

**District Council of New York City and Vicinity,
United Brotherhood of Carpenters and Joiners
of America, AFL-CIO and Manufacturing
Woodworkers Association of Greater New York,
Inc. Cases 2-CB-15010 and 2-CE-172**

August 26, 1998

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX, LIEBMAN,
AND HURTGEN

On June 12, 1995, Administrative Law Judge Steven Davis issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief to the Respondent's exceptions, and the Respondent filed a reply brief to the General Counsel's answering brief. The Respondent also filed a motion to reopen the record, the General Counsel filed a response in opposition to the motion, and the Respondent and the General Counsel each filed responding briefs.

The Board has considered the decision and the record¹ in light of the exceptions and briefs² and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The complaint alleges in substance (1) that the Respondent violated Section 8(e) of the Act³ by entering into and maintaining the "Other Operations" and "Joint Venture" clauses (OOC and JVC) of the July 1, 1993—June 30, 1997 collective-bargaining agreement (the contract) between the Respondent and Charging Party Manufacturing Woodworkers Association of Greater New York (MWA), and (2) that the Respondent also

¹ The Respondent's motion to reopen the record is denied. The General Counsel has acknowledged, in his response to the motion as well as in his brief in opposition to the Respondent's exceptions, that his 8(e) theory is that the Other Operations clause (OOC) of the current collective-bargaining agreement is unlawful on its face, and that there is no allegation that the Respondent has sought to enforce the OOC in an unlawful manner during the relevant limitations period under Sec. 10(b). Thus, the material that the Respondent seeks to introduce into evidence by its motion to reopen the record is not relevant to any of the issues in this proceeding.

Likewise, the testimonial evidence referred to by the judge in his decision (fn. 3 and the first sentence of the last paragraph of the "Respondent's Arguments" section) is also not relevant to any of the issues in this proceeding. Accordingly, we find it unnecessary to pass on the judge's description of that evidence.

² The Respondent's request for oral argument is denied. The record, exceptions, and briefs adequately present the issues and the positions of the parties.

³ Sec. 8(e) states in pertinent part:

(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void.

violated Section 8(b)(3) of the Act by continually rejecting the MWA's bargaining proposal to eliminate the OOC from the contract (the parties' preceding collective-bargaining agreements had contained OOCs), and by instead insisting, as a condition of reaching agreement on the contract, that the MWA agree to include the OOC in it.

A. Request for Deferral to Arbitration

Article XIII of the contract, styled "*GRIEVANCE AND ARBITRATION*," provides in pertinent part that any differences or disputes in regard to the interpretation or construction of any clauses of the agreement, or with respect to their breach of performance, "*may, on demand of either of the parties hereto, shall be submitted for decision and award*" to an arbitrator (sic; emphases added).⁴ On January 31, 1995, 2 days before the opening of the hearing in this case, the Respondent demanded in a letter to the MWA (1) that, pursuant to the above-arbitration provisions, the parties' dispute respecting the interpretation or construction of the OOC and JVC be submitted to arbitration, and (2) that the MWA agree to defer these aspects of the complaint to arbitration. The record does not show whether the MWA replied to this letter. In any event, at the start of the hearing on February 2, 1995, the Respondent renewed on the record its request that the 8(e) issues be deferred to arbitration. The General Counsel opposed the request, and the MWA did not respond to it on the record.

The judge did not rule on the Respondent's request for deferral to arbitration until he issued his decision, in which he denied the request. We agree with the judge that deferral is not appropriate here, but for the following reasons. We decline to defer because the issues on which the Respondent seeks deferral are the fundamental lawfulness of the OOC and JVC themselves under Section 8(e), rather than questions about the validity of their interpretation or attempted application in particular factual circumstances.⁵

There are two provisos to Sec. 8(e), relating to the garment industry and the construction industry, neither of which is relevant to this case. In this regard, in his decision (seventh paragraph of the "Respondent's Arguments" section), the judge states "I cannot find that the record supports a finding that the MWA [i.e., Charging Party Manufacturing Woodworkers Association] is primarily engaged in the building and construction industry." There are no exceptions to this finding, in effect, that the MWA is not primarily engaged in the building and construction industry.

⁴ The corresponding arbitration provisions of the parties' two previous collective-bargaining agreements do not contain "shall" or any other word in the place where "shall" appears in the above-quoted excerpt from the current contract. The inclusion of "shall" in this place in the current contract appears to be inadvertent. In any event, the record does not explain its inclusion.

⁵ Indeed, subsec. 1(b) of the OOC itself states that "all charges of violations of [the OOC] shall be considered as a dispute under this Agreement and shall be processed in accordance with [the Grievance and Arbitration provisions of art. XIII]." (emphasis added).

Generally, the Board does not defer to arbitration an issue which, like those in question, involves the application of statutory policy, standards, and criteria, rather than only interpretation of the contract itself.⁶ Questions of statutory construction, as distinguished from contract interpretation, are legal questions concerning the National Labor Relations Act, which are within the special competence of the Board rather than of an arbitrator.⁷ In *International Organization of Masters (Seatrains Lines)*,⁸ under circumstances similar to those here, the Board declined to defer to arbitration an allegation that a contractual provision violated Section 8(e). The Board affirmed the judge's reasoning that, among other things:

[T]here is no assurance that the arbitrator would necessarily resolve the unfair labor practice issue of whether the contract provision and [the respondent's] demand for arbitration with regard to the sale or other disposition of Seatrain's vessel is violative of Section 8(e) of the Act. It is possible that the arbitrator would look beyond the contract and consider such statutory principles as are necessary to a resolution of the dispute. On the other hand, in the event of a conflict between the provisions of the contract and a principle of Board law, the arbitrator would most likely not depart from the requirements of the contract, and accordingly, would not, therefore, dispose of the question of whether the clause herein involved and the request for arbitration violate Section 8(e) of the Act.⁹

Applying these principles here, we find that fundamental issues of whether the OOC and JVC violated Section 8(e) present questions of statutory construction rather than of contract interpretation and thus raise legal questions concerning the Act itself, which are within the special competence of the Board rather than of an arbitrator. Resolution of these issues necessarily involves the application of statutory policy, standards, and criteria, and is thus not appropriate for deferral to arbitration.

Additionally, we note that the Respondent does not seek to defer to arbitration the issue of whether it violated Section 8(b)(3) of the Act as alleged by continually rejecting the MWA's bargaining proposal to eliminate the OOC from the contract, and by instead insisting, as a

⁶ See, e.g., *Marion Power Shovel Co.*, 230 NLRB 576 (1977) (no deferral of questions concerning representation, accretion, or appropriate unit).

⁷ See, e.g., *Columbus Printing Pressman 252 (R.W. Page Corp.)*, 219 NLRB 268, 270 (1975) (no deferral of, inter alia, question whether a proposed term of a contract was a mandatory subject of bargaining), *enfd.* 543 F.2d 1161 (5th Cir. 1976).

⁸ 220 NLRB 164 (1975).

⁹ *Id.* at 168. See also *Iron Workers Pacific Northwest Council (Hoffman Construction)*, 292 NLRB 562, 578 (1989) (disputed issues in question not susceptible to interpretation under operation of grievance machinery; an arbitrator is not authorized to determine whether respondents attempted to coerce charging party into agreeing to a contract in violation of Sec. 8(e)), *enfd.* 913 F.2d 1470 (9th Cir. 1990).

condition of reaching agreement on the contract, that the MWA agree to include the OOC in it. The 8(b)(3) allegation is based entirely on the premise that the OOC clause is unlawful under Section 8(e).¹⁰ This 8(b)(3) OOC issue is therefore inextricably related to the 8(e) OOC issue. Where an allegation for which deferral is sought—here, the 8(e) issues—is inextricably related to another allegation for which deferral is not sought—here, the 8(b)(3) issue—the request for deferral must be denied.¹¹ Accordingly, for this reason as well as the foregoing reasons, the Respondent's request that the 8(e) issues be deferred to arbitration is denied.

B. Other Operations Clause

The judge found that the "Other Operations" clause (OOC) in the contract was unlawful under Section 8(e), and that the Respondent violated Section 8(e), as alleged, by entering into and maintaining the OOC in the contract. The judge further found that the Respondent violated Section 8(b)(3) by rejecting the MWA's bargaining proposal to eliminate the OOC from the collective-bargaining agreement and by instead insisting that the MWA agree to retain the OOC in the contract, as a condition of the Respondent's agreeing to it.

We disagree with the judge's 8(e) and 8(b)(3) findings in regard to the OOC, and we find instead, for the reasons set forth below, that the Respondent did not violate the Act as alleged in regard to the OOC.

1. 8(e) allegation

a. Facts

The MWA is an organization comprising about 30 employers engaged in the manufacture, sale, and installation of custom architectural woodwork (custom millwork) in the New York City metropolitan area. About 90 percent of the work done by MWA members is manufacturing, done in their respective plants and facilities. Some MWA members also install architectural woodwork.

The parties had collective-bargaining agreements for July 1, 1988—June 30, 1991 (the 1988 contract), and July 1, 1991—June 30, 1992 (the 1991 contract), and a memorandum of agreement extending the terms of the 1991 contract through June 30, 1993 (the 1992 memorandum of agreement). The parties' most recent contract is for July 1, 1993—June 30, 1997 (the contract).

¹⁰ In setting forth the General Counsel's theory of the 8(b)(3) allegation in her opening statement at the hearing, counsel for the General Counsel asserted (1) that it was axiomatic that a labor organization violates Sec. 8(b)(3) when it conditions its agreement to a new contract on an employer's acceptance of an unlawful subject of bargaining, and (2) that the Respondent therefore violated Sec. 8(b)(3) by insisting on the inclusion of the (allegedly) unlawful OOC as a condition of reaching agreement on a new collective-bargaining agreement. The General Counsel does not allege that the Respondent violated Sec. 8(b)(3) by any other conduct.

¹¹ *American Commercial Lines*, 291 NLRB 1066, 1069 (1988). *Accord: Clarkson Industries*, 312 NLRB 349, 353 (1993).

Article I, *JURISDICTION AND UNION SECURITY*, section 1, *Covered Employees*, of the contract, expressly includes within the term “employees covered by this Agreement” all employees in 19 specifically named job classifications and “all other employees doing production and maintenance work.” Article III, section 5 of the contract provides that “[t]ouch-up work shall be permitted at the installation site and shall be permitted to be performed by inside shop employees covered by this Agreement” at wage rates set forth in the contract. Article III, section 6, provides that “[t]he Employer may deliver its manufactured woodwork product to its final destination at the job site using any employees covered by this Agreement at rates provided herein.” Article III, section 9, provides in relevant part:

A signatory Employer, who is currently and actively engaged in the manufacturing and installation of custom millwork, shall obtain eighty (80%) percent of the product or products to be installed from said signatory employer’s mill or shop and provided that said product or products to be installed was manufactured or produced in the signatory employer’s mill or shop and twenty (20%) [percent] of the total product or products to be installed obtained from other sources, provided said product or products should bear the union label.

The 1988, 1991, and current contracts all contain essentially identical clauses styled “Other Operations.” The OOC in the current contract, article XIX, states in pertinent part:

OTHER OPERATIONS

Section 1. *Work Preservation Clause.* (a) In order to protect and preserve, for the employees covered by this Agreement, all work heretofore performed by them, and in order to prevent any device or subterfuge to avoid the protection and preservation of such work, it is hereby agreed that if and when the Employer shall perform any work of the type covered by this Agreement, under its own name or under the name of another, as a corporation, company, partnership, or any other business entity, including a joint venture, wherein the Employer exercises either directly or indirectly any significant degree of ownership management or control, the terms and conditions of this Agreement including Fringe Benefits shall be applicable to all such work.¹²

Finally, an addendum entered into by the parties on July 21 (the same day they entered into the contract) states in pertinent part:

I. [deleted by parties]

¹² The OOCs in the 1988 and 1991 contracts are identical in pertinent part to the OOC in the current contract, except that they are not subtitled “Work Preservation Clause” and the phrase “it is hereby agreed that” in the current contract is written “it is hereby agreed as follows:” in the 1988 and 1991 contracts.

2. Nothing herein shall be construed to prohibit and/or limit the Employer’s right to purchase up to seventy-five percent [75%] of any custom millwork or product of allied nature from any source in the use of its business, in an arms-length transaction. Such right can be exercised provided the Employer does not have an ownership interest, or management, or significant controlling interest of [sic] the company from whom the purchase is being made.

3. An Employer, availing himself of provision #2 of this addendum, shall not have the benefit of any wage concessions provided in Article III, Section 9 of [this] agreement.

4. The terms of this addendum shall be retroactive to July 1, 1993. This becomes effective 9/1/94.

Agreed [signatures] 7/21/94

As more fully detailed in the judge’s decision, during the August 1993—July 1994 negotiations leading to the contract, the MWA repeatedly and consistently insisted that the OOC not be included in the contract, and the Respondent likewise insisted that it be retained. In the midst of these negotiations, on January 5, 1994, the MWA filed the charge in Case 2–CB–15010 in this proceeding, alleging, among other things, that the Respondent violated Section 8(b)(3) of the Act by demanding that the OOC be included in the contract. On July 21, 1994, the Respondent threatened to strike immediately if the MWA did not sign the proposed contract containing the OOC. The MWA then signed the agreement, while advising the Respondent that it would continue to pursue its unfair labor practice charge. Subsequently, on December 21, 1994, the MWA filed the other charge in this proceeding, in Case 2–CE–172, alleging that the Respondent was violating Section 8(e) of the Act since July 21, 1994, by (in effect) entering into the agreement containing the OOC.

b. Analysis and conclusions

(1) Framework for 8(e) analysis

The overall framework for analysis of the question whether an agreement is unlawful under Section 8(e) is set forth in *General Teamsters Local 982 (J. K. Barker Trucking Co.)*.¹³ There, the Board stated:

[I]f the meaning of the clause is clear, the Board will determine forthwith its validity under 8(e); and where the clause is not clearly unlawful on its face, the Board will interpret it to require no more than what is allowed by law. On the other hand, if the clause is ambiguous, the Board will not presume unlawfulness, but will consider extrinsic evidence to determine whether the clause was intended to be administered in a lawful or

¹³ 181 NLRB 515 (1970), *aff’d*, 450 F.2d 1322 (D.C. Cir. 1971).

unlawful manner. In the absence of such evidence, the Board will refuse to pass on the validity of the clause.¹⁴

(2) Applicable 8(e) principles

Not every collective-bargaining agreement with a “cease doing business” objective that comes literally within the proscription of Section 8(e) is necessarily unlawful. Thus, a union may lawfully require an employer to cease or refrain from doing business with another employer if the union’s objective is properly found to be the preservation of work traditionally performed by employees represented by the union.¹⁵ As the Supreme Court has held, Section 8(e) does not prohibit agreements made and maintained for the purpose of pressuring an employer to preserve for its employees work which they have traditionally performed.¹⁶ Rather, the Court said that “[t]he touchstone [of Section 8(e)] is whether the agreement or its maintenance is addressed to the labor relations of the contracting employer vis-à-vis his own employees” as opposed to being “tactically calculated to satisfy union objectives elsewhere.”¹⁷

In *NLRB v. International Longshoremen’s Assn.*,¹⁸ the Supreme Court set forth a two-part test to determine the lawfulness of a purported work-preservation agreement: (1) the agreement must have as its objective the preservation of work traditionally performed by employees represented by the union, and (2) the contracting employer must have the power to assign the employees to do the work in question—a “right of control” test.¹⁹

(3) Conclusion

The OOC Is Not Clearly Unlawful On Its Face

Applying the above principles to the facts here, we find, for the reasons set forth below, that the Respondent has not violated Section 8(e) and 8(b)(3) in regard to the OOC.

(i) Right of control

The General Counsel asserts in his posthearing brief that the OOC is “indisputably, undeniably facially invalid.” He argues that the OOC violates Section 8(e) because (1) it seeks to impose the terms of the contract on affiliates of the MWA signatory employers without regard to whether actual unit work is at issue or whether

the signatory employer actually controls or manages the labor relations of its affiliate, and (2) it thus reaches companies that are performing work that is not within the signatory employer’s right of control, compelling such companies to adopt the terms of the contract.

The General Counsel also relies on the proposition that companies that are bound *only* by common ownership are generally found to be neutrals with respect to each other’s labor relations,²⁰ and argues that the OOC compels the application of contract terms and conditions to affiliates of signatory employers who are related to those employers solely by virtue of common ownership. Moreover, the General Counsel argues that even assuming that a signatory employer did exercise some measure of control over an affiliate, the OOC extends the application of the contract to situations where that control is of an “indirect,” attenuated nature, and is not limited to control over the labor relations of the affiliate.

In *Manganaro Corp.*,²¹ issued subsequent to the judge’s issuance of his attached decision and the parties’ filing of their postdecisional briefs, the Board applied the above-mentioned framework for analysis and principles to a proposed contract clause that is substantially similar—indeed, identical in many respects—to the OOC here. The Board found that the clause there did not violate Section 8(e). Applying the same framework for analysis and principles here, we find that the OOC does not violate Section 8(e).

The proposed clause in *Manganaro* stated:

To protect and preserve, for the employees covered by this Agreement, all work they have performed and all work covered by this Agreement, and to prevent any device or subterfuge to avoid the protection and preservation of such work, it is agreed as follows: If the Contractor performs on-site construction work of the type covered by this Agreement, under its own name or the name of another, as a corporation, company, partnership, or other business entity, including a joint venture, wherein the Contractor, through its officers, directors, partners, owners or stockholders exercises directly or indirectly (including but not limited to management, control, or majority ownership through family members), management, control or majority ownership, the terms and conditions of this Agreement shall be applicable to all such work.²²

The work-preservation purposes of both the OOC and the *Manganaro* clauses are almost identically expressed in terms of protecting and preserving “for the employees

¹⁴ Id. at 517 (footnotes omitted).

¹⁵ *Electrical Workers IBEW Local 46 (Puget Sound NECA)*, 303 NLRB 48, 50 (1991), quoting from *Operating Engineers Local 12 (Griffith Co.)*, 212 NLRB 343, 343–344 (1974), enf. denied 545 F.2d 1194 (9th Cir. 1976), cert. denied 434 U.S. 854 (1977).

¹⁶ *National Woodwork Mfrs. Assn. v. NLRB*, 386 U.S. 612, 635 (1967).

¹⁷ Id. at 645; *Associated General Contractors*, 280 NLRB 698, 701 (1986) (the focus of the analysis is whether the disputed clause has the primary purpose of protecting unit work or unit standards, or the secondary purpose of promoting broader goals of the union by asserting control over the labor relations of other employers).

¹⁸ 447 U.S. 490 (1980) (*ILA I*).

¹⁹ Id. at 504.

²⁰ *Carpenters District Council of Northeast Ohio (Alessio Construction)*, 310 NLRB 1023, 1026 (1993), citing, e.g., *Los Angeles Newspaper Guild, Local 69 (Hearst Corp.)*, 185 NLRB 303 (1970), enf. per curiam 443 F.2d 1173 (9th Cir. 1971), cert. denied 404 U.S. 1018 (1972).

²¹ 321 NLRB 158 (1996).

²² Id. at 161–162.

covered by this Agreement, all work heretofore performed by them” (the OOC), or which “they have performed” (*Manganaro*). There are, to be sure, a few differences between the two clauses that are worth noting. First, the *Manganaro* clause, unlike the OOC, includes just after the above-quoted excerpt an *additional* express reference—“and all work covered by this agreement.” Contrary to our dissenting colleague, we do not find that the absence of such a phrase in the OOC significantly distinguishes it from the *Manganaro* clause for purposes of our analysis and conclusion. For one thing, the term “all work heretofore performed by [employees covered by this agreement]” in the OOC (corresponding to the term “all work [employees covered by this Agreement] have performed” in the *Manganaro* clause) alone makes it reasonably clear that the purpose of the OOC is the protection and preservation of work covered by the contract. In any event, we find that purpose is made abundantly clear in the OOC when, in subsequent language (indeed, language identical to that in the *Manganaro* clause), the OOC is made applicable to a signatory employer performing “work of the type covered by this Agreement.”

Second, the OOC is expressly applicable when work of the type covered by the contract is being performed by a business entity in which a signatory employer “exercises either directly or indirectly any significant degree of ownership management or control”; the *Manganaro* clause is expressly applicable when work of the type covered by that agreement is being performed by a business entity in which a signatory contractor “exercises directly or indirectly . . . management, control, or majority ownership” (emphasis added). Again, we find, contrary to our dissenting colleague, that the differences in language do not significantly distinguish the OOC from the *Manganaro* clause for purposes of our analysis and conclusion.

As noted above, companies that are bound *only* by common ownership are generally found to be neutrals with respect to each other’s labor relations. Thus, even the presence of “majority ownership” in another business entity, as contemplated in the *Manganaro* clause, would not, without more, necessarily lead to a finding that the signatory employer had control over the assignment of the work performed by that other entity. Nor, conversely, would the absence of such “majority ownership” necessarily preclude such a finding. The disjunctive expression of “management, control or majority ownership” makes that clear. Thus, “majority ownership” alone in another business entity is neither a necessary nor sufficient condition for establishing the existence of control over the assignment of the work performed by that other entity. Consequently, the absence of a “majority” ownership standard in the OOC does not affect our ap-

plication of the *Manganaro* analysis to the OOC, or our result.²³

Finally, the phrase “any significant degree” modifying “ownership management or control” in the OOC does not undermine our reliance on *Manganaro*. Suffice it to say that anything less than a significant degree of “ownership management or control” would likely also be an ineffective degree of such control, and thus beyond the scope of the Union’s legitimate interest in preserving work over which the employer *can* exercise effective control.

The crucial focus in analyzing whether the OOC violates Section 8(e) is not whether, or to what extent, the signatory employer and the affiliated business entity are bound by common ownership. Rather, we find that the crucial focus is whether, as both the OOC and the *Manganaro* clauses state, work of the type covered by the collective-bargaining agreement is being performed by a business entity over which the signatory employer exercises control.²⁴

The OOC, like the clause in *Manganaro*, is applicable to a signatory employer if it “perform[s] . . . work . . . covered by this Agreement, under its own name or . . . the name of another . . . wherein the Employer exercises . . . directly or indirectly . . . any significant degree of ownership management or control.” We find, as we did in *Manganaro*, that the requirement that the signatory employer exercise “any significant degree of ownership management or control” over another entity reasonably means that the signatory employer must have the right or the power effectively to control the assignment of the work of that entity’s employees. In addition, again similar to the *Manganaro* clause, the OOC by its terms states that it applies only if the signatory employer “exercises” such control: “This is more than potential authority; it refers to the actual or active control of the work.”²⁵ And, finally, the OOC by its terms, like the clause in *Manganaro*, limits its objective to work of the type covered by the current contract which the signatory employer actually “perform[s]”: “This further indicates that the clause requires the [signatory employer] to have the authority to

²³ Chairman Gould agrees with the majority that the crucial focus in analyzing whether the OOC violates Sec. 8(e) is not common ownership between two companies, but rather whether the work covered by the contract is being performed by a business entity over which the signatory employer exercises control. He agrees that here the OOC applies only when the signatory employer performs work covered by the contract and the signatory employer exercises actual or active control over the work. He, therefore, finds it unnecessary to rely on the discussion of the relationship between companies that are bound only by common ownership.

²⁴ 321 NLRB at 164. Our dissenting colleague does not agree with *Manganaro*, and thus would not apply its analysis to the OOC. Instead, taking the General Counsel’s pre-*Manganaro* position in this case, our colleague contends that if a signatory employer merely owns another company, the OOC would by its terms make the contract applicable to the other company. As fully discussed herein, however, under *Manganaro*, the OOC would not make the contract applicable to a company owned by a signatory employer merely on the basis of that ownership.

²⁵ *Id.*

control the work; otherwise, the work done through the device of another entity would not be work the [signatory employer] performs.”²⁶

Thus, as in *Manganaro*, we find here that the OOC is applicable *only* when the signatory employer has the right of control over the work in question, regardless of the extent of any ownership interest the signatory employer might have in the other business entity.²⁷ Consequently, and as discussed above, the OOC could be legitimately applicable even where the signatory employer might have a less-than-majority ownership interest in the other business entity, as long as such employer nevertheless has—on some other basis—the right of control over the work in question. As in *Manganaro*, here also the OOC is applicable to “the signatory [employer] who performs and exercises control over the work, not to tangential ownership or management.”²⁸

And the fact that the OOC may by its terms be applied to circumstances in which the signatory employer exercises *indirect* rather than direct control over the work covered by the contract does not negate the underlying operative fact that the OOC is still applicable only when the signatory employer exercises the right of control—be it direct or indirect, but ultimately effective control nevertheless—over the work covered by the contract.²⁹

²⁶ Id. Our dissenting colleague challenges the validity of this interpretation, i.e., that the OOC’s expressly limited applicability only to work that the signatory employer *performs* signifies that it is also limited only to work that the signatory employer has the actual authority to control. Our colleague finds that this interpretation is wholly undercut by the presence of the words “perform” and “control” in different contexts in the OOC. He contends that the express terms of the OOC would permit its application to a nonsignatory employer which would be said to be performing work of the type covered by the contract merely because it is owned by a signatory employer. We have, however, already found that under the terms of the OOC a signatory employer’s control over the assignment of the work performed by another business entity cannot be established solely by majority ownership. Thus, the OOC by its terms would not be applied to a nonsignatory employer on the basis of mere common ownership with a signatory employer.

Moreover, the General Counsel has acknowledged that his 8(e) theory is that the OOC is unlawful on its face, and that there is no allegation that the Respondent has sought to enforce the OOC in an unlawful manner. Accordingly, we need not speculate about the particular circumstances under which the parties may attempt to apply the OOC. Rather, we only need to determine whether the OOC is unlawful on its face. In finding that it is not, we are interpreting it as requiring signatory employers to do no more than what the law allows the Respondent to require them to do: preserve work (1) of the type which is covered by the collective-bargaining agreement and traditionally performed by employees of the Employer who are represented by the Respondent, and (2) which the Employer ultimately has the power—the right of control—to assign.

²⁷ Thus, for the same reasons set forth in *Manganaro*, supra at 164 fn. 20, we find that this case, like *Manganaro*, is distinguishable from the Board’s decision in *Carpenters District Council of Northeast Ohio (Alessio Construction)*, 310 NLRB 1023 (1993). Accordingly, we believe that our dissenting colleague’s reliance on *Alessio* is unavailing.

²⁸ 321 NLRB at 165 (emphasis in original).

²⁹ Id.

In light of all the above considerations, we find that the OOC is not clearly unlawful on its face under the “right of control” test, the second prong of the *ILA I*, supra, two part test, and we have interpreted it as requiring signatory employers to the contract to do no more than what the law allows such a clause to require them to do.

(ii) Work-preservation objective

The only express purposes of the OOC are “[1] to protect and preserve, for the employees covered by this Agreement, *all work heretofore performed by them*, and . . . [2] to prevent any device or subterfuge to avoid the protection and preservation of *such work*” (emphasis added). The OOC expressly is applicable to an employer bound by the contract only if and when the employer is “perform[ing] *work of the type covered by this Agreement*”—in which circumstance the OOC expressly makes the contract applicable only to “*all such work*” (emphasis added).³⁰ Thus, on its face, the OOC has as its objective only the preservation of, and application of the contract to, work traditionally performed by employees represented by the Respondent, and nothing in the language of the OOC indicates that it has any other objective.³¹

Consequently, the OOC facially satisfies the first part—a valid work-preservation objective—of the *ILA I* two-part test for determining the lawfulness of a purported work-preservation agreement under Section 8(e). Therefore, the OOC is not clearly unlawful on its face under the “work-preservation” test,³² and we interpret it as requiring no more than what the Respondent may lawfully seek: i.e., the protection and preservation, for the employees it represents, of the work traditionally performed by them under the contract. Thus, what the OOC requires is simply that, if a signatory employer, under its own or some other identity, performs work *covered* by the contract, then that work must be performed *under the terms* of that contract.³³

³⁰ Unlike in *Manganaro*, the contract in this case does not state the Respondent’s jurisdiction in geographical terms. Although MWA Attorneys Trivella and Miller and MWA Vice President Arena all testified that the Respondent’s jurisdiction was limited to the five boroughs of New York City, the contract itself does not contain any such statement of geographical jurisdiction.

³¹ *Manganaro*, supra at 165. And again, the General Counsel’s 8(e) theory is only that the OOC is unlawful on its face; there is no allegation that the Respondent has sought to enforce the OOC in an unlawful manner during the relevant limitations period under Sec. 10(b).

³² We find unavailing the General Counsel’s argument that the language “all work heretofore performed by [the employees covered by this Agreement]” and “work of the type covered by this Agreement” in the OOC is the equivalent of the language “same or similar type of business enterprise” and “same or similar classifications of employees” which the Board found overly broad in *Alessio Construction*, supra at 1026. As the Board itself noted in *Alessio*, the language there—unlike the language in the OOC here—made no reference at all to the work being performed by unit employees.

³³ *Manganaro*, supra at 166.

2. 8(b)(3) allegation: principle and conclusion

If a union insists to bargaining impasse on a contractual provision that is a nonmandatory subject of bargaining because it is unlawful, the union will be found to have violated Section 8(b)(3).³⁴

As discussed above, the General Counsel's 8(b)(3) case is based on his inextricably related allegation that the OOC is unlawful under Section 8(e), and that the Respondent consequently violated Section 8(b)(3) by insisting upon the inclusion of the OOC in the contract as a condition to reaching agreement on that contract. Because we have found that the OOC is not unlawful, we consequently find that the Respondent has not violated Section 8(b)(3) as alleged in the complaint.

C. Joint Venture Clause

The Joint Venture Clause (JVC) in the contract states:

JOINT VENTURE

When an Employer enters into a Joint Venture with an Employer who is not bound by this Agreement, then said Joint Venturers shall sign an agreement as Joint Venturers with the District Council³⁵ before they can employ any members of the District Council. Each Joint Venturer shall comply with the Bonding provisions in Article X.³⁶

The judge found, and we agree, that the JVC was unlawful under Section 8(e), and that the Respondent therefore violated Section 8(e) as alleged by entering into the JVC in the contract.³⁷ More specifically, the judge found that the JVC violates Section 8(e) because it obligates a nonsignatory employer seeking to do business as a joint venturer with a signatory employer to sign a collective-bargaining agreement with the Respondent³⁸ in order for the joint venture to employ members of the Respondent, even though the JVC is not expressly applicable only to unit work covered under the contract, and thus might result in the contract being imposed on work that is not related to the unit work covered under the contract. Thus, the judge found that the JVC had as its main purpose the satisfaction of union objectives elsewhere, not the preservation or protection of unit work, and was thus

³⁴ *Alessio Construction*, supra at 1025.

³⁵ I.e., the Respondent here.

³⁶ Art. X, *Bonding*, states that every employer covered by the contract shall provide a surety bond to guarantee payment of all fringe benefits to the fringe benefit funds specified in the contract.

³⁷ As with the OOC, the General Counsel has also acknowledged that his 8(e) theory in regard to the JVC is that it is unlawful on its face, and that there is no allegation that the Respondent has sought to enforce the JVC in an unlawful manner during the relevant limitations period under Sec. 10(b).

³⁸ Thus, the JVC requires the nonsignatory employer to do more than just apply the terms of the signatory employer's collective-bargaining agreement with the Respondent. The JVC requires the nonsignatory employer expressly to sign an agreement with the Respondent. We note, however, that the JVC requires the nonsignatory employer to sign an agreement with the Respondent only in the nonsignatory's capacity as a joint venturer.

thus secondary in nature, attempting to influence the labor relations of nonsignatory employers in units removed from the contractual unit. The judge's findings are correct and we affirm them.

CONCLUSIONS OF LAW

1. By entering into an agreement with the Manufacturing Woodworkers Association (MWA) of Greater New York, Inc., which contained the Joint Venture Clause (JVC), the Respondent has violated Section 8(e) of the Act.

2. The above-unfair labor practice affects commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

The National Labor Relations Board orders that the Respondent, District Council of New York City and Vicinity, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, New York, New York, its officers, agents, and representatives, shall

1. Cease and desist from entering into, giving effect to, or enforcing the Joint Venture clause in its collective-bargaining agreement with the Manufacturing Woodworkers Association of Greater New York, Inc.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its New York, New York business office and at its meeting halls copies of the attached notice marked "Appendix."³⁹ Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Within 14 days after service by the Region, mail signed copies of the attached notice to all signatory employers of the Manufacturing Woodworkers Association of Greater New York, Inc. for posting by them, if willing, at all places where notices to employees are customarily posted.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

³⁹ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of The National Labor Relations Board."

MEMBER HURTGEN, dissenting in part.

For the following reasons, I agree with the judge that the “Other Operations” clause is facially invalid under Section 8(e), and that the Respondent violated Section 8(b)(3) by insisting, in negotiations, on agreement to this clause as a condition of reaching an agreement.

The “Other Operations” clause provides, in pertinent part, that:

In order to protect and preserve, for the employees covered by this Agreement, all work heretofore performed by them, and in order to prevent any device or subterfuge to avoid the protection and preservation of such work, it is hereby agreed that if and when the Employer shall perform any work of the type covered by this Agreement, under its own name or under the name of another, as a corporation, company, partnership, or any other business entity, including a joint venture, wherein the Employer exercises either directly or indirectly any significant degree of ownership management or control, the terms and conditions of this Agreement including Fringe Benefits shall be applicable to all such work.

The vice of this clause is that it imposes the contract on employers who are separate from the signatory employer. That is, the contract is imposed if the signatory employer exercises (directly or indirectly), ownership, management, *or* control. Thus, for example, if the signatory company merely owns the other company, the contract is foisted on the other company. Of course, as a matter of law, a signatory company’s mere ownership of another company does not establish that the two are a single employer.¹ Thus, the clause is a secondary one in the classic sense that it is aimed at the labor relations of a separate employer. In sum, the clause imposes the contract on entities who are separate companies, *i.e.*, not a single employer with the signatory.

In light of the foregoing, and consistent with former Member Cohen’s dissent in *Painters District Council 51 (Manganaro Corp. Maryland)*, 321 NLRB 158, 168–171 (1996), and with the Board’s decision in *Carpenters District Council of Northeast Ohio (Alessio Construction)*, 310 NLRB 1023 (1993), I conclude that the “Other Operations” clause in this case is secondary and unlawful. The more particularized rationale for my position is to be found in the *Manganaro* dissent and in *Alessio*. I need add only the points set forth below.

In reaching a contrary conclusion, my colleagues say that the clause applies only when the employer “performs” the work. My colleagues read the word “per-

form” as implying “control,” and they therefore conclude that the clause applies only where the employer “controls” the work. This strained reading of the word “perform” ignores the fact that the word “control” itself appears elsewhere in the clause, and its context wholly undercuts the position of my colleagues. More particularly, as noted above, the clause applies when the signatory employer performs the work under its own name or under the name of another business entity, if the employer exercises ownership, management *or* control of the other entity. Thus, the signatory employer is said to “perform” the work if it merely owns the entity which actually performs the work. And, in that circumstance, the other entity is bound to the contract. In sum, “perform” is not confined to situations where the signatory employer actually performs and controls the work.

My colleagues seek to interpret the clause so as to make it lawful in their view. However, they concede that the issue is the facial validity of the clause. Thus, our task is to take the contract as it is written, not as it might be interpreted. The contract, as written, undercuts the majority’s contention. That contention is that “the OOC [clause] would not make the contract applicable to a company owned by a signatory employer merely on the basis of that ownership.” The clear language of the clause is *contra*. Under that clear language, common ownership alone triggers the application of the clause.

Contrary to my colleagues, I do not find this to be a work-preservation clause. The mere fact that the work may have been previously performed by the Employer’s employees does not make the clause a “work-preservation” clause. The operative portion of the clause does not seek to recapture or preserve unit work. It is not confined to situations where work is transferred from the Employer to the other entity.² And, even if it were so confined, the clause does not forbid the transfer of the work or seek to retrieve the work. Rather, the clause leaves the work with the other entity, and imposes the contract on that entity.

As noted above, my colleagues seek to equate the instant clause to the one in *Manganaro*. As also noted above, I agree with the dissent in *Manganaro*. However, I note that the instant clause is even more clearly secondary than the one in *Manganaro*. As discussed above, mere ownership (even 100-percent ownership) is insufficient to show single employer status. A fortiori, “majority ownership” (the *Manganaro* phrase) does not establish that status. And, since “significant degree of ownership” (the instant clause) could even be less than majority ownership, the instant clause is even worse than *Manganaro*.

¹ See, e.g., *Los Angeles Newspaper Guild Local 69 (Hearst Corp.)*, 185 NLRB 303, 304 (1970), *enfd. per curiam* 443 F.2d 1173 (9th Cir. 1971). The Board has applied the same test for determining relatedness of companies in double-breasting situations. *Sheet Metal Workers Local 80 (Limbach Co.)*, 305 NLRB 312, 314 fn. 5 (1991); *Carpenters Local 745 (SC Pacific)*, 312 NLRB 903 (1993), *enfd. in unpublished decision Carpenters Local 745 v. NLRB*, No. 93–71038 (9th Cir. Dec. 19, 1995).

²As stated in former Member Cohen’s *Manganaro* dissent, the significant portion of the clause is its operative language, not its prefatory language.

The instant clause is even more clearly secondary than the one in *Manganaro* in another sense. The *Manganaro* clause reads in terms of “all work covered by this agreement.” The instant clause reads in terms of “all work heretofore performed” by the employees. Thus, the instant clause would protect work previously performed by a unit employee irrespective of whether that work was contract (i.e., unit) work. Concededly, the instant clause later speaks of “work of the type covered by this agreement.” But this only adds ambiguity. Where as here, the clause imposes the contract on separate employers, the clause is literally a secondary one, unless a primary objective is clearly shown. The instant clause does not clearly show a primary objective.

Finally, the clause is not protected by the construction industry proviso. The signatory Association is not primarily engaged in the construction industry (see majority opinion at fn. 3), and may not even be engaged in that industry. But, even if it is so engaged, the clause, unlike the one in *Manganaro*, is not confined to onsite construction work. And, even if it were so confined, it is not within the intendment of the Section 8(e) proviso. See discussion in *Manganaro* dissent and in *Alessio*.

For all of these reasons the clause is clearly unlawful, and the Respondent could not lawfully insist upon it.

APPENDIX

NOTICE TO MEMBERS

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

The Joint Venture clause in our collective-bargaining agreement with the Manufacturing Woodworkers Association of Greater New York, Inc., has been found to be unlawful under Section 8(e) of the National Labor Relations Act.

WE WILL NOT enter into, give effect to, or enforce the Joint Venture clause in our collective-bargaining agreement with the Manufacturing Woodworkers Association of Greater New York, Inc.

DISTRICT COUNCIL OF NEW YORK CITY AND VICINITY, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO

Mindy E. Landow, Esq., for the General Counsel.
Donald L. Sapir and Scott A. Weiss, Esqs. (Sapir & Frumkin LLP), of White Plains, New York, for the Respondent.
Irving T. Bush, Esq., of New York, New York, for the Charging Party.

DECISION

STATEMENT OF THE CASE

STEVEN DAVIS, Administrative Law Judge. Based on a charge in Case 2-CB-15010 filed on January 5, 1994, and a charge in Case 2-CE-172 filed on December 21, 1994, by the Manufacturing Woodworkers Association of Greater New York, Inc. (MWA or the Association), a consolidated complaint was issued against the District Council of New York City and Vicinity, United Brotherhood of Carpenters and Joiners of America, AFL-CIO (Respondent or the Union) on January 24, 1995.

The complaint alleges essentially that Respondent violated Section 8(e) of the Act by maintaining two unlawful contractual provisions in its collective-bargaining agreement with the Association, and violated Section 8(b)(3) of the Act by insisting, as a condition of reaching any collective-bargaining agreement, that the MWA agree to retain one of the clauses in that contract.

Respondent's answer denied the material allegations of the complaint, and on February 2, 3, and 6 and March 3, 1995, a hearing was held before me in New York City.

On the evidence presented in this proceeding, and my observation of the demeanor of the witnesses, and after consideration of the briefs filed by all parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

The MWA is an organization comprised of about 30 employers employing about 1500 employees, who are engaged in the manufacture, sale, and installation of architectural woodwork in the New York City metropolitan area. One purpose of the MWA is to represent its employer-members in negotiating and administering collective-bargaining agreements with various labor organizations, including Respondent.

Annually, the Association's employer-members collectively purchase and receive at their facilities in New York State goods and materials valued in excess of \$50,000 directly from suppliers located outside New York State. Respondent admits, and I find, that the Association and its members are and have been employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Respondent admits, and I find, that it is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Disputed Clauses

The MWA and the Union have had a collective-bargaining relationship for many years. Prior to the current dispute, the parties' last full collective-bargaining agreement was for the period 1988 to 1991, which was extended by 1-year renewal agreements for the periods 1991-1992 and 1992-1993.

Negotiations for a renewal agreement began in August 1993 and culminated in July 1994 with a new agreement, which was effective retroactively from July 1, 1993, to June 30, 1997.

The prior agreement and the current agreement contain the same disputed clauses:

Joint Venture. When an Employer enters into a Joint Venture with an Employer who is not bound by this Agreement, then said Joint Venturers shall sign an agreement as Joint Venturers with the District Council before

they can employ any members of the District Council. Each Joint Venturer shall comply with the Bonding provisions in Article X.

Other Operations.

Section 1. *Work Preservation Clause.* (a) In order to protect and preserve, for the employees covered by this Agreement, all work heretofore performed by them, and in order to prevent any device or subterfuge to avoid the protection and preservation of such work, it is hereby agreed that if and when the Employer shall perform any work of the type covered by this Agreement, under its own name or under the name of another, as a corporation, company, partnership, or any other business entity, including a joint venture, wherein the Employer exercises either directly or indirectly any significant degree of ownership management or control, the terms and conditions of this Agreement including Fringe Benefits shall be applicable to all such work.

The Other Operations Clause (OOC) further provides that any violations thereof shall be considered as a "dispute" and processed according to the contract's grievance-arbitration provisions. Remedies for violations include the payment of backpay and payments to the trust funds.

B. The Negotiations

Negotiations for a successor agreement began on August 17, 1993, at which the Union's demands were presented. On the following day, the Association presented its proposals which included the elimination of the OOC. Association Attorney Scott Trivella told the union negotiators that he believed that the clause was unlawful. The union representatives said that they would speak to their attorneys about the matter.

At a negotiation session in early September, Ray O'Kane, the Union's representative, reported that he had spoken to the Union's attorney who said that the OOC was lawful, and that the clause must remain in the renewal agreement. Nevertheless, in proposals submitted to the Union on August 24, September 1, and September 14, the Association continued to insist on the elimination of the OOC.¹

Present at a negotiation session on November 30 were Attorney Algernon Miller, Arena and Trivella for the Association, and James Davis for the Union. Davis reported Union President Frederick Devine's position that the contract had to be signed, or there would be a strike. During a limited discussion concerning the OOC, Davis insisted that it remain in the contract.²

¹ The specific proposal stated that it sought the "elimination of the runaway shop clause." The evidence is clear that what was sought was the elimination of the OOC, sec. 18 in the expiring contract, and not the runaway shop clause, which was sec. 16. The OOC was referred to in negotiations as the runaway shop clause, as testified by Trivella and MWA Representative Joseph Arena. Further, there was no evidence that the runaway shop clause, sec. 16, was sought to be eliminated by the MWA.

² Respondent denied the complaint allegation that Davis was the special assistant to the union president, and a supervisor and agent of Respondent. The evidence is clear that Davis acted as agent for the Union. He was the spokesman for the Union at collective-bargaining negotiations, signed an addendum to the contract on behalf of it, and in a letter to MWA Attorney Miller dated January 31, 1995, Union Attorney Donald Sapir noted that a copy was sent to "Jim Davis, Director of Organizing" for the Union.

By letter to the Union dated December 30, MWA Attorney Trivella declared an impasse in negotiations and set forth the Association's determination to implement its final offer, which included the elimination of the OOC.

The Union struck for 1 week in early January 1994, during which time the MWA filed the instant charge alleging the Union's insistence on the OOC. Arena and Davis then privately negotiated an agreement to end the strike. That agreement was short lived, and reopened negotiations took place in late January or early February. At the negotiations, Trivella told Union Attorney Sapir that the OOC was unlawful, and that he had seen the Union attempt to apply the clause to neutral employers.³ Sapir denied knowledge of such attempts.

At a negotiation session held in May or June 1994, a lengthy discussion of the lawfulness of the OOC and the Joint Venture Clause (JVC) took place. Present at the session were three MWA attorneys, two union attorneys, and Arena and Davis. The MWA insisted that the clauses were illegal, and that the OOC was an unlawful accretion clause. The Union believed that the provisions were legal. The Union proposed that the matter be decided by an arbitrator but the MWA rejected that offer. During the meeting, Davis phoned the union office and reported that the Union would not agree to the elimination of the two clauses.

Respondent threatened to strike if the clauses were eliminated from the contract. The Union offered to amend one of the clauses by adding a "subcontractors" clause. The subcontractors clause stated as follows:

All work covered by this Agreement shall be contracted or subcontracted only to an employer who is signatory to or agrees to become signatory to a collective bargaining agreement with the Union. The parties hereto mutually agree with respect to such work falling within the scope of this Agreement that is to be done at the site of construction, alteration, maintenance, or repair of any building, structure, or other works. If the Employer should contract or subcontract any of the aforesaid works falling within the trade jurisdiction of the Union as set forth herein, said Employer shall contract or subcontract such work only to firms which comply with the standards of wages and fringe benefits and working conditions established herein.

MWA Attorney Miller objected that the proposed amended clause was more restrictive than that in the current agreement, and agreed to retain the current language, rather than accept the "worst of 2 evils."⁴ However, Miller announced that he would continue to pursue the unfair labor practice charge.

In early July, another negotiation session was conducted. Union Attorney Sapir stated that the clauses were legal, specifically that the OOC was a valid work-preservation clause. MWA Attorney Irving Bush replied that the clauses went be-

³ There was undisputed testimony that, pursuant to the OOC, the Union's benefit funds sought to collect from MWA members for nonbargaining unit work, such as the installation of terrazzo floors, painting work, demolition work, work performed by laborers, and for materials purchased from a glazier.

⁴ I reject Respondent's argument that in so doing, the MWA accepted the language now contained in the collective-bargaining agreement. By filing the instant charge, the MWA clearly did not accept the disputed clauses. *Dairy Employees Local 754 (Glenora Farms Dairy)*, 210 NLRB 483, 490 (1974).

yond the preservation of work performed by unit employees. Union Agent Davis said that the MWA should agree to the clauses since it has “lived with” the clauses in the past, and that the Union would not “hurt” the Association. The meeting ended with the Union continuing to insist that the clauses remain in the successor agreement “as is.”

On July 21 at a meeting at union headquarters to discuss certain grievances, Davis told MWA Attorney Miller that Union President Devine directed that a signed contract be obtained that day or the MWA representatives could not leave. They spoke about the OOC, and Miller said that he was reluctant to sign the agreement unless the Union agreed to the removal of that clause, and another matter relating to the manning of “outside” jobs. Davis told Miller to sign the agreement or he would “bring on the strike.”

The Union’s agents left the room for 60 to 90 minutes, and according to Arena, leaving the Association’s representatives “to think about what the possible consequences could be for management’s side.” Later, Miller signed the collective-bargaining agreement and Davis signed the addendum to that agreement.⁵ On signing, Miller told the Union that he would continue to pursue the charges concerning the illegal contract clauses.

In a letter to MWA Attorney Miller dated January 31, 1995, Union Attorney Sapir requested that the MWA agree that the question of the interpretation or construction of the two clauses be submitted to arbitration. The Association refused. At the hearing, Respondent moved that the proceeding be deferred to the parties’ contractual grievance-arbitration procedure.

Analysis and Discussion

A. The Legality of the Contractual Clauses

As set forth below, I find that the Other Operations Clause and the Joint Venture Clause violate Section 8(e) of the Act, and that Respondent further violated Section 8(b)(3) of the Act by insisting, as a condition of reaching agreement on a renewal collective-bargaining agreement, that the OOC be included in such agreement.

1. General principles

An agreement is unlawful under Section 8(e) of the Act if it is an agreement to cease doing business with another person, if it has secondary, as opposed to primary, work-preservation objectives, and is not saved by the construction industry proviso to that section. *Carpenters District Council of Northeast Ohio (Alessio Construction)*, 310 NLRB 1023, 1025 (1993).

Whether a provision of a collective-bargaining agreement violates Section 8(e) of the Act depends on whether “the Union’s objective was preservation of work for [the unit] employees, or whether the agreements and boycott were tactically calculated to satisfy union objectives elsewhere. . . . The touchstone is whether the agreement or its maintenance is addressed to the labor relations of the contracting employer vis-a-vis his own employees.” *National Woodwork Mfrs. Assn. v. NLRB*, 386 U.S. 612, 644-645 (1967).

The focus of the analysis is whether the disputed clause has the primary purpose of protecting unit work or unit standards, or the secondary purpose of promoting the broader goals of the union by asserting control over the labor relations of other em-

ployers. *Associated General Contractors*, 280 NLRB 698, 701 (1986).

Applying those principles, I find that the clauses have as their main purpose the satisfaction of union objectives elsewhere, and not the preservation or protection of unit work. They are thus secondary in nature, attempting to influence the labor relations of nonsignatory employers in units far removed from the contractual unit. *Sheet Metal Workers Local 91 (Schebler Co.)*, 294 NLRB 766, 770 (1989).

In *Schebler*, the Board found that an “integrity clause,” which required a signatory employer that had an ownership interest in another company to force the other company to pay union wages and benefits, violated Section 8(e) of the Act. The Board noted that the integrity clause forced the cessation or alteration of business with the affiliated company by requiring the signatory employer to use its influence to cause the related company to change its nonunion operation or its wage and benefit package, and causes the employer to change its own affiliation with the related company. The Board held that the “purpose and effect” of the clause is to alter the business relationship between the employer and its related firms.

The Board has also found that a contractual clause which treats “common ownership alone, without regard to whether there is evidence of common management or common control of labor relations, as a trigger for forcing a signatory employer to the choice of either extending the contract to the affiliated entity or eliminating its ownership of that entity” violates Section 8(e) of the Act. *Carpenters Local 745 (SC Pacific)*, 312 NLRB 903, 904 (1993). “Companies that are bound only by common ownership are generally found to be neutrals with respect to each other’s labor relations.” *Alessio*, supra at 1026.

In *Alessio*, supra, the Board found unlawful a clause which required that if the signatory employer formed or participated in the formation of another company which will engage in the same or similar type of business and employs the same or similar classification of employees as in the contract, then the affiliated company shall be manned in accordance with the referral provisions of the signatory’s contract.

2. The other operations clause

The OOC is similarly flawed because it applies to affiliated companies where the signatory employer “exercises either directly or indirectly any significant degree of ownership management or control.” Respondent argues that the absence of commas between those terms establishes that “management” and “control,” and not ownership are the terms emphasized. However, the clear meaning of the phrase is that the contract terms will apply if the signatory employer exercises either ownership management or control. Clearly, ownership is the “trigger” for forcing a signatory employer to extend the contractual terms to its affiliate. *SC Pacific*, supra, and such companies are generally neutrals with respect to each other’s labor relations. *Alessio*, supra.

Even assuming that some management or control is exercised by the signatory employer over its affiliate, the OOC refers to “indirect” management or control. The clause does not state that such control, even of a “significant degree,” as set forth in the OOC, is directed to the affiliate’s labor relations. *SC Pacific*, supra, or that the signatory employer has the power to assign the work to unit employees. “If the contracting employer has no power to assign the work, it may be inferred that the agreement has a secondary objective, to influence whoever

⁵ Generally, Union President Devine signed such addenda, but in this instance Davis did.

has such power of assignment.” *NLRB v. Longshoremens ILA*, 447 U.S. 490, 504-505 (1980).

The secondary nature of the OOC clause may be further seen in its requirement that the affiliate employer assume all the terms of the collective-bargaining agreement, including such noneconomic terms as the union-security clause. It is thus apparent, that the OOC “is designed to do more than merely preserve bargaining unit work for unit employees or prevent the erosion of union standards.” *Food & Commercial Workers Local 1441 (Ralphs Grocery)*, 271 NLRB 697, 698 (1984).

The OOC does not require that the signatory employer control or manage the affiliates covered by the provision, and would therefore reach companies performing work that was not within the signatory’s “right of control.” *Alessio*, supra at 1026. The clause would apply where the signatory employer did not have the power to assign the disputed work to unit employees. Thus, the clause is aimed at ensuring that the affiliate’s employees are covered by the agreement, and thus not aimed at preserving unit work. If the signatory employer has no power to assign the work, it may be inferred that the agreement has a secondary objective, to influence the company which has such power over the work. *NLRB v. Longshoremens ILA*, supra.

The OOC provides essentially that when a signatory employer performs any work “of the type covered by this agreement” under its own name or the name of another, including a “joint venture, wherein the Employer exercises either directly or indirectly any significant degree of ownership management or control, the terms and conditions of this Agreement including Fringe Benefits shall be applicable to all such work.”

The clause clearly is not an attempt to preserve unit work, notwithstanding the clause’s language to that effect. It does not specifically apply to unit work, or specifically to the work performed by signatory employers. It requires that affiliated companies are bound to the contract if “any work of the type” covered by the contract is performed by the affiliated employer. As in the clause found unlawful in *Alessio*, which referred to companies which will engage in the “same or similar type of business . . . [with the] same or similar classification of employees covered by this collective-bargaining agreement,” the work sought to be preserved is not identified as unit work. The Board stated in *Alessio*, supra at 1026:

The use of the phrases “same or similar *type* of business enterprise” and “same or *similar* classifications of employees” and the absence of any references to unit work make it clear that the clause is not limited in its application to companies that are performing work that was diverted from signatory employers.

Accordingly, I find that the OOC has the purpose and effect of causing the signatory employer to force an affiliated employer to (a) change its nonunion operation and (b) avoid entering into a relationship with another company with the result that the clause alters the business relationship between the signatory employer and its affiliated company. It therefore violates Section 8(e) of the Act.

3. The joint venture clause

The JVC requires that when a signatory employer enters into a joint venture with an employer who is not bound by the collective-bargaining agreement, the joint venturers “shall sign an agreement as joint venturers with the [Respondent] before they can employ any members of the [Respondent].”

The JVC thus requires that any company seeking to do business with a signatory company in a joint venture must become a signatory to the collective-bargaining agreement before the joint venture can employ any members of Respondent.

The JVC is flawed because it does not refer to unit work. It does not state what work will be performed by the joint venture. The work to be performed may not relate to the work performed under this collective-bargaining agreement, yet the affiliated company is obligated to sign this agreement in order to employ any members of Respondent.

Similarly, the JVC does not set forth any criteria concerning common management or common control of labor relations between the joint venturers. *SC Pacific*, supra, and requires the entire contract to be adhered to, including noneconomic terms. *Ralphs Grocery*, supra.

4. Respondent’s arguments

Respondent argues that the OOC is a valid work-preservation clause, applying only if the signatory employer controls its affiliate and diverts unit work to avoid its collective-bargaining obligations.

Respondent further contends that the clear language of the clause does not establish that a mere ownership interest is sufficient to trigger the application of the clause, and seeks support from the phrase “ownership management or control” in the clause. It thus argues that the clause becomes applicable only when the signatory employer exercises a significant degree of management or control through its ownership of the affiliate. However, as set forth above, if the signatory employer exercises even “indirectly” any significant degree of “ownership management or control” that would be sufficient to trigger the application of the clause. The “significant degree” required is too vague to make an otherwise invalid clause valid.⁶

Respondent further argues that the JVC is a valid prehire agreement pursuant to Section 8(f) of the Act, according to which an employer “engaged primarily in the building and construction industry” may make an agreement with a union covering employees who are engaged in such industry where the union’s majority status has not been established.

Respondent contends that the clause validly “invites” a newly formed joint venture to voluntarily recognize the Union before the joint venture employs its members, and that the joint venture may refuse to do so.

Respondent has the burden of establishing that the signatory employer is engaged in the construction industry under Section 8(f). *Carpenters Chicago Council (Polk Bros.)*, 275 NLRB 294, 296 (1985). I find that it has not met that burden. Respondent attempts to support its theory with the vague testimony of MWA member Joseph Arena that “we are architectural woodworkers, but I guess under a broad category, it’s part of the construction industry since I can remember. It’s a part of that broad scope.” Arena also stated that architectural woodwork encompassed the fabrication of desks, the front of the courthouse.”

⁶ The cases cited by Respondent in support of this proposition are inapposite since they relate to findings, in 8(a) cases, that the employers are alter egos or single employers. *Il Progresso Italo Americano Publishing Co.*, 299 NLRB 271 (1990); *Omnitest Inspection Services*, 297 NLRB 752 (1990); and *Consumers Asphalt Co.*, 295 NLRB 749 (1989). No such findings can be made here. The question is the illegality of the OOC on its face.

However, MWA Attorney Trivella testified that 90 percent of the work of the MWA members consisted of manufacturing which primarily occurs in the shops, and as to which these clauses pertain. MWA members are also engaged in the installation of such woodwork at the jobsites. Prior to the current collective-bargaining agreement, such installation work was covered by a separate Building Construction Trades Agreement (BCA). However, the current agreement incorporates the terms of the BCA as it relates to installation work.

Accordingly, I cannot find that the record supports a finding that the MWA is primarily engaged in the building and construction industry, and I reject Respondent's contention that the JVC constitutes a valid 8(f) prehire agreement. *Bell Energy Management Corp.*, 291 NLRB 168, 169 (1988).

Further, the clauses at issue cannot be saved by the construction industry proviso in Section 8(e) which permits agreements to cease doing business between a union and an "employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work." First, as set forth above, 90 percent of the work of the MWA members consist of "inside" manufacturing work performed in shops. In addition, the clauses do not refer to contracting or subcontracting work, but apply to affiliates of the signatory employer based upon its "ownership management or control" over the affiliate. The Board has found no Congressional intent to protect an "anti-dual-shop clause" such as the OOC here, by the use of the construction industry proviso. *Alessio*, supra at 1029.

I reject Respondent's argument that there has been no evidence that either clause has been applied unlawfully by it. There was testimony that the clause was validly applied to an alleged "alter ego" of MWA member Hammerman. This misses the point. The question is the illegality of the clauses. "A company may set up a related company in such a way that it is neither an alter ego nor a single employer with the first company." *SC Pacific*, supra at 904 fn. 3.

As set forth above, there is undisputed evidence that, pursuant to the OOC, the Union's benefit funds sought to collect from MWA members for nonbargaining unit work, such as the installation of terrazzo floors, painting work, demolition work, work performed by laborers, and for materials purchased from a glazier. Even assuming that there was no such evidence, "the act of entering into, signing, executing, or making a contract, either express or implied, which is prohibited by Section 8(e), is sufficient to establish a violation of that section without regard to whether there are any attempts to implement such contract." *Teamsters Local 728 (Brown Transport Corp.)*, 140 NLRB 1436, 1437 (1963).

B. The Alleged Violation of Section 8(b)(3) of the Act

A party may not insist on including a clause in a collective-bargaining agreement which would be illegal under the Act, including a hot cargo clause violative of Section 8(e). *Alessio*, supra at 1029; and *Sheet Metal Workers Local 20 (George Koch Sons)*, 306 NLRB 834, 837 (1992).

I have found, above, that the OOC violates Section 8(e) of the Act. The evidence is clear that Respondent insisted on the inclusion of the OOC in its renewal collective-bargaining agreement as a condition of entering into such contract. Thus, the MWA representatives insisted that the OOC be eliminated from the renewal agreement, but Respondent repeatedly refused

to remove them. Moreover, on two occasions, in May-June, and in July, Respondent threatened to strike if the clauses were eliminated from the renewal agreement.

It cannot be said that the MWA agreed to the clauses since it signed the agreement with them with the understanding that it would file charges, which it did.⁷ Although there was some testimony concerning the withdrawal of the charges, MWA witnesses testified that the conditions under which it would withdraw the charges were not met by Respondent.

Accordingly, I find and conclude that Respondent insisted on the inclusion of the Other Operations Clause in the contract, in violation of Section 8(b)(3) of the Act.

C. Respondent's Request to Defer to Arbitration

Respondent moved that this matter be deferred to arbitration, and at the hearing served a demand for arbitration on the MWA.

The collective-bargaining agreement contains a broad grievance-arbitration provision, which states in part:

If at any time, however, there arise any differences or disputes under this Agreement respecting the interpretation or construction of any clauses herein, or with respect to the breach of performance hereof, then the same may, on demand of either of the parties hereto, shall be submitted for decision and award to an arbitrator designated by the American Arbitration Association, pursuant to its rules and regulations for the construction industry.

The Board has held that in 8(e) cases, deferral to arbitration "is not appropriate in a dispute where the contract provisions governing the dispute are as here unlawful on their face or by their express terms call for a result inconsistent with Board policy under the Act." *Operating Engineers Local 701 (Oregon-Columbia Chapter)*, 216 NLRB 233, 234 (1975); *International Organization of Masters (Seatrains Lines)*, 220 NLRB 164, 168 (1975).

CONCLUSIONS OF LAW

1. By entering into and maintaining in effect an agreement with the Manufacturing Woodworkers Association of Greater New York, Inc., which contained the Other Operations Clause, and the Joint Venture Clause, Respondent has violated Section 8(e) of the Act.

2. By insisting upon the inclusion of the Other Operations Clause, as a condition of reaching agreement on a renewal collective-bargaining agreement, Respondent has violated Section 8(b)(3) of the Act.

3. The above-unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has committed certain unfair labor practices, I shall recommend the issuance of an order directing it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

⁷ See fn. 4, supra.

Because the posting of a single notice may not adequately inform employers that the Other Operations Clause and the Joint Venture Clause are unlawful under Section 8(e) and that Respondent may not insist on the inclusion of such clauses as a condition of reaching agreement upon collective-bargaining agreements, I shall also recommend that Respondent be ordered

to mail a copy of the notice to all signatory employers of the Manufacturing Woodworkers Assn. of Greater New York, Inc., *Schebler*, supra at 776.

[Recommended Order omitted from publication.]