Central Pennsylvania Regional Council of Carpenters of the United Brotherhood of Carpenters and Joiners of America, AFL–CIO *and* Novinger's, Inc. Case 4–CE–118

August 1, 2002

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND COWEN

On March 15, 2001, Administrative Law Judge Earl E. Shamwell Jr. issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel and the Charging Party filed answering briefs. In addition, the General Counsel filed cross-exceptions and the Charging Party filed cross-exceptions and a supporting 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 record in light of the exceptions, cross-exceptions, and briefs, and has decided to affirm the judge's rulings, findings, and conclusions as modified and explained below and to adopt the recommended Order as modified.

The judge found that the Respondent Union violated Section 8(e) by its maintenance of an antidual-shop clause with a secondary objective, i.e., article V, section 6 of its collective-bargaining agreement with Charging Party Novinger's, Inc. We agree, and we affirm the judge's decision subject to our discussion of several matters below.[1]

1. In finding that the complaint in this case was not barred by Section 10(b),[2] the judge properly relied on several instances within the 10(b) period where the Respondent took steps to pursue its grievance alleging a violation of the contract provision at issue here. Although the grievance was filed before the 10(b) period, these instances constitute "reaffirmation," "maintenance," and "giving effect" to the disputed provision, and thus "entering into" an 8(e) agreement, within the 10(b) period. *Dan McKinney Co.*, 137 NLRB 649, 653–657 (1962). See, e.g., *Iron Workers (Southwestern Materials)*, 328 NLRB 934, 935 (1999).

2. We do not rely on the judge's discussion of the Respondent's single-employer defense. The judge concluded that the Charging Party, Kelly Systems, Inc., and Novinger Group, Inc. are not a single employer. However, the complaint alleged that article V, section 6 violates Section 8(e) on its face, i.e., by its express terms it authorizes unlawful secondary conduct, without regard to its actual effect on any particular entity. Further, the complaint does not allege that the Respondent violated Section 8(b)(4)(B) by pursuit of its grievance filed on November 6, 1998, and its amended grievance filed September 14, 2000, both of which allege violations of the disputed contract provision and implicate the three employers above. Thus there are no allegations in this case that the Respondent actually engaged in secondary activity with respect to any entity. Accordingly, it is unnecessary to address the question whether the Charging Party, Kelly Systems, Inc., and Novinger Group, Inc. constitute a single employer rather than distinct entities. See *Teamsters (Active Transportation Co.)*, 335 NLRB 830, 832–833 (2001).[3]

3. In his cross-exceptions, the General Counsel requests that we modify the "cease and desist" paragraph in the judge's recommended order by broadening its language, consistent with the corresponding paragraph in the judge's recommended notice, and with the Board's remedy and Order in *Southwestern Materials*, supra at 937. We agree, and we will modify the Order accordingly. We observe as well that our "cease and desist" remedy prohibits the Respondent from relying on the contract provision found unlawful here in its pursuit of the grievances referred to above.

4. We deny the Charging Party's cross-exception requesting that we order the Respondent to withdraw its grievances. As stated above, the complaint does not allege that the Respondent pursued either grievance in violation of Sec. 8(b)(4)(B). See *Active Transportation*, supra, slip op. at 3. Accordingly, our remedy for the Respondent's 8(e) violation does not and should not require that the Respondent formally withdraw its grievances. Rather, as we have explained above, the Respondent is precluded from relying on article V, section 6 in pursuing the grievances.

We also deny the Charging Party's cross-exception seeking the addition of a "narrow order" paragraph—i.e., language requiring the Respondent to cease violating

[1] Member Liebman participated in *Teamsters (Active Transportation Co.)*, 335 NLRB No. 68 (2001), a case outside the construction industry, in which the Board dismissed an 8(e) complaint, following *Painters District Council 51 (Manganaro Corp.)*, 321 NLRB 158 (1996), and *Carpenters District Council of Northeast Ohio (Alessio Construction)*, 310 NLRB 1023 (1993). In her view, the judge's finding of a violation in this case under *Alessio* and *Manganaro* is fully consistent with the dismissal in *Active Transportation*. While she questions *Alessio*'s analysis of the interplay between Sec. 8(e), its construction industry proviso, and antidual-shop clauses (see *Alessio*, supra at 1026–1029), she acknowledges that *Alessio*, and *Manganaro* as well, are current Board law, and she affirms their application in this case on that basis.

[2] Sec. 10(b) provides, in pertinent part, that no complaint shall issue based on an unfair labor practice occurring more than 6 months prior to the filing of the unfair labor practice charge.

[3] Member Cowen was not on *Active Transportation*, supra, and does not find it necessary to rely on the analysis in that case or to express his view regarding the same.

Section 8(e) in any like or related manner. A remedial paragraph of this kind would be redundant to the paragraph we have added to the Order in response to the General Counsel's cross-exception, discussed above. In addition, Board precedent indicates that a "narrow order" paragraph is unnecessary in remedying an 8(e) violation. See *Teamsters Local 36 (California Dump Truck Owners)*, 249 NLRB 386 fn. 2 (1980), enfd. 669 F.2d 759 (D.C. Cir. 1981), affd. sub nom. *Shepard v. NLRB*, 459 U.S. 344 (1983).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Central Pennsylvania Regional Council of Carpenters of the United Brotherhood of Carpenters and Joiners of America, AFL–CIO, its officers, agents, and representatives, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1.

"1. Cease and desist from entering into, giving effect to, or enforcing the ant-dual shop provisions of article V, section 6 in its collective-bargaining agreement with Novinger's, Inc."

Richard Wainstein, Esq., for the General Counsel.
Ira H. Weinstock, Esq., of Harrisburg, Pennsylvania, for the Charging Party.
Bruce D. Bagley, Esq. (McNees, Wallace & Nurick), of Harrisburg, Pennsylvania, for the Charging Party.

DECISION

STATEMENT OF THE CASE

EARL E. SHAMWELL JR., Administrative Law Judge. Original unfair labor practice charges were filed against Central Pennsylvania Regional Council of Carpenters of the United Brotherhood of Carpenters and Joiners of America, AFL–CIO (the Respondent) by Novinger's, Inc. (the Employer) on August 24, 1999. Based on these charges, the Regional Director for Region 4 of the National Labor Relations Board (the Board) issued a complaint on October 27, 1999, alleging that the Respondent violated Section 8(e) of the National Labor Relations Act (the Act) by entering into, maintaining, and giving effect to an agreement wherein the employer agreed not to do business with another employer or person. The Respondent timely filed its answer to the complaint on November 5, 1999, essentially denying the commission of any unfair labor practices.

This matter was originally set for trial on September 14, 2000, at the Philadelphia Regional Offices of the Board. However, on September 11, 2000, in a telephone conference call, the parties herein, namely the General Counsel, the attorneys for the Employer, Novinger's, Inc., and the Respondent Central Pennsylvania Regional Council of Carpenters of the United Brotherhood of Carpenters and Joiners of America, AFL–CIO, indicated that they jointly desired to petition the undersigned Administrative Law Judge to waive a formal hearing of the matter and consider this matter pursuant to a stipulated record.

Accordingly, on September 12, 2000, the Regional Director issued an order postponing the scheduled hearing indefinitely. On October 10, 2000, the parties herein submitted to me a motion styled "Stipulation on Waiver of Hearing and Joint Motion to Set Date for Filling of Briefs," in which they agreed that the unfair labor charge, the complaint, the answer, the September 12, 2000 Order postponing hearing indefinitely and the stipulation of facts, and other attachments designated as joint exhibits would constitute the entire record in this case and that no testimony would be necessary to decide the case. Additionally, the parties waived a formal hearing before me. On October 31, 2000, by Order, I granted the parties' aforementioned motion and approved the stipulation of facts and admitted it and the other joint exhibits into evidence; furthermore, the parties were given until November 15, 2000, to file briefs.[1] The parties were further notified that I might determine, after a review of the stipulated record and the briefs, that additional evidence (documentary or testimonial) may be required to resolve the issue(s) presented in this case.

On consideration of the entire record in this case, including the briefs filed by the parties, I make the following.

FINDINGS OF FACT

I. JURISDICTION

Novinger's, Inc., a Pennsylvania corporation with a primary office and place of business in Harrisburg, Pennsylvania, engages in the construction of interior and exterior walls and ceilings of commercial, industrial, or institutional dwellings and buildings. During the past year, in the course and conduct of its business operations, Novinger's purchased and received goods valued in excess of $50,000 directly from points outside the Commonwealth of Pennsylvania. The Respondent admits, and I would find and conclude that, at all times material herein, Novinger's has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

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

III. RELEVANT FACTS[2]

The Employer is a wholly owned subsidiary of its parent company—Novinger Group, Inc. (N.G.). N.G. also owns another subsidiary company, Kelly Systems, Inc. (Kelly). James Novinger is president of N.G., the Employer, and Kelly, and owns a majority of the shares of N.G. As president and majority shareholder, James Novinger possesses ultimate authority

[1] The parties jointly requested an extension of time for filing of briefs, which request was granted by Chief Administrative Law Judge Robert A. Giannasi on November 7, 2000. The parties were given a new date of December 8, 2000, to file briefs.

[2] In this section, I have incorporated, in part, the parties' stipulated and agreed-upon facts verbatim; in other cases, I have paraphrased the stipulations to meet my stylistic choices, but without changing the factual content. Notably, I have drawn inferentially, where deemed appropriate, certain conclusions from the stipulations.

over the operations of all three entities.[3] The Employer and Kelly are both engaged in the installation of dry wall (or gypsum), board walls, and ceilings in the commercial construction industry and, to an extent, share some equipment commonly used in the drywall construction industry.[4]

The Respondent and the Employer are parties to a collective-bargaining agreement (the agreement) effective by its terms from May 1, 1998, through April 30, 2003.[5]

Pursuant to the agreement, the Employer employs carpenters who are members of and represented by the Respondent. Kelly is not a signatory to the agreement but employs carpenters and operates with a nonunion work force.[6]

Article V, section 6 of the agreement provides (in pertinent part) as follows:

Article V. section 6. The employers stipulated that any of their subsidiaries or joint venture to which they may be parties when such subsidiaries or joint venture engage in multiple dwelling, commercial, industrial or institutional building construction work shall be covered by the terms of this agreement. . . . It is agreed that any dispute relating to the above Recognition and Union Security clause cannot be resolved between representatives of the Keystone Contractors Association and the Central Pennsylvania Regional Council of Carpenters shall be submitted to arbitration.[7]

The language of article V, section 6 has been included in prior collective-bargaining agreements between the parties since 1982.

Sometime in October 1998, the Respondent obtained information that Kelly was performing drywall construction work but that Kelly was not performing the work in accordance with the collective-bargaining agreement. Accordingly, on November 6, 1998, the Respondent wrote to the Employer and advised that the Union was filing a grievance against the Company for violation of article V, section 6 of the agreement. The Respondent's grievance letter, in pertinent part, reads as follows:

> Dear Mr. Novinger:
> As a member of the American Subcontractors Association of Central Pennsylvania, and therefore, a signatory employer to the collective bargaining agreement with the Central Pennsylvania Regional Council of Carpenters (formerly known as Keystone District Council), Novinger's, Inc. is bound by the terms of that agreement with respect to the employment of Union carpenters. Pursuant to Article V, Section 6, the firms doing business under the names of Kelly Systems and Novinger Group, Inc. are likewise subject to the terms of the collective bargaining agreement. Therefore, the failure of Novinger's Inc./Novinger Group, Inc./Kelly Systems to ensure that all employees maintain good standing membership in the Union after the seventh (7th) day of employment specifically violates Article V, Section 3 of the collective bargaining agreement. Accordingly, you should consider this a grievance reduced to writing pursuant to Article IX of the collective bargaining agreement. We are seeking a make whole remedy for all work performed by non-Union personnel in violation of the collective bargaining agreement.
> . . . However, if you fail to respond to this letter within seven (7) days, we will submit the matter to the American Arbitration Association for selection of an arbitrator in accordance with article IX of the collective bargaining agreement.
>
> Very truly yours,
>
> IRA H. WEINSTOCK[8]

On November 25, 1998, the Respondent sent the following letter to the American Arbitration Association (AAA) in Philadelphia:

> AMERICAN ARBITRATION ASSOCIATION
> 230 South Broad Street
> Philadelphia, PA 19102
>
> RE Central Pennsylvania Regional Council of Carpenters and Novinger's Inc.
>
> Dear Sir/Madam:
> Please be advised that a dispute exists between Novinger's Inc. and the Central Pennsylvania Regional Council of Carpenters. I am enclosing the grievance previously submitted to Mr. James Novinger, President of Novinger's, Inc. Please send a panel of arbitrators to the undersigned, as attorney for the Union, and to Norman White, Esquire, attorney for Novinger's. Mr. White's address is: McNEES, WALLACE & NURICK, 100 Pine Street, P. O. Box 1166, Harrisburg, Pennsylvania 17108-1166.
> If you have any questions, please feel free to contact me.
>
> Very truly yours,

[3] The parties have also stipulated that the three entities have one common Secretary, namely Patrick A. Hospodavis. Furthermore, the three entities are all Pennsylvania corporations and each maintains an office and principal place of business at 1213 Paxton Church Road, Harrisburg, Pennsylvania.

[4] The parties disagree only to the extent to which the two companies share equipment. The Respondent contends that the Employer and Kelly "commonly" use each other's scaffolding, fax machinery, dumpsters, trucks, and gang boxes. The General Counsel contends that the use of the equipment between the companies is merely "occasional" or "sporadic," that most of the equipment is separately purchased and maintained by the two companies. See Jt. Exh. 5, stipulation 9.

[5] The collective-bargaining agreement in its entirety is contained in Jt. Exh. 6.

[6] The parties have not expressly stipulated to the nonunion status of Kelly's work force; however, this fact is conceded by the Employer in its brief as well as by the nature of the controversy between the parties. (See C.P. Br. at p. 2 and Jt. Exh. 7.)

[7] Art. V is captioned "Recognition and Union Security" and contains five other sections which, in the main, purport to secure and maintain the Union's role as exclusive bargaining representative for negotiated wages, hours, and other terms and conditions of the Employer's employees and their required membership in the Union. It should be noted that the clause refers to employers because the agreement is an area collective-bargaining agreement between the Respondent and the Keystone Contractors Association and American Subcontractors Association of Central Pennsylvania. The term "employers" refers to "those employers who have granted bargaining authorization to [Keystone and American] and future employers desiring to avail themselves of the benefits derived herein as a signatory to this Agreement." (See Jt. Exh. 6, pp. 3–4.)

[8] This letter is contained in Jt. Exh. 7.

IRA H. WEINSTOCK[9]

Sometime in early 1999, the AAA scheduled an arbitration hearing on the grievances before Arbitrator John Skonier for August 30, 1999.

Consequently, on and after February 24, 1999,[10] the Respondent initiated several steps pursuant to its prosecution of the grievance. For example, on July 26, 1999, the Respondent served a subpoena duces tecum on the Employer in connection with the scheduled hearing on the grievance. On August 6, 1999, the Respondent requested from the Employer certain additional information for the arbitration hearing. On August 16, 1999, the Respondent requested that the Employer accept service for certain subpoenas from the Respondent in connection with the arbitration hearing.

However, the Employer, in anticipation of filing the instant unfair labor practice charge (which, as noted, was filed on August 24, 1999), requested by letter dated August 23, 1999, that AAA postpone the scheduled arbitration hearing; on August 27, 1999, AAA postponed the hearing on the grievance over the Respondent's objection. On December 8, 1999, AAA confirmed by letter the agreement of the Respondent and the Employer that the grievance arbitration hearing be held in abeyance indefinitely.

However, on September 14, 2000, the Respondent sent the following letter to the Employer:

> Dear Mr. Novinger:
>
> As you are aware, the Union filed a grievance on November 6, 1998. The subject matter of the grievance is part of an NLRB proceeding. The Union wishes to amend the grievance to allege a violation of the entire contract for the failure of Novinger's Inc./Novinger Group, Inc./Kelly System to abide by all the terms and conditions of the contract between the American Subcontractors Association of Central Pennsylvania and the Central Pennsylvania Regional Council of Carpenters.
>
> Your conduct violates the " Statement of Policy" Section, Article 5—Recognition and Union Security, as well as other terms of the contract. You should consider this an amended grievance or, in the alternative, a new grievance reduced to writing pursuant to Article 9 of the collective bargaining agreement. The Union is seeking a make-whole remedy for all work performance by non-union personnel in violation of the collective bargaining agreement. It is the Union's position that this grievance be an amendment to the grievance that was filed on November 6, 1998 or, in the alternative, a new grievance retroactive to May 1, 1998.
>
> Very truly yours,
> IRA H. WEINSTOCK[11]

[9] This letter is contained in Jt. Exh. 8.

[10] The parties have stipulated and agreed that this date commences the limitations period covered by Sec. 10(b) of the Act for the instant charge. (See stipulations of fact 13.) I would find and conclude that this date on the record would correspond to the limitations period under the Act.

[11] This letter is contained in Jt. Exh. 9.

On September 20, 2000, the Employer responded to the Respondent in the following correspondence (in pertinent part) to Mr. Weinstock:

> Dear Mr. Weinstock:
>
> I have reviewed your letter of September 14, 2000, with Counsel.
>
> As you know the Union's November 6, 1998 grievance has been found by the NLRB Regional Director to be unlawful on its face. We therefore do not recognize any right by the Union to "amend" a grievance which is unlawful on its face. Additionally, we object to any attempt to "amend" a grievance almost two years after the filing of the grievance. Please be assured that if the November 6, 1998 grievance is ever actually arbitrated, we will certainly renew our objection before the arbitrator and we reserve our right to challenge arbitrability. In addition, the grievance as amended is denied on its merits.
>
> With regard to your request that we treat your letter of September 14, alternatively, as a new grievance retroactive to May 1, 1998, the new grievance is denied on the basis that it has not been filed timely. Also, it is Novinger's position that the purported new grievance violates Section 8(e) of the NLRA, just as did the November 6, 1998 grievance. Additionally, the purported new grievance is denied on its merits.
>
> Very truly yours,
> NOVINGER'S, INC.
> By:/s/
> James David Novinger[12]
> President

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Respondent's Arbitration Deferral Defense

In its brief, the Respondent argues that by virtue of its having amended the grievance on September 14, 2000, to include other violations of the agreement,[13] namely the statement of policy

[12] See Jt. Exh. 10.

[13] The agreement on page 3 contains the following "Statement of Policy":

> It is mutually recognized that this Agreement is the result of cooperative effort between the Keystone Contractors Association and American Subcontractors Association of Central PA, hereinafter referred to as KCA and ASA, and the Central Pennsylvania Regional Council of Carpenters of the United Brotherhood of Carpenters and Joiners of America, hereinafter referred to as the Union, in an effort to secure greater stabilization and more harmonious working conditions for the men employed. The provisions of this Agreement have been arrived at by proper collective bargaining. In view of these facts, it is the duty of both Employers and Representatives of the Union to accept the terms of the Agreement as set forth as being those to be enforced during the life of the Agreement, and it is understood that Both Employers and Union Representatives will endeavor to carry out to the fullest degree the intent and letter of the Agreement.

section and article V generally, the grievance in toto, as amended, should be deferred to arbitration. The General Counsel counters and contends that a deferral to the parties' grievance-arbitration procedure is not appropriate. I would agree with the General Counsel. My reasons are as follows.

> Article IX of the agreement governs arbitral matters and states (in pertinent part):
>
> Any and all disputes, complaints, controversies or grievances whatsoever between the Union or any employees and the Employer, which directly or indirectly arise under, out of, or in connection with or in any manner relate to this Agreement, or the breach thereof, or the acts, conduct or relations between the Parties shall be adjusted as follows:
>
> (a) The matter shall first be reduced to writing and taken up and between the representatives of the Union, which may be the Steward, and the aggrieved employee, if he so desires, and the representative of the Employer, and they shall attempt to settle the same.
>
> (b) If settlement satisfactory to the Parties cannot be reached in twelve (12) hours from the time the matter is first presented under (a), it shall be submitted to the Business Representative of the Union and the representative of the Employer who must attempt to arrive at a settlement satisfactory to the Parties within twenty-four (24) hours from the time the matter is first presented under (b). Should the representatives of the Union and the Employer fail to reach a satisfactory settlement within the said twenty-four (24) hours, and should the Union or the Employer demand arbitration, the two representatives shall during this same period endeavor to select an impartial arbitrator by agreement to her [sic] hear the dispute.
>
> . . . .
>
> (e) The decision of the arbitrator whether selected under (b) or (d) hereof shall be final and binding upon the parties hereto. In the event that any party shall fail to appear before the arbitrator selected under (b) or (d) hereof after due notice shall have been given to such party, the arbitrator is hereby authorized to render a decision on the testimony of the party appearing.
>
> . . . .
>
> (g) The above procedure shall constitute the exclusive method of the handling of all disputes, complaints, controversies or grievances between the parties hereto, except those disputes, complaints, controversies or grievances which are hereinafter set forth as excluded from the operation of the no-strike, no-stopping, no-lockout, no-picketing provision hereof. Furthermore, there shall be no proceedings in any court over matter within the scope of this Article. [Agreement at pages 9–10.]

Clearly, the pertinent provisions of the arbitration section of the agreement indicate the parties' intention to settle disputes of virtually any kind or description arising under the contract through the stated arbitral process. Accordingly, the Respondent's request for deferral of the instant charge is not without reasonable support. However, the Board has stated that it will decline to defer to arbitration where the issues on which [the Respondent] seeks deferral are the fundamental lawfulness of [contract clauses] themselves, rather than questions about the validity of their interpretation or attempted application in particular factual circumstances. *Carpenters (Mfg. Woodworkers Assn.)*, 326 NLRB 321 (1998). In *Carpenters*, the Board also noted that it not defer to arbitration issues involving the application of statutory policy standards and criteria, rather than only the interpretation of the contract itself. Id. at 322. Thus, under Board standards, certain issues in question are deemed not to be susceptible to interpretation under the operation of a contract's grievance-arbitration machinery. More pointedly, the Board also has recognized that, in any given dispute, an arbitrator or the use of one does or may not provide assurances that the unfair labor practice issue relating to a violation of Section 8(e) will be resolved and that there may be questions raised regarding the arbitrator's authority to determine whether a violation of the Act has occurred through the action of a party to the agreement.[14] The instant dispute, in my view, does not lend itself to resolution through the arbitral process for similar reasons. First, the lawfulness of article V, section 6 of the agreement is at issue, not its interpretation. Second, while the arbitrator here may indeed have plenary authority to resolve disputes under the agreement, there is no guarantee that he/she would look beyond the contract and consider statutory principles necessary to resolving the 8(e) issue. For these reasons, I would deny the Respondent's request for deferral to arbitration under the parties' agreement.

B. The Respondent's 10(b) Procedural Defense

The Respondent defends against the allegation in the complaint on grounds of Section 10(b) of the Act, arguing that the Act precludes consideration of the instant matter because the underlying charges were filed outside of the 6-month limitation period.[15]

The Board has long held that Section 8(e)[16] essentially proscribes the "entering into" of an agreement whereby the em-

Notably, art. V contains five other provisions generally relating to covered employers' recognition of the Union as the sole and exclusive bargaining representative of unit employees and union security, that is requiring among other things that membership in good standing in the Union be a condition of employment for all employees of the employer; with discharge mandated for noncompliance; and prohibiting union members from working for any contractor unless covered by the agreement. See agreement, pp. 6-7. The General Counsel has not charged that these provisions, sec. 1-5, are in any way violation of Sec. 8(e) of the Act although, as noted, the Employer also regards the amended grievance as violative of Sec. 8(e). This decision will only deal with the alleged unlawfulness of art. V, sec. 6.

[14] *See International Organization of Masters (Seatrain Lines)*, 220 NLRB 164 (1975), and *Iron Workers Pacific Northwest Council (Hoffman Construction)*, 292 NLRB 562 (1989).

[15] Sec. 10(b) of the Act provides, in pertinent part:

. . . *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made . . . .

[16] The relevant portion of Sec. 8(e) of the Act provides:

ployer agrees to cease doing business with another person, and the maintenance, enforcement, and reaffirmation of such an agreement within the 10(b) period constitutes an "entering into" within the meaning of Section 8(e).[17] It is undisputed here that at least as of February 24, 1999, the beginning of the 10(b) period, the Respondent continued to pursue the original article V, section 6 grievance of November 25, 1998, by serving on the Employer a subpoena duces tecum in connection with the arbitration hearing scheduled for the grievance; requesting of the Employer on August 16, 1999, additional information for the arbitration hearing scheduled for August 30, 1999; requested that the Employer accept service for certain subpoenas from it in connection with the scheduled arbitration hearing; and on September 14, 2000, after the filing of the instant unfair labor practice charge, seeking to amend the original grievance to include additional provisions of the agreement. Under established Board law, demands by a union pursuant to the contract arbitral process that the employer comply with the terms of the agreement encompassing alleged violations of Section 8(e) may constitute a reaffirmation of the disputed clause and a maintenance of its enforceabililty. *Teamsters Local 467*, 265 NLRB 1679, 1681 (1982), enfd. 723 F.2d 915 (9th Cir. 1983). The Respondent, however, contends that while its filing of the original grievance was an act furthering enforcement of the instant clause, its subsequent actions were minor ministerial acts insufficient to constitute acts of reaffirmation or maintenance of the enforceability of the offending clause. Thus, the Respondent would argue that in order for the conduct on its part to rise to the level of a reaffirmation or maintenance of the 8(e) clause, there must be something more to the conduct to take it beyond the de minimis or ministerial. The Respondent submits that the employer's interests must actually in some substantial way be harmed during the 10(b) period by the conduct undertaken by the union pursuant to the enforcement of the clause in question.[18]

I have examined the authorities cited by the Respondent and conducted additional research on the subject. I have not found any Board authority that supports the Respondent's argument that the reaffirming or maintenance acts of the Respondent must be of a certain degree or quality within the 10(b) period in order to constitute entering into a prohibited 8(e) agreement. The long established law is, on the other hand, quite clear. That is, the prohibition of Section 8(e) extends beyond the mere initiation of a prohibited obligation, that by enforcing and giving effect to the clauses in question within the period covered by the charges, a party may violate the Section. *Retail Clerks Local 770*, 138 NLRB 244, 247 (1962). Thus, the Board looks to the facts and circumstances constituting conduct which may constitute enforcement of the clauses alleged as violative of Section 8(e) to determine whether such conduct was within the 10(b) period preceding the charge. If the charged party maintains or implements the clauses within the 10(b) period, then the charge will lie and is not time-barred, irrespective of the date the parties entered initially into the 8(e) agreement. *Dan McKinney Co.*, 137 NLRB 649, 652 (1962). Significantly, the words "enter into" must be interpreted broadly and encompass the concepts of reaffirmation, maintenance, or giving effect to any agreement that is within the scope of Section 8(e). Thus, the Board does not even require that both the contracting union and the employer take action to implement the contract clause during the period covered by the charge to satisfy the "entering into" language; the action of one or both will suffice to establish the violation. *Dan McKinney Co.*, supra, at 654.

Accordingly, the Respondent's 10(b) defense is, in my view, without merit. I would find and conclude for purposes of Section 10(b) that the Respondent's actions, as recited above, during the 10(b) period were sufficient to constitute a reaffirmation of the disputed clause and maintenance of its enforceability by the Respondent. *Teamsters Local 467*, supra.

C. The 8(e) Case on the Merits

The General Counsel (and Charging Party) contends that the provision—article V, section 6 of the agreement—is unlawful under Section 8(e) on its face and that the Respondent reaffirmed the provision and maintained its enforcement by relying on it in the grievance initially filed in November 1998.[19] The essence of the General Counsel's position is that the subsidiary/joint venture provision is facially over-broad, especially in its coverage of and application to the Employer's joint venture partners and joint ventures "where the work in question is being

> It shall be an unfair labor practice for any unfair 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: *Provided*, That nothing in the 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 . . .

[17] *Gaslight Club*, 248 NLRB 604, 606 (1980); *Bricklayers Local 2 (Gunnar I. Johnson)*, 224 NLRB 1021 (1976); *International Organization of Masters, Mates & Pilots (Seatrain Lines)*, 220 NLRB 164 (1975); *Carrier Air Conditioning Co. v. NLRB*, 547 F.2d 1178 (2d Cir. 1976); *Sydney Danielson v. International Organization of Masters, Mates and Pilots*, 521 F.2d 747, 754 (2d Cir. 1975); *NLRB v.* Sheet Metal Workers *Local 28*, 380 F.2d 827, 829 (2d Cir. 1967). *Los Angeles Mailers Union 9* [Hilboro Newspaper Printing Co.] *v. NLRB*, 311 F.2d 121 (D.C. Cir. 1962).

[18] The Respondent cites as examples of the type of harm that must be visited on the Employer during the 10(b) period, union strikes predicated on enforcement of the 8(e) clause; (*Greater St. Louis Automotive Trimmers & Upholsterers Assoc.*, 134 NLRB 1363 (1961)); employees refusal to cross a neutral gate reserved for them ((*Bricklayers Local 2*, 224 NLRB 1021 (1976)); and the parties actually entering into a new contract that included the offending provisions. (*Sheetmetal Workers Local 216*, 172 NLRB 35 (1968)).

[19] The General Counsel has specifically disavowed any contention that the Respondent's object here was to apply the agreement for a secondary purpose, or that the grievance itself violates Sec. 8(b)(4)(ii)(B) of the act. The General Counsel also took no position regarding the relationship between the three corporate entities involved here—the Employer, Kelly, and Novinger Groups—contending that the relationship is irrelevant where the charges go to a facially unlawful contract clause.

performed by joint venture partners who are separate employers and whose labor relations with other employees are not controlled by the signatory Employer" (G.C. Br. at p. 9.)[20]

The Respondent defends on several grounds: (1) Section 8(e) does not apply in the instant case because the Employer here is a single employer and as such cannot be said to have entered into an agreement to cease doing business with any other persons; (2) the contract provision is limited to primary considerations, that is, its object is the preservation of the traditional work of the employees within the bargaining unit; (3) that since the Employer possesses the right to control the work of Kelly and Novinger Group, the provision is self-limiting to projects the subsidiaries and joint venture may undertake with each other; (4) the clause was designed by the Employer and the Respondent to protect against reassignment of union work to nonunion corporate entities under the Employer's control; and (5) the clause is saved by the 8(e) construction industry proviso.

Discussions and Conclusions

First, regarding the Respondent's single-employer defense, the Board holds that in determining whether two (or more) nominally separate employing entities constitute a single employer, it will look to four factors—common ownership or financial control, common management, interrelation of operations, and common control of labor relations. No single factor is controlling and not all need be present. *Dow Chemical Co.*, 326 NLRB 288 (1998). However, three of the four—the interrelation of operations, common management, and centralized control of labor —are more critical than common ownership or financial control. Thus, in general, according to the Board, single-employer status is marked by the absence of an arms-length relationship between two or more unintegrated entities. *Hahn Motors*, 283 NLRB 901 (1987). Recently, the Board reiterated its long-held position that the most important factor in deciding whether a single-employer relationship exists is the control which one party may or may not exercise with respect to another's labor relations. *Canned Foods, Inc.*, 332 NLRB 1449 (2000). As noted, the parties have stipulated and agreed to certain facts touching on this issue, that is (in summary) James Novinger's ultimate authority over the operations of the three entities involved, the sharing of a common secretary, some common usage of equipment between Kelly and the Employer, and the interrelation of the drywall functions of Kelly and the Employer. However, in spite of the opportunity (through the negotiated stipulations) to deal with the most important factor, the parties did not address the issue of control, either of the entities could exercise (or not) over the labor relations of the other. Therefore, on this record, there is an absence of evidence that either entity controlled in any measurable way the labor relations of any other entity. For example, there is no evidence that the workers of each worked interchangeably—an unlikely event given the issues here—or that there were any management personnel common to all entities who could affect their labor relations. That James Novinger was the "boss" of all entities and he utilized one individual, Patrick A. Hospodavis, as a secretary (whose functions and duties were not defined) for all three companies, does not establish in my view the requisite control over labor policies for purposes of determining a single-employer relationship here. Accordingly, I would find and conclude that there is insufficient evidence of a single-employer relationship in this matter. In concluding that the Employer here is not a single employer, then, per force, Kelly and N.G. are clearly separate employers in my view. Accordingly, I would reject the Respondent's argument that Section 8(e) does not apply to the instant cause because the Respondent has not establish the critical factor—central control of labor relations—in the three entities here.[21] Therefore, for purposes of Section 8(e), in my view, the clause in question is an agreement to cease business with another person.

For purposes of Section 8(e) analysis, the Board employs the following analytical framework to disputed contract clauses.

An agreement is unlawful under Section 8(e) if (1) it is an agreement of a kind described in the basic prohibition of that Section—e.g., an agreement to cease doing business with another person; (2) it has a secondary, as opposed to primary work preservation, objectives; and (3) it is not saved by coming within the terms of the construction industry proviso to Section 8(e). *Carpenters District Council of Northeast Ohio (Alessio Construction)*, 310 NLRB 1023, 1025 (1993).

In *Southwestern Materials* and Supply,[22] the Board opined in further refinement of principles applicable to 8(e) contract clauses, stating:

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. However, not every collective-bargaining agreement with a "cease doing business" objective is necessary 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 protected work performed by the employees of the employer bound by the contractual proviso. 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 an exemption under the construction industry proviso to Section 8(e).

Thus, in analyzing clauses (such as 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. On the other hand, if it is concluded that the clause has a secondary purpose, then the

[20] The General Counsel notes on this point that the gravamen of the Respondent's grievance is the Employer's failure to insure that all employees of Kelly and Novinger Group were members in good standing; the performance of drywall work with nonunion employees; and that the Union be recognized as the exclusive bargaining representative.

[21] The Board has emphasized that the common control must be actual or active as distinguished from potential control. *Western Union Corp.*, 226 NLRB 274, 276 (1976), and discourages judges from making findings on the basis of unsubstantial inferences. *Canned Foods*, supra, at 2.

[22] 328 NLRB 934 (1999).

clause will be found to be illegal under Section 8(e) unless it is saved from illegality by the construction industry proviso.

In *NLRB v. Longshoreman ILA*, 447 U.S. 490, 504 (1980), (*ILA I*), the Supreme Court took the view that in order for an agreement to be a lawful work preservation agreement, it must pass two tests. First, it must have as its objective the preservation of work traditionally performed by employers 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 agreement has a secondary objective, that is, to influence whoever does have such power over the work.

Applying these principles to instant case, I would conclude and find that the clause in article V, section 6 of the agreement clearly on its face is an agreement to cease doing business with another person, namely the Employers' own subsidiaries or joint ventures to which it may be a party when such subsidiaries or joint venture engage in various categories of commercial drywall construction work, unless such subsidiaries or joint venture parties agree to be covered by the contract between the Respondent and the Employer. Thus, as argued by the General Counsel, on its face, article V, section 6 would seemingly require the Employer to sever its relationship(s) with its own subsidiaries or other joint venture partners—employers—who would not or could not comply with the parties' agreement.

The next issue is whether the provision has a primary or secondary objective. As noted, the Respondent argues the "self-limiting nature" of the provision to the Employers' own subsidiaries and its joint venture partners doing work typically and traditionally by employees represented by the union. The Respondent submits that the provision merely reflects the Union's reaction to encroachment of nonunion shops on the traditional work performed by union shops. The General Counsel argues to the contrary that the provision facially has secondary objectives in that it applies to the Employer who, as the contracting employer, has no power to assign work or has control of the labor policies of its subsidiaries or joint venture partners.

I would find and conclude that the language of the instant clause is overly broad mainly but not solely because it makes no distinction between joint venture partners of the Employer over whom the Employer may have the so-called right of control of labor policies and those over whom it may not. Contrary to the Respondent, I do not believe the clause is self-limiting by its literal terms. The language of the clause is not ambiguous; consequently, I need not consider the Respondent's explication of its intent or objective.[23] Said another way, it seems clear to me that the clause, by its terms, is not solely addressed to the labor relations of the contracting Employer vis a vis his own employees. In my view, because it would apply to the Employer's joint venture partners any and everywhere situated within the ambit of the commercial drywall industry, the clause seems aimed at fostering the Respondent's own organizational interests as opposed to the unit employees' job security. *Teamsters Local 814*, 225 NLRB 609, 611 (1976).[24]

I have carefully considered two primary cases cited by the Respondent in support of its contention that the provision here has a primary work preservation objective—*Carpenters (Mfg. Woodworkers Assn.*, 326 NLRB 321 (1998), and *Manganaro Corp.*, 321 NLRB 158 (1996)—and I would find them factually distinguishable from the instant case. Notably, in both cases, the provisions in question were markedly different from the instant provision in that the work preservation purpose of both was clearly and amply delineated in the collective-bargaining agreements considered by the Board. The Board's approval of these provisions that it viewed protected all work heretofore performed by unit employees (*Carpenters*) and work which they had performed (*Manganaro*), in my view, was predicated on this clear statement of lawful purpose and objective. Here, the clause and verily the agreement as a whole in no way proximate the precise and limiting language considered in these decisions. In my view, article V, section 6 takes a shotgun approach and, as such, is clearly over-broad in its reach. Accordingly, I would conclude that the provision on its face is proscribed by Section 8(e). Thus, unless it falls within the construction industry proviso relating to outside work, as argued by the Respondent, the provision in question cannot be saved.

In *Iron Workers (Southwestern Materials)*, supra, the Board stated that "[I]n *Carpenters District Council (Alessio Construction)*, 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."[25]

An antidual shop clause is a clause aimed at prohibiting or discouraging a unionized employer's maintenance of an affiliation with a nonunion company in a double breasting arrangement. Double breasting is a corporate arrangement, found typically in the construction industry in which a unionized employer forms, acquires, or maintains a separately managed nonunion company.[26]

The General Counsel contends that the clause here is similar to the antidual shop clauses held to be unprotected in *Southwestern Materials* and *Alessio Construction* by the Board. Thus, he argues that the clause, being facially unlawful, cannot be saved by the construction industry proviso. I would agree with the General Counsel, consistent with the Board's holding in *Operating Engineers Local 520 (Massmen Construction Co.)*, 327 NLRB 1257 (1999). In that case, the Board had occasion to examine a collective-bargaining agreement negotiation in which the Union demanded an agreement which would include a provision prohibiting the signatory employer from entering into any joint venture or joint work undertaking, unless

[23] See *General Teamsters Local 982 (J. K. Barber Trucking Co.)*, 181 NLRB 515 (1970), affd. 450 F.2d 1322 (D.C. Cir. 1971), where the Board stated that if the meaning of the clause is clear, the Board will determine forthwith its validity under Sec. 8(e).

[24] The Respondent's broad organizational interests evidently are bottomed on its fears of the encroachment of nonunion shops on work traditionally performed by union shops. (R. Br., pp. 11–12.)

[25] 328 NLRB 934, 937 (1999).

[26] *Carpenters District Council (Alessio Construction)*, 310 NLRB 1023 (1993).

all parties to the contract for the joint venture also accepted and were bound by the collective-bargaining agreement. However, one of several construction contractors (of a builders' association) refused to agree to the clause, and the union engaged in a 1-day work stoppage, picketing one of the refusing contractor's worksites which resulted in a 1-day shutdown of the site. The Board, inter alia, held the clause violated Section 8(e) because the clause was viewed as an unlawful attempt to control the signatory employer's business relationships (and, hence, secondary in nature). The Board further found the clause in question, a joint venture clause like the antidual shop clause [in *Alessio*], fell outside the protections of the construction industry proviso. Id. at 2.

Therefore, I would find and conclude the instant clause, as contained in article V, section 6, is an antidual shop clause and not protected by the construction industry proviso of Section 8(e).

CONCLUSIONS OF LAW

1. By entering into, maintaining and reaffirming an agreement with Novinger's, Inc. that contained an antidual shop provision (the subsidiary joint venture provision of art. V, sec. 6), 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.

THE REMEDY

Having found that the Respondent has engaged in 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.

On these findings of fact and conclusions of law and on the entire record, and pursuant to Section 10(c) of the Act, I issue the following recommended[27]

[Recommended Order omitted from publication]

[27] See, *General Teamsters Local 982 (J. K. Barber Trucking Co.)*, 181 NLRB 515 (1970), affd. 450 F.2d 1322 (D.C. Cir. 1971), where the Board stated that if the meaning of the clause is clear, the Board will determine forthwith its validity under Sec. 8(e).