Section 8(f), and, therefore would not invalidate or otherwise affect such lawful recognition. See Zidell Explorations, Inc., 175 NLRB 887 (1969), which holds that if, after signing a valid Section 8(f) agreement, an employer commits 8(a)(2) by denying employees their statutory grace period, the later conduct does not invalidate the Section 8(f) contract.

16/ The Mountain States Telephone and Telegraph Co., 118 NLRB 1104, 1107-1108 (1957).

17/ See UFCW, Local No. 1222 (Fed-Mart Stores, Inc., 262 NLRB 817 (1982) (Board quashes 10(k) where dispute not about the assignment of work but about which union would represent the employees to be chosen by the employer).

Thus, while UMWA has a hiring hall and requires signatories to observe seniority in hiring, and while some of the current Johnson employees were never members of UMWA and are presumably not the most senior employees on the seniority list, most of the employees at the project are UMWA members. If any displacement of employees were to take place at all, it presumably would be to replace one UMWA member with another in accordance with their seniority rights under the ABC contract. In any event, the evidence is insufficient to establish that the UMWA is seeking the wholesale substitution of an entirely different group of employees for those hired by Johnson to man the project. Thus, there is insufficient evidence that two distinct and separate groups of employees would be competing for the same work within the meaning of Section 8(b)(4)(D). 18/ In these circumstances, further proceedings are unwarranted as to the instant 8(b)(4)(D) charges.

4. The Employer's and USA's Section 8(b)(7)(A) charges against UMWA

Inasmuch as the Employer and USA had a Section 8(f), as opposed to a Section 9(a) relationship, their collective-bargaining agreement does not constitute a bar to the petition herein. It follows that a question concerning representation can be raised, and that Section 8(b)(7)(A) does not lie. 19/ Accordingly, these charges should be dismissed, absent withdrawal.

H.J.D.

18/ The evidence here is unlike that presented in Lincoln Contracting, supra; Gunther-Nash, supra; and Mountaineer Resources, supra, in that the UMWA in each of those cases was seeking, much more clearly than here, to get the work reassigned from USA represented employees to UMWA members.

19/ See Associated General Contractors of California, Inc., 220 NLRB 540, 548 (1975).

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