

International Association of Bridge Structural and Ornamental Iron Workers, AFL-CIO and Southwestern Materials & Supply, Inc. Case 6-CE-28

July 19, 1999

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX
AND HURTGEN

On June 24, 1991, Administrative Law Judge Michael O. Miller issued the attached decision. The General Counsel filed exceptions and a supporting brief; Charging Party Southwestern Materials, Inc. (Southwestern) and interested parties Elwin G. Smith, Inc. (Smith) and E.G. Smith Construction Products, Inc. (Products) filed exceptions and a supporting brief; the Respondent filed limited exceptions and a supporting brief and a brief in support of the judge's decision; and Southwestern, Smith, and Products filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel. The Board has considered the decision and the record¹ in light of the exceptions and briefs 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 that the Respondent violated Section 8(e) of the Act by filing in Federal district court a summary judgement motion in a civil lawsuit that reaffirmed an agreement that Smith would not do business with certain companies that did not have a contract with the Respondent. The agreement provides, among other things, that:

2. This agreement shall be effective in all places where work is being performed or is to be performed by the Employer-or any person, firm or corporation owned or financially controlled by the Employer, and covers all work coming under the jurisdiction of the Association [i.e., the Union].

4. The Employer agrees not to sublet any work under the jurisdiction of the Association or its local unions-to any person, firm or corporation not in contractual relationship with this Association or its affiliated Local Unions.

The judge found, contrary to the Respondent's contention, that the complaint is not barred by Section 10(b) of the Act. On the merits, however, the judge dismissed the complaint on the basis that neither of the contract clauses which the Respondent sought to enforce in the Federal court suit violates Section 8(e). The judge found that although section 2 (the antidual shop clause) has a secondary objective which brings it within the general pro-

scription of Section 8(e), it is saved by the construction-industry proviso to 8(e). He found that section 4 (hereafter referred to as the subcontracting clause) is also a lawful clause because it has the primary purpose of preserving bargaining-unit work.

Although we agree with the judge that the complaint is not barred by Section 10(b), we do not agree that the complaint should be dismissed on the merits as to section 2. Like the judge, we find that section 2 has a secondary rather than a primary objective. However, contrary to the judge, we find that section 2 is not saved from illegality by the construction industry proviso and that the Respondent's filing of the Motion for Summary Judgment therefore violated Section 8(e) insofar as it sought to enforce section 2. In addition, although we affirm the judge's dismissal of the allegations relating to section 4, we do so for reasons different from those relied on by the judge.

I. HISTORY OF THE ALLEGED 8(e)
CONTRACTUAL PROVISIONS

In 1959, the Union and Elwin W. Smith & Co., Inc. entered into the collective-bargaining agreement containing sections 2 and 4. Cyclops Corporation purchased and merged itself with that company in 1972. Thereafter, the company was known as the Elwin G. Smith Division of Cyclops Corporation (Division). In addition to operating certain iron curtain-wall manufacturing plants, Division employed construction crews. These construction crews were covered by the collective-bargaining agreement to which the Union and Elwin G. Smith & Co., Inc., were parties, as well as by local agreements that were specific to the areas where construction was being performed.

In the years following the formation of Division, Cyclops acquired three other companies: Southwestern Materials & Supply, Inc., in 1974; Peterson Construction Products, in 1975; and Flour City Architectural Metals, a unionized curtainwall contractor, in 1983. With respect to all but Southwestern, the acquisitions were merged into Division, and the Union was informed that employees of the newly merged companies would be covered by the collective-bargaining agreement. Southwestern, however, remained a wholly owned subsidiary of Cyclops and operated as a nonunion contractor engaged in construction of low- and midrise buildings.

The manufacturing and sales operations of Division were split off into a separate wholly owned Cyclops subsidiary named E.G. Smith Construction Products, Inc. (Products) in 1984. Products' manufacturing crews were represented by a local of the Iron Workers International Association. Division, which continued to operate unionized construction crews, and Southwestern, which remained nonunion, each derived 80 to 95 percent of their business from Products. In 1987, Division emerged from further corporate restructuring as a wholly owned subsidiary of Cyclops known as Elwin G. Smith, Inc.

¹ The Charging Party, Smith, and Products have requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and positions of the parties.

Some time in 1986, the Respondent began questioning the practice of alleged subcontracting to Southwestern by a Smith entity that it believed to be under contract with the Respondent. On March 31, 1986, the Respondent filed a grievance against Division claiming that it had "been operating in violation of the International Agreement" at six construction sites. On May 14, 1986, the Respondent wrote to Division seeking information about the business entities in question. By an August 20, 1986 letter, the Respondent demanded arbitration. This correspondence did not refer to specific contract provisions to support the Respondent's claim of contract violations. The requests for information and demand for arbitration were denied.

On September 2, 1986, the Respondent filed a Petition to Compel Arbitration and/or Complaint for Damages (Breach of Contract) in the United States District Court for the Western District of Pennsylvania. The petition specifically sought to require defendants Smith, Products, and Southwestern to arbitrate the applicability of, inter alia, sections 2 and 4 of the contract to work performed by Southwestern. The complaint sought damages. On January 14, 1988, pursuant to a schedule established by the court, the Respondent filed a Motion for Summary Judgment reasserting that the defendants were obligated to arbitrate the applicability of the agreement to work performed by Southwestern. The district court has stayed the Respondent's petition and complaint pending completion of the instant proceeding.

II. THE RESPONDENT'S PROCEDURAL DEFENSES

A. Section 10(b)

The unfair labor practice charge in this case was filed on January 26, 1988. The General Counsel contends that the Respondent's Motion for Summary Judgment, filed in Federal district court on January 14, 1988, was a sufficient reaffirmation of the contract clauses to bring the Respondent's attempted enforcement of those clauses within the 10(b) 6-month limitation period. The Respondent argues that its filing of a Motion for Summary Judgment is not a reaffirmation of the alleged 8(e) contract, and that any violation would have occurred between March and August 1986, when it grieved the subcontracting of work to Southwestern under the bargaining agreement and later sued to compel arbitration. The judge agreed with the General Counsel that the charge had been filed within the 10(b) limitation period.

We agree with the judge and the General Counsel. On September 2, 1986, the Respondent petitioned to compel arbitration and sued for damages under the collective-bargaining agreement. The summary judgment motion, on which the instant 8(e) complaint is grounded, citing sections 2 and 4 of the agreement, was filed on January 14, 1988, less than 2 weeks before the January 26 charge. This reaffirmation of the clauses occurred within the 10(b) period and renders the charge predicated on that

reaffirmation timely.² Although the grievances which had been the subject matter of the law suit, as well as the petition to compel arbitration, were reaffirmations of the clauses that could themselves have triggered a charge, these acts did not preclude the instant charge based on the later January 14, 1988 reaffirmation.

The General Counsel excepts to the judge's failure to find that the filing and maintenance of the suit independently violate Section 8(e). To the extent that these events occurred more than 6 months before the filing of the charge, we find that they are barred by Section 10(b).

B. *Bill Johnson's*

The Respondent further contends that its suit to compel arbitration, including the Motion for Summary Judgment, is privileged by the Supreme Court's decision in *NLRB v. Bill Johnson's Restaurants*, 461 U.S. 731 (1983). We find no merit in this contention. In *Bill Johnson's*, the Court held that the Board may not enjoin a party from maintaining an allegedly retaliatory state-court lawsuit that has a reasonable basis in fact and law, but rather must await the conclusion of the state-court proceeding before deciding the unfair labor practice issue. The Court specifically stated, however, that the principles it was discussing did not apply to suits that have "an objective that is illegal under federal law," and that the Board may enjoin such suits. *Id.* at 737 fn. 5. For the reasons set forth below, we have concluded that to the extent that the Respondent's lawsuit seeks to enforce section 2 of its agreement with the Charging Party, the suit has an objective that is illegal under Section 8(e) of the Act. Thus, nothing in *Bill Johnson's* precludes the Board from ordering the Respondent to withdraw the suit insofar as it relates to section 2. Assuming without deciding that the instant Motion for Summary Judgment has a reasonable basis, we conclude that the objective of the suit is in violation of Federal law and is therefore exempt from the general rules of *Bill Johnson's*.

III. THE MERITS

A. *Applicable 8(e) Principles*

Section 8(e) of the Act generally forbids parties from entering into a collective-bargaining agreement in which an employer agrees to refrain from dealing in the product of another employer or to cease doing business with any other person.³ However, not every collective-bargaining

² See *Bricklayers Local 2 (Gunnar I. Johnson & Sons)*, 224 NLRB 1021, 1025 (1976); *Teamsters Local 467 (Mike Sullivan Associates)*, 265 NLRB 1679, 1681 (1982), *enfd.* 723 F.2d 916 (9th Cir. 1983); *Retail Clerks Local 770 (Frito Co.)*, 138 NLRB 244, 247 (1962) ("any enforcement [of clauses alleged to violate 8(e)] during the period covered by the charges constitutes an 'entering into' such agreement in violation of that section of the Act").

³ Sec. 8(e) provides in relevant part:

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 from handling, using, selling, transporting or otherwise dealing in any of

agreement with a “cease doing business” objective is necessarily unlawful. It is well established that contract clauses that fall within the literal proscription of Section 8(e) are nevertheless lawful if they have the primary objective of preserving or protecting work performed by the employees of the employer bound by the contractual provision.⁴ Moreover, even clauses that are secondary in nature and therefore within the general proscription of Section 8(e) may be lawful if they satisfy the requirements for exemption under the construction industry proviso to 8(e). Thus, in analyzing clauses of the type at issue here, the first question to be answered is whether the clause is secondary in nature or has the primary objective of preserving bargaining unit work. If it is concluded that the clause has a work preservation objective, the clause will be found to be lawful. If on the other hand it is concluded that the clause has a secondary purpose, then the clause will be found to be illegal under 8(e) unless it is saved from illegality by the construction industry proviso.

1. Secondary v. work preservation objective

In *NLRB v. Longshoremens ILA*, 447 U.S. 490 (1980) (*ILA I*), the Supreme Court held that the question of whether an agreement to cease doing business is a lawful work preservation agreement or has a proscribed secondary objective depends on “whether, under all the surrounding circumstances, the Union’s objective was preservation of work for [bargaining unit] employees, or whether the agreement[] . . . [was] 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-à-vis his own employees.” 447 U.S. at 504, quoting *National Woodwork Mfrs.*, supra at 644–645. The Court went on to explain that:

Under this approach, a lawful work preservation agreement must pass two tests: First, it must have as its objective the preservation of work traditionally performed by employees represented by the union. Second, the contracting employer must have the power to give the employees the work in question—the so-called “right of control” test of [*NLRB v. Enterprise Assn. of Pipefitters*, 429 U.S. 507 (1977)]. The rationale of the second test is that if the contracting employer has no power to assign the work, it is reasonable to infer that

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; Provided, that nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting or work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work.

⁴ *National Woodwork Mfrs. Assn. v. NLRB*, 386 U.S. 612 (1967)

the agreement has a secondary objective, that is, to influence whoever does have such power over the work.

Applying these principles to the clauses at issue here, we find that that section 2 and section 4 are not primary work preservation clauses but rather have a secondary purpose.

Section 2 by its terms provides that the contract will apply to any work coming under the jurisdiction of the union that is performed either by Smith or by an entity “owned or financially controlled by” Smith. We find first that section 2 fails the “right of control” test in that it is not limited to work that Smith has the power to assign. Under the clause, any company that is simply owned by Smith is bound to the contract. However, as the Board has previously noted, the fact that the signatory employer owns another business entity would not, without more, establish that the signatory employer had control over the assignment of the work performed by the other entity. *Carpenters (Mfg. Woodworkers)*, 326 NLRB No. 31, slip op. at 5 (1998).

We note further that section 2 does not have (and does not by its terms purport to have) the objective of preserving bargaining unit work for employees of the signatory employees. As noted above, the clause requires that the contract be extended to affiliated entities whose assignment of work the signatory employer does not control. Thus, the clause is not limited to addressing the labor relations of the contracting employer vis-à-vis its own employees, but instead seeks to regulate the labor policies of other, neutral employers—an objective that is clearly secondary.⁵

Section 4 also fails to satisfy either test for a lawful work preservation agreement. By its terms, section 4 prohibits the signatory employer from subcontracting work within the union’s jurisdiction to any person or entity that does not have a contract with the union, and therefore seeks to regulate the labor policies of entities over which the signatory exercises no right of control. Such clauses have long been found to have a secondary, rather than primary work preservation objective, and thus to fall within the general proscription of Section 8(e). As stated in *Chicago Dining Room Employees (Clubmen, Inc.)*, 248 NLRB 604, 606 (1980),

⁵ In both respects, sec. 2 differs from the work preservation clauses found to be lawful in *Painters District Council 51 (Manganaro Corp.)*, 321 NLRB 158 (1996), and *Carpenters (Mfg. Woodworkers)*, supra. As found by the Board, the clauses at issue in those cases limited application of the contract to work that the signatory contractor performed, either under its own name or under the name of another entity over whose assignment of work the signatory employer exercised control. The clauses also were found to be limited in their objective to preserving work traditionally performed by unit employees.

As explained in his dissenting opinion in *Mfg. Woodworkers*, Member Hurtgen does not agree with the Board majority’s reasoning in *Manganaro*. Nonetheless, he agrees with his colleagues that sec. 2 herein is distinguishable from the clause there at issue.

It is well settled that contract clauses which purport to limit . . . subcontracting to employers who are signatories to union contracts, so-called union-signatory clauses, are proscribed by Section 8(e). Such clauses are viewed as not being designed to protect the wages and job opportunities of unit employees, but as being directed at furthering general union objectives and undertaking to regulate the labor policies of other employers.

2. Application of the construction industry proviso

Having found that both section 2 and section 4 have secondary objectives and therefore fall within the general proscription of 8(e), the question remains whether either section is saved by the construction industry proviso, which exempts from the 8(e) proscription agreements between labor organizations and employers in the construction industry which relate to the contracting or subcontracting work to be done on the construction site.

In *Carpenters District Council (Alessio Construction)*, 310 NLRB 1023 (1993), which issued after the judge's decision, the Board strictly construed the construction industry proviso to exclude antidual shop clauses from among the categories of secondary activity that Congress intended to be tolerated in the construction industry. After examining the legislative history, a majority of the Board concluded that, in enacting the proviso, Congress sought only to preserve the status quo and the pattern of collective-bargaining in the industry in 1959. *Id.* at 1027. The Board noted that the kind of construction contract clauses having a "cease doing business" objective which the legislative history indicates Congress wanted to protect differ substantially from antidual shop clauses of the kind involved herein. Applying *Alessio* to the facts of this case, we find that section 2 is not sheltered by the construction industry proviso to Section 8(e).

Section 4, however, is the kind of clause which Congress sought to protect by enacting the construction industry proviso. As the Supreme Court stated in *Woelke & Romero Framing v. NLRB*, 456 U.S. 645, 666 (1982), "[T]he construction industry proviso to Sec. 8(e) . . . ordinarily shelters union signatory subcontracting clauses that are sought or negotiated in the context of a collective bargaining relationship, even when not limited in application to particular jobsites at which both union and non-union workers are employed." Although the General Counsel contends that the clause falls outside the protection of the proviso because it is not limited to work to be done at the site of construction, the evidence does not show that the clause has been or is intended to be applied to offsite work. See *Los Angeles Building & Construction Trades Council (Fowler-Kenworthy Electric)*, 151 NLRB 770 (1965). We conclude, therefore, that the language of section 4 is not unlawful under Section 8(e) as modified by the proviso. Accordingly, we dismiss the portion of the complaint relating to section 4.

CONCLUSIONS OF LAW

1. By reaffirming an agreement with Elwin G. Smith, Inc., which contained an antidual shop provision (sec. 2), 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.

REMEDY

As noted, we conclude that section 2 is unlawful, and that the motion for summary judgment is unlawful to the extent that it is based thereon. In addition, the "cease and desist" portion of our Order would require the withdrawal of the motion and would forbid any further action to press the lawsuit insofar as it is based on Section 2.

ORDER

The National Labor Relations Board orders that the Respondent, International Association of Bridge Structural and Ornamental Iron Workers, AFL-CIO, its officers, agents, and representatives, shall

1. Cease and desist from entering into, giving effect to, or enforcing section 2 in its collective-bargaining agreement with Elwin G. Smith, 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 business offices and meeting halls copies of the attached notice marked "Appendix."⁶ 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 Elwin G. Smith, Inc. for posting by it, if willing, in 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.

APPENDIX

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

⁶ 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."

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 antidual shop clause in our collective-bargaining agreement (sec. 2) with Elwin G. Smith, 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 antidual shop clause (sec. 2) in our collective-bargaining agreement with Elwin G. Smith, Inc.

INTERNATIONAL ASSOCIATION OF BRIDGE,
STRUCTURAL AND ORNAMENTAL IRON
WORKERS, AFL-CIO

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Paul D. Supton, Esq. (Van Bourg, Weinberg, Royer, & Rosenfeld), of San Francisco, California, for the Respondent.

Dion V. Kohler, Esq. (Powell, Goldstein, Frazer & Murphy), of Atlanta, Georgia, for the Charging Party.

Hayes C. Stover, Esq. (Kirkpatrick & Lockhart), of Pittsburgh, Pennsylvania, for the interested parties, Cyclops Corporation, Elwin G. Smith, Inc., and E. G. Smith Construction Products, Inc.

DECISION

STATEMENT OF THE CASE

MICHAEL O. MILLER, Administrative Law Judge. This case was tried in Pittsburgh, Pennsylvania, on February 13, 14, 15, and 16, 1990, based on an unfair labor practice charge filed on January 26, 1988, by Southwestern Materials & Supply Company, Inc., and a complaint issued by the Regional Director for Region 6 of the National Labor Relations Board (the Board) on August 25, 1989. The complaint alleges that International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO (the Union or Respondent) violated Section 8(e) of the National Labor Relations Act (the Act) by reaffirming, within the statutory 6-month limitations period, an agreement with Elwin G. Smith, Inc. wherein Elwin G. Smith, Inc. agreed to cease and refrain from handling, using, selling, transporting, or otherwise dealing in the products of, or to cease doing business with, any other employer or person, thereby entering into, maintaining, and giving effect to the agreement.

Respondent's timely filed answer denies the substantive allegations of the complaint and raises affirmative defenses.¹

¹ Respondent's contentions regarding the constitutionality of the Act are rejected. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); *Brown v. Lithographers Local 17*, 180 F.Supp. 294 (ND Cal. 1960); *Lithographers Local 78*, 130 NLRB 968 (1961), *enfd.* as modified 372 F.2d 20 (5th Cir. 1962); *Teamsters Local 413 v. NLRB*, 334 F.2d 539 (D.C. Cir. 1964), *cert. denied* 379 U.S. 916 (1964). Also rejected is the contention that the unfair labor practice charge should be deferred to arbitration. *Masters, Mates, & Pilots (Seatrains Lines)*, 220 NLRB 164, 168 (1975) ("[W]here the very demand for arbitration is alleged as a reaffirmance of the allegedly violative contract clause . . . the issue of whether the demand for arbitration constitutes a violation of Section 8(e) could not be deferred because the mere acceptance of the arbitration by the arbitrator could, in effect, constitute a compounding of the unlawful act."). See also *Operating Engineers Local 701 (Oregon-Columbia AGC)*, 216 NLRB 233 (1975).

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Respondent, and the Charging Party (in conjunction with the interested parties), I make the following

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION STATUS— PRELIMINARY CONCLUSIONS OF LAW

At all material times, Southwestern Materials & Supply Company, Inc., a Texas corporation with an office and place of business in Plano, Texas, has been engaged in the construction industry in the installation and erection of curtainwall panels and related products on low and midrise buildings. In the course and conduct of its business during the 12-month period ending on December 31, 1987, Southwestern purchased and received products, goods, and materials at its Plano, Texas facility valued in excess of \$50,000 directly from points outside the State of Texas. I find and conclude that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The complaint alleges, the Respondent admits, and I find and conclude that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICE

A. *The Contract and the Parties*

On September 21, 1959, the Union entered into a collective-bargaining agreement with an entity then known as Elwin G. Smith & Co., Inc. That agreement provided, *inter alia*:

2. This agreement shall be effective in all places where work is being performed or is to be performed by the Employer—or by any person, firm or corporation owned or financially controlled by the Employer, and covers all work coming under the jurisdiction of the Association [i.e. the Union].

4. The Employer agrees not to sublet any work under the jurisdiction of the Association or its local unions—to any person, firm or corporation not in contractual relationship with this Association or its affiliated Local Unions.

In 1972, *Cyclops Corporation (Cyclops)* acquired Elwin G. Smith & Co., Inc. and merged that entity into itself as the *Elwin G. Smith Division of Cyclops Corporation (Division)*. Division operated several plants where it manufactured curtain wall (exterior wall and window units) and other materials used in nonresidential construction. Its manufacturing operations are not directly involved in this proceeding. Division also maintained unionized field construction crews for the erection of its products. They worked under the Elwin G. Smith & Co., Inc. contract with the Union, which had been assumed by Division, and the local agreements applicable to the areas in which the construction was performed.

In about 1975, Cyclops acquired Peterson Construction Products. In 1983, it acquired Flour City Architectural Metals, Inc., a unionized curtainwall contractor. Both of these acquisitions were merged into Division and, in each case, the Union was notified that the employees of the acquired companies would be under the agreement between Division and the Union.

In 1974, Cyclops acquired *Southwestern Materials & Supply, Inc. (Southwestern)*. Unlike the acquisitions merged into Divi-

sion, Southwestern remained a wholly owned subsidiary of Cyclops, engaged in the erection of low- and midrise buildings as an open shop (i.e., nonunion) contractor.

In 1984, the manufacturing and sales operations of Division were split off into a new wholly owned subsidiary of Cyclops known as *E. G. Smith Construction Products, Inc. (Products)*. Products' manufacturing operations were unionized, under contract with a Shopmen's local of the Iron Workers International Association. Division continued to operate the unionized field operations while Southwestern continued to operate as an open shop contractor. Both derived the bulk of their business (80–95 percent) as subcontractors for Products.

In 1987, there was a further corporate restructuring. The only change of significance is that Division became *Elwin G. Smith, Inc. (Smith)*, a wholly owned subsidiary of Cyclops.

B. Attempted Enforcement of the Contract

1. Facts

In about 1986, local representatives of the Union began to raise questions about subcontracting by a Smith entity, which they believed to be under union contract to Southwestern. The Union filed grievances, sought information from the employing entities, and demanded arbitration. Its requests for information and its demand for arbitration were rejected.²

On September 2, 1986, the Union filed a petition to compel arbitration and/or complaint for damages (breach of contract) in the United States District Court for the Western District of Pennsylvania. As amended, that petition/complaint was filed against Elwin G. Smith, Inc. (Smith), E. G. Smith Construction Products, Inc. (Products), and Southwestern Materials & Supply, Inc. (Southwestern), all as wholly owned subsidiaries of Cyclops Corporation. On or about January 14, 1988, the Union filed a Motion for Summary Judgment, pursuant to a schedule established by the district court. The motion reasserted the named defendants' alleged obligation to arbitrate the applicability of the agreement to work performed by Southwestern.

Respondent's petition and complaint have been stayed by the district court pending the completion of these proceedings before the Board.

2. Discussion—Section 10(b)

The unfair labor practice charge was filed on January 26, 1988; the statutory limitations period thus commenced on July 25, 1987.³ The only action taken by the Union within that period was the January 14, 1988 filing of the Motion for Summary Judgment. The General Counsel contends that this was a sufficient reaffirmation of the contract to bring Respondent's attempted enforcement within the limitations period.

Respondent, on the other hand, argues that the filing of such a motion, according to a schedule set by the court, is not a reaffirmation of the contract, that the reaffirmation occurred when the grievance and suit were filed, outside the limitations period,

and that the Board's stricter rules with respect to allegations of continuing violations, announced in such cases as *Chambersburg Country Market*, 293 NLRB 655 (1989), and *Chemung Contracting Corp.*, 291 NLRB 773 (1988), mandate dismissal.

Respondent's arguments must fall. The Board has repeatedly held that a union's actions taken to enforce a contract, including intermediate steps involved in such enforcement, constitute reaffirmation of the clause in issue. Thus, in *Teamsters Local 467 (Mike Sullivan & Associates)*, 265 NLRB 1679 (1982), enfd. 723 F.2d 916 (9th Cir. 1983), the Board found reaffirmation based on the union's participation in an evidentiary arbitration hearing, wherein it reasserted its position that the employer was bound by the unlawful contract provisions, notwithstanding that the grievance and demand for arbitration were filed more than 6 months prior to the filing of the charge. The union's defense against the employer's motion to vacate the award was similarly deemed a tacit reassertion of the agreement. The Union's conduct here, filing a Motion for Summary Judgment which reasserts its contentions concerning the effect of the clauses, is equatable to the actions of the union in *Teamsters Local 467*, supra. See also the cases therein at 1681.

Similarly unpersuasive is Respondent's contention that, because the motion was filed pursuant to the court's order, it did not rise to the level of a reaffirmation. The Board has held that it is immaterial that the reaffirmation occurred in the context of arbitration sought by the employer and mandated by the Federal court and not as a result of Respondent's voluntary act. *Bricklayers Local 2 (Gunnar I. Johnson & Son)*, 224 NLRB 1021 (1976), enfd. 562 F.2d 775 (D.C. Cir. 1977).

Finally, in this regard, I must reject Respondent's assertions with respect to allegations of "continuing violations." In *Chemung Contracting*, supra, the employer ceased to make payments into various funds required by the terms of an *expired* contract. The union, with knowledge of the employer's failure, did not file a charge until after 6 months had passed. The administrative law judge, citing *Farmingdale Iron Works*, 249 NLRB 98 (1980), enfd. mem. 661 F.2d 910 (2d Cir. 1981), found that each act of prohibited conduct occurring within the limitations period constituted a separate and distinct violation. The Board held the allegations time barred, noting that the employer had unequivocally repudiated its obligation to make the fund contributions outside the 10(b) period. Thus, it held, the operative facts occurred outside the 10(b) period.

In *Chemung Contracting*, the Board found the judge's reliance on *Farmingdale Iron Works* to be misplaced. In so holding, it expressly noted that in *Farmingdale*, a charge had been "filed during the term of an existing collective-bargaining agreement regarding the cessation of contractually required periodic benefit fund payments" and that the Board had there held each failure to make the required fund payments to be a separate and distinct violation of the employer's bargaining obligation. (Emphasis added.) It stated, *Chemung*, supra at 775:

A key to the *Farmingdale* "separate violation" holding is that the charge addressed a failure to make benefit payments while the contract was still running. Thus, in order to make out a prima facie case of an 8(a)(5) violation, the General Counsel did not need to reach beyond the 10(b) period for evidence; the employer's benefit payment obligation . . . and its breaches of that obligation were all apparent from documentary and testimonial evidence within that period.

See also *American Commercial Lines*, 291 NLRB 1066 (1988).

² Respondent's contention that this refusal to furnish information equates to a waiver of Charging Party's right to complain about the attempted enforcement of the contract is rejected. The right to file a charge is statutory and the waiver of such a right must be in clear and unequivocal terms, not present here. *NLRB v. Metropolitan Edison Co.*, 460 U.S. 693 (1983).

³ Sec. 10(b) provides, inter alia:

Provided, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge

Farmingdale, not *Chemung* or its progeny, govern this issue. In the instant case, as in *Farmingdale*, there was an existing collective-bargaining agreement. In *Farmingdale*, the employer, during the term of that contract and within the 10(b) period, breached its contractual obligations; in the instant case, the Union, within the 10(b) period, sought enforcement of allegedly unlawful terms of an existing contract, thereby reaffirming its existence and applicability. It is that timely reaffirmance, not any earlier act, which will establish the violation, if those clauses are unlawful. Proof of that violation will come from current evidence.⁴

3. Discussion—lawsuit as violation

Respondent contends that its filing of a Motion for Summary Judgment cannot be deemed to be an unfair labor practice. In so arguing, it misapprehends the nature of the General Counsel's allegation. The complaint does not assert that Respondent violated 8(e) by moving for summary judgment; rather, it asserts that, by doing so, Respondent reaffirmed, and thereby entered into, maintained, and gave effect to the allegedly unlawful clauses within the 10(b) period. It is the clauses, not the motion, which allegedly violate the Act. The instant case is therefore distinguishable from *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983), and *Clyde Taylor Co.*, 127 NLRB 103 (1960), wherein the filing of retaliatory lawsuits were alleged to be the violative acts.

Moreover, to the extent to which it may be argued that General Counsel seeks to prohibit judicial enforcement of those clauses, as her brief indicates, the Court in *Bill Johnson's* made clear (at fn. 5) that a suit which has an illegal objective is subject to Board injunction.⁵ Whether that objective was in fact illegal is the ultimate question to be determined herein.

C. Section 8(e)

Section 8(e) provides:

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 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: Provided, that nothing in this subsection (e) shall apply to an agreement between a labor organization 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 . . .

The General Counsel alleges that sections 2 and 4 of the 1959 agreement, quoted above in section II,A, are facially invalid under Section 8(e) as agreements which condone future secondary boycotts. Respondent contends that they had a patent work-preservation objective and thus were privileged under *National Woodwork Mfrs. v. NLRB*, 386 U.S. 612 (1967). Respondent further contends, and the General Counsel disputes, that the construction industry proviso, quoted above, insulates the clauses even assuming that the requisite work-preservation objective is absent. That issue will be resolved, *infra*.

In *Sheet Metal Workers Local 91 (Schebler Co.)*, 294 NLRB 766, 770 (1989), *enfd.* in part and remanded on grounds not material here, 905 F.2d 417 (D.C. Cir. 1990), the Board, adopting the decision of Administrative Law Judge Robert A. Gianasi, stated:

Section 8(e) was intended to close certain loopholes in the secondary boycott provisions of Section 8(b)(4) and its language closely tracks 8(b)(4)(B). It thus prohibits agreements which condone future secondary boycotts. As the Board has stated, perhaps "no language can be explicit enough to reach in advance every possible subterfuge of resourceful parties. Nevertheless . . . in using the term "implied" in Section 8(e) Congress meant to reach every device which, fairly considered, is tantamount to an agreement that the contracting employer will . . . cease doing business with another person." *Lithographers Local 78 (Employing Lithographers of Greater Miami)*, 130 NLRB 968, 976 (1961), enforced as modified, 301 F.2d 20 (C.A. 5, 1962).

Although Section 8(e) can be literally read to forbid all agreements which prevent an employer from establishing a business relationship with another person or cause it to terminate or alter an already existing relationship, it has not been so construed. Thus the Board has approved clauses whose main purpose is to protect jobs customarily performed by unit employees. Because a union has a legitimate primary interest in preserving work for unit employees and in ensuring that negotiated employment standards will not be undermined, a union may negotiate work preservation and union-standard clauses despite their incidental effect of limiting the group of persons with whom the primary employer may do business. *Associated General Contractors of California, Inc.*, 280 NLRB 698, slip op. pp. 11–12 (1986).

However, contractual clauses whose main purpose is to serve the institutional interest of the union to organize or regulate the labor policies of employers with whom the union does not have a collective-bargaining relationship are unlawful under Section 8(e) because they are secondary in character and not aimed at preserving unit work or standards. Thus, the Board's inquiry is whether the contract clause at issue has the "primary purpose of protecting unit work or unit standards" or, instead, the secondary purpose of promoting the broader goals of the union "by asserting control over the labor relations" of other employers. *Ibid.* See also *Retail Clerks Union Local 1442 (Food Employers Council, Inc.)*, 271 NLRB 697 (1984). As the Supreme Court has stated, the touchstone of Section 8(e) is whether the agreement is addressed to "the la-

⁴ It is irrelevant to the 10(b) question that, in order for Respondent to defend on the basis that Smith, Southwestern, and/or Products are a single employer and/or alter ego, it must delve into pre-10(b) history. What Respondent must prove is not that they were so related at some remote time, but that they were so related at the point in time when the union reaffirmed the allegedly invalid contract clauses. To hold otherwise would render most cases time barred.

⁵ Respondent also argues that, inasmuch as the Board did not deem antidouble-breasting clauses unlawful at the time it filed its action, it could not have had the unlawful objective attributed to it by the General Counsel. Suffice it to say that the absence of a Board holding of illegality does not equate to the Board's imprimatur. However, given the unresolved state of the law, and the information which the Union had before it when the suit was initiated, there is no warrant for concluding that the Union filed that action in bad faith.

bor relations of the contracting employer vis-a-vis his own employees” or whether it is “tactically calculated to satisfy union objectives elsewhere.” *National Woodwork Manufacturers*, 386 U.S. 612, 644–645 (1967).

In *Schebler*, the employer, Winger, and the union had executed an agreement containing an “Integrity Clause.” That clause designated any signatory employer which also had an ownership interest in another business entity engaging in work within the union’s jurisdiction which provided its employees with wages, hours, or other working conditions inferior to those of the signatory union or the applicable sister local, as a “bad faith” employer. Also considered a “bad faith” employer was any signatory employer which was a subsidiary of another entity where that parent entity also had another subsidiary whose employees received wages, hours, or working conditions inferior to those of the signatory union or its affiliated sister locals.

Pursuant to the integrity clause, an agreement with a bad-faith employer was subject to rescission by the union. The union’s admitted purpose was to eliminate double-breasting, that is, the contracting of work on a nonunion basis by related firms which also contract work as a union contractor, and ensure that its signatories were “either 100% union or 100% non-union.”

For all intents and purposes, the “integrity clause” in *Schebler* and section 2 of Respondent’s contract with Smith and its corporate predecessors are equivalent to one another. Rather than being subject to rescission, as in *Schebler*, section 2 purports to make the entire agreement applicable to, and enforceable against, all work within the Union’s jurisdiction which is “performed . . . by any person, firm or corporation” owned or controlled by the signatory employer. The distinction, if anything, makes more convincing the argument that by such language, the Union sought to engage in “top-down” organization.

The Board, in *Schebler*, held that the “integrity clause” violated Section 8(e). It noted that the clause, like section 2, was not limited to work in the unit or units covered by the contract and was an attempt to bring nonunion contractors into the union fold without organizing their workers. Here, I note, the application of the clause was not limited to contractually covered units and the Union’s suit to enforce section 2 was addressed to Smith, Products, and Southwestern (as the caption was ultimately amended).

The Board further found that the integrity clause in *Schebler* “requires that the signatory employer force related firms or affiliates to grant employees the wages, hours and working conditions of union agreements under penalty of having its own union agreement rescinded.” In the instant case, section 2 would apply the entire agreement to such related firms or affiliates. Thus, the plain words of section 2 of the agreement herein, like the clause in *Schebler*:

force a cessation or alteration of business with the related firm. It is well settled that the “cease doing business” language of Section 8(e) and 8(b)(4) does not require a total cessation of business. An alteration or interference with the business relationship is sufficient. See *International Longshoremen’s Local 1410 (Mobile Steamship Ass’n)*, 235 NLRB 172, 179 (1978) and cases cited there. Here, the Clause [and Section 2] requires the employer to use its influence to cause the related firm to change their nonunion operation or their wage and benefit package. Alternatively, the Clause [and Section 2] requires the employer to change its own affiliation with the related firm. The purpose and effect of the Clause [and Section

2] is thus to alter the business relationship between the employer and its related firms. [*Schebler*, supra at 770–771.]

Thus, I find that section 2 of the instant agreement, like the integrity clause of *Schebler*, is a facially invalid hot cargo agreement, violative of Section 8(e) unless saved by either the relationship between the affiliated firms or by the construction industry proviso, discussed infra.

The General Counsel further contends that section 4 of the agreement, precluding the Employer’s subcontracting of work within the Union’s jurisdiction to firms not under contract to the Union or one of its affiliated locals, “is invalid by being secondary on its face and further is not protected by the [construction industry] proviso because it is not limited to subcontracting of work at construction sites.” (GC Br. 49.) Respondent argues, and the Charging Party appears to agree (CP Br. 58), that section 4, *on its face*, is valid.⁶

The General Counsel’s argument regarding section 4 must fall. That section, on its face, is a traditional subcontracting clause, intended to preserve bargaining unit work. *Woelke & Romero Framing v. NLRB*, 456 U.S. 645 (1982); *National Woodwork*, supra. See also *Connell Co. v. Plumbers & Steamfitters*, 421 U.S. 616 (1975). When considered as part of the contract as a whole, its validity rises or falls together with section 2.

D. Single Employer/Alter Ego-Single Bargaining Unit

Section 8(e) proscribes agreements wherein an employer agrees to cease doing business “with any other person.” Thus, if the contract provision at issue were directed solely at affiliated entities which were one with the signatory, as a single employer or its alter ego, and at employees of these entities who comprised a single appropriate unit for bargaining purposes, it would not contravene 8(e). *Schebler*, supra at 771, and cases cited therein.

In the instant case, the contractual provision at issue is limited neither to those entities which are in a single employer or alter ego relationship with the signatory, Smith, nor to employees who are in a single bargaining unit with Smith’s employees. It is, like the integrity clause in *Schebler*:

written so broadly that it permits an interference with business relationships with other “persons” who are not single employers. [It] requires the signatory employer’s affiliate to abide by the terms of a union agreement if it does . . . work of the type set forth in the Standard Agreement. But that affiliate need not meet the requirements of common management, centralization of labor relations or interrelation of operations which are part of the single employer doctrine. The . . . Clause requires only that the signatory employer have a limited ownership interest in the affiliate which must then apply union terms and conditions Moreover, the Clause seeks union conditions in all . . . units wherever they are located There can be no doubt, in these circumstances, that the object of the Clause is not the preservation of . . . unit work but the attainment of objectives elsewhere—with other employers or persons and in other work units. [*Schebler*, supra at 771.]

⁶ The Charging Party and the parties in interest assert that sec. 4, when read in conjunction with sec. 2, applying the entire agreement to employers with whom the Union has no collective-bargaining relationship, violates 8(e).

Thus, it is clear that section 2 of Respondent's agreement with Smith is, like the integrity clause in *Schebler*, intended to promote union recognition in all units operated by, or affiliated with, the contracting employer whether or not they are separate and distinct persons or constitute separate bargaining units. It would operate to bar Smith from affiliating or remaining affiliated with any firm which operated as an open shop, i.e., nonunion contractor, if that firm performed work within the Union's jurisdiction. It is, therefore, "the classic Section 8(e) clause condemned in the *Woodwork* case."

The foregoing discussion, emphasizing the breadth of the clause as written rather than the relationship of existing business affiliates, renders unnecessary any full-blown discussion of the single employer/alter ego contentions of the parties. However, as this was the major focus of the litigation before me, the parties are entitled to resolution of these issues.

In short, determination of whether two or more entities are sufficiently integrated so that they may be treated as a single employer requires consideration of four principal factors: (1) common management; (2) centralized control of labor relations; (3) interrelationship of operations; and (4) common ownership. *Radio Union v. Broadcast Service of Mobile*, 380 U.S. 255, 256 (1965). Of these, the first three, particularly centralized control of labor relations, are the most significant. *Parklane Hosiery Co.*, 203 NLRB 597, 612 (1973). "Single employer status depends on the circumstances and has been characterized as an absence of an 'arm's length relationship . . . among unintegrated companies.'" *Blumenfeld Theatres Circuit*, 240 NLRB 215 (1979), *enfd.* 626 F.2d 865 (9th Cir. 1980); *Truck & Dock Services*, 272 NLRB 592 fn. 2 (1984). In considering alter ego status, the Board looks, as well, at commonality of business purpose, operations, customers, premises, supervision, and equipment as well as evidence of an intention to avoid labor relations obligations. *Hiysota Fuel Co.*, 280 NLRB 763 fn. 2 (1986).

Smith, Southwestern, and Products are under common ownership, that of Cyclops. Their officers and directors are appointed by Cyclops; they report to Cyclops and it is to Cyclops that their profits, if any, flow. There is limited overlap in their boards of directors; one individual serves on all three. Most of the officers of Smith came from Products, from which Smith was split off. Similarly, Southwestern has had officers who came to it from Products. Cyclops provides health, pension, and profit-sharing benefits for the salaried employees of all of its subsidiaries. Those subsidiaries maintain their own bank accounts but Cyclops must approve and underwrite any major expenditures. Legal services are provided for the subsidiaries by Cyclops, which must approve any use of outside counsel other than for debt collection.

Products has identical master subcontracting agreements with both Smith and Southwestern. It also has administrative agreements with each pursuant to which it provides such services as payroll, tax accounting, personnel, and public relations. The record reflects that Smith and Southwestern have little say on the terms of these agreements. In general, each entity maintains its own offices; in some locations, however, Products shares office space with one or the other, under written lease agreements. Smith and Southwestern do not share any facilities.

Products, which holds itself out as an integrated manufacturer and installer of curtainwall, generally sells its product with installation. Products' estimators have knowledge of the productivity, wage rates, and crew sizes of both construction

firms. They estimate and bid the jobs, deciding whether the job will be done on a union (Smith) or open shop (Southwestern) basis. That decision is based, essentially, on the needs of the customer; if the overall project is to be done on a union basis, or is in an area where such work is usually done on that basis, it will bid the job as union work. If the overall project is to be done nonunion, that is how it will be bid. On one occasion, a job was bid nonunion. After Southwestern unloaded the materials, it discovered that it was on a union jobsite and declined to participate further. That project was reassigned to Smith.

While Smith and Southwestern get and perform some jobs on their own, the bulk of their work, 80 percent or more, comes from Products. It does not appear that either has ever turned down a job proffered by Products.

In estimating the jobs, Products sets certain parameters, including the number of crews to be assigned, the starting and completion dates, limitations on overtime, and whether the crews will work five 8-hour days or a 4/10 schedule. Products has its own project managers who visit the jobsites from time to time to review the work and its progress. Those managers may give overall direction concerning the work and it is to them, or to their superiors at Products, that customer complaints are directed. One project manager may oversee projects being done by both Smith and Southwestern. Products may also perform jobsite audits, to ensure that the proper numbers of employees are on the site, working the hours being claimed by the subcontractor.

Smith and Southwestern also have their own construction or project managers who similarly visit the sites. In addition, they have their own job superintendents who exercise direct supervision over the crews at the sites. Southwestern has its own permanent foremen and one traveling crew; where additional manpower is required, it is hired locally. Similarly, Smith has one traveling crew and secures the remainder of its hourly paid craft employees from the local union hiring hall.

Products, Smith, and Southwestern each hire its own managers and employees. Each determines the wage rates applicable to those employees, handles its own grievances and complaints, and discharges those employees without consulting with Cyclops or each other. Each has some employees, salaried and hourly, who worked at some prior time for the other, but there is no interchange of such employees. Each also purchases and maintains its own equipment and possesses its own licenses.

The issue is not free from doubt but, on balance, I would find neither an alter ego nor a single employer relationship here. Thus, while there is common ownership, a common customer through which there is a common business purpose, and something less than a full "arm's length relationship" between Smith and/or Southwestern and Products, the record fails to indicate centralized control of labor relations, common supervision of day-to-day operations, or other evidence of interrelated operations. Neither can it be concluded, from the mere existence of both union and open shop subsidiaries, that the corporate structure was established as a subterfuge to avoid labor law obligations.

Moreover, even assuming that Products, Smith, and Southwestern are so integrated as to comprise a single employer, section 2 would remain subject to 8(e) if the employees of Smith and Southwestern comprised separate bargaining units.⁷

⁷ It is axiomatic that, in the absence of either a single employer relationship or unequivocal evidence that these separate employers in-

A finding of single employer would not resolve that unit issue. As the Supreme Court stated in *South Prairie Construction Co. v. Operating Engineers (Peter Kiewit Sons' Co.)*, 425 U.S. 800, 825 (1976):

[A] determination that two affiliated firms constitute a single employer “does not necessarily establish that an employer-wide unit is appropriate, as the factors which are relevant in identifying the breadth of an employer’s operation are not conclusively determinative of the scope of an appropriate unit.” [Citations omitted.]

In determining an appropriate unit in the construction industry, where there is more than one location of a single employer, the Board looks at the following particularly relevant factors:

bargaining history; functional integration of operations; similarity of skills, duties and working conditions; centralized control of labor relations and supervision, particularly in regard to hiring, discipline, and control of day-to-day operations; and interchange of employees among construction sites.

Dezcon, Inc., 295 NLRB 109, 111 (1989). (Citations omitted.)

There is no bargaining history in such a unit here; for more than 15 years, the employees of Smith and its predecessors have been represented in a single unit while the Southwestern employees have been unrepresented. While the overall duties and skills have been similar, the Smith employees have worked along craft lines while those of Southwestern have not. There has been no centralized control of labor relations or supervision; each company has hired and disciplined its own employees and has had separate supervisors responsible for the day-to-day operations at each site. Finally, while a few employees of one entity have appeared on the payroll of another, there has been no interchange; employees are not moved by the employer(s) between Smith and Southwestern jobsites. Thus, it is clear that a single unit would not be appropriate. See also *Edenwald Construction Co.*, 294 NLRB 297 (1989), and cases cited therein.

E. Construction Industry Proviso

Contrary to the contentions of the General Counsel, *Schebler* did not address the applicability of the construction industry proviso to the integrity clause involved therein. Judge Gianassi expressly found that that clause did not relate solely to onsite construction work and that, therefore, he did not need to reach the issue of “whether, assuming that the double-breasting prohibition of the Integrity Clause is limited to contracting or subcontracting at a construction jobsite, it has been negotiated in the context of a collective-bargaining relationship where the Clause seeks to regulate not only work in the [contractually covered] unit but also work in all other units where sheet metal work is to be performed.” He pointed out that the answer to this issue turned on whether Congress intended, in 8(e), to protect such clauses and referred to *Woelke & Romero*, supra, “approving as within the proviso a subcontracting clause negotiated in the context of a collective-bargaining relationship even when not limited in application to particular jobsites at which both union and nonunion workers are employed.” *Schebler*, supra at 772, footnote 6. However, because the respondents had

expressly disavowed reliance on 8(e), the Board found it unnecessary to pass on the judge’s references to it.

The General Counsel further errs in asserting that section 4 of the instant agreement is not limited to the subcontracting of work at construction sites. That section provides that the Employer agrees not to subcontract any work “under the jurisdiction of the Association or its local unions” to any person not in a contractual relationship with the Association or its affiliated locals. Similarly, section 2 “covers all work coming under the jurisdiction of the Association.”

The foregoing language, restricting the application of both sections to work under the Union’s jurisdiction, suffices to demonstrate that they were intended to apply to the Employer’s construction jobsite work. The language in *Plumbers (Carvel Co.)*, 152 NLRB 1672 (1965), enfd. in part and reversed in part 361 F.2d 160 (1st Cir. 1966), was similar. There, the employer had agreed that its union member-employees would not be assigned or expected to work “on any job or project on which a worker or person is performing any work within the jurisdiction of Local 217,” if that worker did not enjoy benefits equal to those provided in the contract. The Board, without any discussion of the Local’s precise jurisdiction, rejected the contention that the proviso was not applicable. It held that the terms of the clause “plainly show[ed]” that it was intended to prevent the employer from doing business on a construction jobsite where others were doing work within the union’s jurisdiction under terms and conditions different than those established in the agreement between Carvel and the union. The Board, therefore, applied the proviso to the otherwise secondary and unlawful agreement.

The General Counsel and the Charging Party argue that the proviso is inapplicable because of “Respondent’s attempts through its civil suit to apply Paragraph 2 to Products and Cyclops . . . because neither are employers engaged in the construction industry.” (GC Br. 51; CP Br. 59.)

Cyclops was not named as a defendant in the Union’s civil action. That action, prior to the amendment of the caption, was brought against the no longer extant Smith Division of Cyclops; as amended, it alleged only Smith, Products, and Southwestern, “wholly owned subsidiaries of Cyclops Corporation” as defendants. Therefore, whether or not Cyclops is a construction industry employer within the ambit of Section 8(e) is irrelevant.

Further, I find that Products is “an employer in the construction industry” within the meaning of Section 8(e). Products sold the curtainwall, which it manufactured as a complete package, with installation, which was unquestionably “construction industry” work. It contracted with the customer for that installation and then subcontracted the actual work to Smith or Southwestern. Its project managers oversaw that construction and it was responsible to the customer for the performance of the construction work. Products exercised substantial control over the project from the bidding to completion. It was, in essence, the general contractor for curtainwall erection and it is irrelevant that it employed no construction workers on its own. *A. L. Adams Construction Co. v. Georgia Power Co.*, 733 F.2d 853 (11th Cir. 1984).

Charging Party, in its reply brief, seeks, to no avail, to distinguish *Georgia Power*, asserting that Georgia Power was held to be a construction employer “because it signed a construction labor agreement and employed craft workers during the first four years of the agreement.” The court’s decision, however, finds Georgia Power to be a construction employer on the basis

tended to be bound by group action as a multiemployer bargaining unit, the employees of Smith and Southwestern cannot be deemed to be within a single bargaining unit. See *Ruan Transport Corp.*, 234 NLRB 241, 242 (1978).

of its then current role as its own general contractor, even though it employed no craft workers at that point in time; the reference to the agreement it had executed and to the craft workers it had employed earlier in the project was merely additional support for its holding. The court noted that if the contrary argument prevailed, “some general contractors, which are primarily involved in the construction industry, could never qualify under Section 8(f). They may subcontract the entire project and only manage and coordinate the work, as did Georgia Power in this case.”⁸

Finally, the General Counsel and the Charging Party maintain that paragraph 2 of the agreement, by failing to relate to contracting or subcontracting of work to be done at the site of construction, falls outside the plain language, and therefore the protection, of the proviso. Respondent, asserting the contrary proposition, relies on Judge Marvin Roth’s administrative law judge’s decision in *Painters District Council 51 (Manganaro Corp.)*, JD-313-86, issued December 18, 1986 (*Manganaro*).⁹ As an ALJD, that decision is without precedential value; however, Judge Roth’s reasoning, relying on *Carvel*, supra (*Woelke & Romero*, supra, and *Berman Enterprises v. Longshoremen ILA Local 333*, 644 F.2d 930 (2d Cir. 1981)), is worthy of consideration as the first full-blown analysis of this issue.

In *Carvel*, the charging party-employer had a contract with the Plumbers’ union which provided that its employees would not be assigned or expected to work on any jobsite where other employees, who were not receiving benefits equivalent to those under the union contract, were performing work within the union’s jurisdiction. When Carvel began to perform work as a subcontractor on a jobsite where the general contractor had assigned other plumbing work to a nonunion subcontractor, the union pulled his employees from the job. The General Counsel alleged that the agreement was not protected by the construction industry proviso, because it was not restricted to the subcontracting or contracting out of work to be performed at the construction site.

The Board rejected the General Counsel’s position in *Carvel*. It held that:

As the disputed provision is limited to work on a construction industry jobsite, we cannot agree with the General Counsel that the proviso is inapplicable solely because the contract provision does not specifically refer to the “contracting out” or “subcontracting” of unit work. To hold the proviso applicable only where a contract provision copies the statutory language, even though the situation falls squarely within the one contemplated by such language, would in our opinion, sacrifice substance to form. Additionally, the application of the proviso does not,

⁸ The Charging Party likens Products to a materialman, i.e., one who manufactures and assembles products subsequently installed by others on a construction site. Materialmen are excluded from the definition of construction industry employer. *Painters Local 1247 (Indio Paint)*, 156 NLRB 951 (1966). Products’ role, selling its curtainwall installed, estimating, bidding, and overseeing the job, is far more akin to that of the general contractor than it is to that of materialman.

⁹ Since the close of this hearing, the Board has issued two Decisions and Orders in *Manganaro*, 299 NLRB 618 (1990), and one, following a motion for reconsideration, which is unpublished. Neither addresses this issue; as that case presently stands, it has been remanded to Judge Roth to receive further evidence and a determination as to whether the antidual shop clause involved therein constituted a primary work-preservation clause.

in our view, depend on the precise relationship between Carvel with whom the Union has a contract and other employers and persons on the job . . . who may be affected by the enforcement of the contractual proviso. The language of the proviso itself does not limit its applicability to the “contracting out” or “subcontracting” of work by the employer with whom the union has an agreement within the scope of Section 8(e).

Consequently, we conclude that the failure of [the contractual provision] to refer specifically to “contracting out” or “subcontracting” and the fact that it may affect persons and employers with whom Carvel has no contractual relationship does not bar application of the proviso here. [*Carvel*, supra at 1676-677, citations omitted.]

Judge Roth concluded, and I agree, that under *Carvel*, “the protection afforded by the proviso extends to contracting or subcontracting of jobsite work among firms which may not even be related to the signatory employer.” *Manganaro*, supra. *Carvel*, I find, precludes a finding that section 2 of the instant contract does not involve “contracting out” or “subcontracting.”

As Judge Roth noted, the Board’s decision in *Operating Engineers Local 542 (York County Bridge)*, 216 NLRB 408 (1975), enfd. 532 F.2d 902 (3d Cir. 1976), cert. denied 429 U.S. 1072 (1977), would require finding that the dual shop clause went beyond the protection of the construction industry proviso if that decision were still good law. In *York County Bridge*, the union threatened a strike unless the employer would agree to a contract containing the following two clauses:

Section 11—Non-Union Equipment:

(a) No operator shall be required to operate equipment belonging to a contractor or supplier with whom this Local Union is not in signed relations, provided, Union equipment is available in the locality. No party to this agreement shall rent or supply equipment unmanned to anyone doing construction work covered by this agreement who is not in signed relations with this Union.

(b) No employee represented by this Union on construction work shall be required to operate equipment of or for any Employer who has any interest in a firm or company doing construction work within the jurisdiction of this Union and which is not in signed relations with this Union.

This second clause is similar, in its effect, to section 2 of the instant agreement.

The contract also provided that the Union and its members were not obligated to work on the same job or project with, or service, any contractor or subcontractor not a party to an agreement with the Union.

The Board reviewed the legislative history and concluded that “the 8(e) [construction industry] proviso was intended to prevent labor strife among nonunion and union employees at the same jobsite.” Noting that the contract contained a clause specifically dealing with that situation, quoted above, the Board pointed out that neither (a) nor (b) of section 11 was limited to situations where the boycotted supplier had employees on the jobsite and would be redundant if they were: It held:

As these provisions reach beyond the performance of work at the jobsite they also reach beyond the construction

industry proviso and are unlawful under Section 8(e). [Citation omitted.]

Section 11(b) of the agreement . . . excuses employees represented by Respondent from operating equipment of any employer who has an interest in a firm doing construction work within Respondent's jurisdiction without a contract with Respondents. [It is prohibited by Sec. 8(e).]

Not long after the Board issued its *York County Bridge* decision, the Supreme Court decided *Connell Construction Co. v. Plumbers Local 100*, 421 U.S. 616 (1975). *Connell* was an antitrust action alleging as an illegal restraint on competition (under secs. 1 and 2 of the Sherman Act), union picketing which resulted in agreements with general contractors, *with whom the union did not have or seek collective-bargaining agreements*, which precluded those contractors from subcontracting work within the union's jurisdiction to firms which were not party to the union's current collective-bargaining agreement. The union defended on the ground that the subcontracting agreement was protected by the construction industry proviso to Section 8(e). *Connell* argued that the proviso was intended to permit only those subcontracting agreements which arose in the context of a collective-bargaining relationship.

The court agreed with *Connell*, concluding that the existence of a collective-bargaining relationship was a limitation on the applicability of the construction industry proviso to clauses restricting the subcontracting of work on a construction site. In doing so, it analyzed the legislative and decisional history of the proviso and concluded that its intent was broader than merely to alleviate such frictions as may arise between union and nonunion employees working on the same jobsite, the basis of the Board's rationale in *York County Bridge*. However, the court also noted, without indicating disagreement, that other courts had found that to be the purpose of the proviso.

The court added that the union-respondent in *Connell* was not contending that it sought to protect its members from having to work alongside nonunion men, since the agreement was not limited to jobsites on which its members were working and would still permit its members to work alongside nonunion subcontractor-employers of other crafts. The union, in *Connell*, sought the agreement in order to pressure mechanical contractors in its geographical area to recognize it as the representative of its employees. To permit such agreements, the court found, would give construction unions:

an almost unlimited organizational weapon. The unions would be free to enlist any general contractor to bring economic pressure on nonunion subcontractors, as long as the agreement recited that it only covered work to be performed on a jobsite somewhere. The proviso's jobsite restriction then would serve only to prohibit agreements relating to subcontractors that deliver their work complete to the jobsite.

Noting that one of the principal purposes of the 1959 Amendments was the elimination of "top-down" organizing, and pointing out the distinctions between the way Congress treated the garment industry, permitting the use of subcontracting agreements as an organizing tool, and all other industries where both primary picketing and secondary organizational tactics were restricted, the court stated that "[i]t is highly improbable that Congress intended such a result." *Connell*, supra, 631-632.

Thus, the court interpreted the proviso as being intended to allow agreements pertaining to certain secondary activities on a

construction site because of the close community of interests there. However, to permit such subcontracting agreements with "stranger" contractors, outside the bounds of a collective-bargaining relationship, and not limited to a particular jobsite, the court felt, would be contrary to one of the major aims of the 1959 Act, which was to limit "top-down" organizing campaigns, and therefore not protected by the proviso.

In *Carpenters Local 944 (Woelke Framing)*, 239 NLRB 241 (1978), the Board was confronted with the applicability of the proviso to subcontracting clauses which required that the contractor subcontract jobsite work only to firms which were signatory to union agreements and were thus secondary in their thrust, which were executed in the context of a collective-bargaining relationship, *and which applied at all times and at all jobsites* whether or not the signatory employer had employees working there within the union's craft jurisdiction. The General Counsel argued therein that the court's rationale in *Connell* excluded such clauses from the proviso's protection.

The Board rejected the General Counsel's argument, noting that the Court's *Connell* decision was cast, entirely, "in terms of the impact of the absence of a collective-bargaining relationship upon the applicability of the proviso to a subcontracting clause which comes within the literal language of the proviso." The Board went on to say:

The bottom line of the Court's opinion, as we construe it, is that the construction industry proviso to Section 8(e) permits subcontracting clauses such as those here in the context of a collective-bargaining relationship . . . [*Woelke*, supra at 250.]

The Board, in *Woelke*, did not cite *York County Bridge*.

On review, the Ninth Circuit, en banc, enforced the Board's Order. In doing so, it noted that the court in *Connell* had emphasized the "problems of shoulder-to-shoulder friction between union and nonunion workers on the jobsite" and "antagonism of the 1959 Congress to 'top-down' organizing that is one of the effects of subcontractor agreements." *Woelke*, supra, 654 F.2d at 1314. It concluded, however, that *Connell* should not be read to give the proviso such narrow scope. Rather, that court concluded, the thrust of *Connell* favored a broader view of the proviso, and upheld the reading of that decision supporting the validity of subcontracting clauses in the context of a collective-bargaining relationship regardless of the presence or absence of union workers at the jobsite. In granting enforcement, it noted that the Board had not always taken the expansive view of the proviso, citing its *York County Bridge* decision.

The Supreme Court affirmed the circuit's majority opinion, holding that union signatory subcontracting clauses, sought or negotiated in the context of a collective-bargaining relationship are protected by the proviso even where they are not limited in application to construction projects where both union and nonunion workers are employed. In reaching that conclusion, the court reviewed the legislative history. It noted, in particular, the Congressional intent that the proviso maintain the status quo respecting collective-bargaining agreements in the construction industry, including the lawfulness of broad subcontracting clauses similar to those involved in the case before it. It therefore concluded that "endorsing the clauses at issue here is fully consistent with the legislative history of § 8(e) and the construction industry proviso." 456 U.S. at 2382-2383.

The Court stated that the argument that the proviso was intended to avoid jobsite frictions occasioned by the presence of

union and nonunion workers on a single jobsite and therefore only afforded protection to clauses intended to alleviate such friction rested on “faulty premises.” The proviso, it said, serves a variety of purposes in addition to this legitimate goal. *Id.* at 2383 fn. 14. As *York County Bridge* was based solely on the premise that the proviso was intended to avoid the aforementioned jobsite frictions, this holding effectively undercuts its support. That case now offers no guidance with respect to the instant situation.

With respect to the concern for “top-down” organizing, the Court recognized both that the 1959 Amendments were intended, in part, to restrict the ability of unions to engage in such organizing and the fact that secondary subcontracting agreements such as the ones before it created “top-down” organizing pressure. It stated, at 456 U.S. at 2384:

However, even if the agreements were limited in application to jobsites at which both union and nonunion workers were employed, there would be some top-down organizing effect. Such pressure is implicit in the construction industry proviso. The bare assertion that a particular subcontracting agreement encourages top-down organizing pressure does not resolve the issue we confront in this case: how much top-down pressure did Congress intend to tolerate when it decided to exempt construction site projects from § 8(e)? . . . we believe that Congress endorsed subcontracting agreements obtained in the context of a collective-bargaining relationship—and decided to accept whatever top-down pressure such clauses might entail. Congress concluded that the community of interests on the construction jobsite justified the top-down organizational consequences that might attend the protection of legitimate collective-bargaining objectives.

The Court then pointed out that the top-down organizing effect was limited by the proscriptions of Section 8(b)(7), prohibiting unlimited picketing to force a subcontractor into a union agreement without regard to the wishes of its employees, and by Section 8(f), permitting a contractor’s employees to challenge the union’s representative status in an election petition before the Board and allowing the subcontractor to repudiate an

8(f) agreement under appropriate circumstances. It also referred to the obligation of unions to refer both members and nonmembers from its hiring halls, thus preventing nonunion employees from being frozen out of the job market and to the prohibition of picketing for secondary objects, including enforcement of secondary subcontracting clauses.

The foregoing, particularly *Carvel* and *Woelke & Romero*, lead me to the conclusion that the double-breasting clause involved in this case, and the subcontracting agreement which follows it, fall within the ambit of protection offered by the proviso. The clauses are directed at contracting or subcontracting within the construction industry and they were executed within the context of a collective-bargaining relationship. As the Supreme Court concluded, at 456 U.S. at 2385:

We hold that the construction industry proviso to § 8(e) . . . ordinarily shelters union signatory subcontracting clauses that are sought or negotiated in the context of a collective bargaining relationship, even when not limited in application to particular jobsites at which both union and nonunion workers are employed. This interpretation of the proviso is supported by its plain language, as well as legislative history.¹⁰

This broad language encompasses the issue before me.

Accordingly, I find that the Union has not violated the Act as alleged in the complaint.

CONCLUSION OF LAW

Respondent has not engaged in the unfair labor practice alleged in the complaint.

[Recommended Order for dismissal omitted from publication.]

¹⁰ I need not reach the “moreover” argument, based on *Berman*, supra, raised by Judge Roth, as I agree that *Woelke & Romero* is dispositive of contentions regarding the extension of the clause to alleged “stranger contractors.” I do note that sec. 2 applies to entities “owned or financially controlled by” the signatory employer and that, in fact, Products effectively controlled the assignment of subcontracts to Smith and Southwestern.