United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: March 7, 1997

TO : F. Rozier Sharp, Regional Director
Region 17

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: F & A Food Sales, Inc.
Case 17-CA-18391

240-3367-8312
385-7533-4000
530-4090-5000
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This Section 8(a)(5) case was submitted for advice on the following issues:

(1) where (a) the certified and contract unit included certain classifications, (b) during the term of the contract, the Employer lawfully subcontracted out those classifications but then (c) terminated the subcontract and resumed performing the work in-house, whether the Employer was privileged to withdraw recognition from the Union as to the classifications involved when the work returned to the Employer;

(2) whether the Union's agreement to a subcontracting clause and to its implementation, and the Union's failure to seek to organize the employees of the contractor which performed the subcontracted work constituted a waiver of its right to represent the drivers and helpers upon the termination of the subcontract; and

(3) whether this issue should be deferred to the grievance-arbitration provisions of the collective-bargaining agreement.

FACTS

On August 17, 1992, the Region certified the International Association of Machinists, hereinafter the Union, as the exclusive bargaining agent of the Employer's drivers, warehouse employees, fuelers, helpers and

maintenance employees, excluding office clerical and sales employees.[1] After a year of bargaining, the parties entered into a 3-year collective-bargaining agreement effective September 4, 1993. The contract contained a grievance-arbitration provision and a management rights clause which expressly permitted subcontracting.

In December 1993, three months after the entry into a contract, the Employer subcontracted all of the driver-helper function to Ryder Dedicated Logistics, Inc., hereinafter RDL, an unrelated employer. Before the Employer subcontracted the work, it discussed the matter with the Union, and the Union signed an agreement which recited that it did not "object" thereto. The Union has not attacked the lawfulness of the subcontracting.

RDL hired most of the Employer's drivers, after interviewing them independently. RDL hired additional drivers both at the beginning of the subcontracting and thereafter as need required. When necessary, RDL also transferred RDL employees from other locations to the Employer's facility. RDL directed its employees with a dispatcher/supervisor/manager who was stationed at the Employer's facility. RDL leased the same trucks that the Employer had previously leased. During the period of the subcontracting, the Union did not attempt to organize the RDL drivers and helpers who performed trucking for the Employer.

Twenty months later, in August 1995, a date still within the term of the 1993-1996 collective-bargaining agreement, the Employer terminated the subcontract and resumed trucking in-house. The Employer hired some of the former RDL drivers. Since the resumption, there has been a substantial amount of interchange and transfer between the drivers and helpers, on the one hand, and the warehouse employees, on the other.

In September 1995, the Union requested recognition and bargaining for the drivers and helpers. The Employer refused and instead proposed an election among the drivers and helpers. The Union filed this charge in January 1996. Later in 1996, during bargaining for a new contract, the parties disagreed on whether the drivers and helpers should be part

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[1] The certification also set forth the normal statutory exclusions.

of the unit. The parties reached agreement on a new collective-bargaining agreement which covered all of the other employees in the certified unit. However, the dispute about the drivers and helpers remains unresolved.

ACTION

We conclude that the Employer, by refusing to honor the collective-bargaining agreement during its term as to the drivers and helpers, and by refusing to bargain about the drivers and helpers as part of the certified unit, violated Section 8(a)(5)-8(d).

1. The Section 8(a)(5)-8(d) violation

The certified unit included the drivers and their helpers. The contractual unit included the same two classifications. The subcontracting both began and ended while the collective-bargaining agreement was in force. Upon the restoration of the driver-helper work, and during the remaining term of the contract, the drivers and helpers once again were part of the certified unit and covered by the contract. At that point, it was clear that the subcontracting had been temporary, the drivers and helpers had returned to the unit under the contract that had originally covered their work, and there was no reason to challenge their inclusion in the certified unit. Moreover, during this period the Board would not have clarified the unit to exclude the drivers and helpers.[2]

Therefore, by its refusal to honor the contract as to the driver-helpers, and its subsequent refusal to bargain about the drivers and helpers, the Employer unilaterally modified the scope of the unit and the contract's unit description, in violation of Section 8(a)(5)-8(d).[3]

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[2] The Board's established policy is not to clarify the unit while the contract is extant. The stated reason for the policy is that such Board action would disrupt the parties' collective bargaining relationship. Edison Sault Electric Co., 313 NLRB 753 (1994).

[3] Bremerton Sun Publishing Co., 311 NLRB 467 (1993).

We considered Cablevision Systems Development Company,[4] the recent case that deals with a situation somewhat resembling the instant case, to be distinguishable. Cablevision's predecessor had subcontracted certain work to Broadway, an independent company, in 1974. Cablevision, through its single employer relationship with its wholly owned subsidiary Atlantic, had a collective-bargaining agreement with Local 3, IBEW. In mid-1977, Cablevision decided to terminate the subcontract and perform the work in-house. It hired substantially all the employees who formerly performed the same work for Broadway, and they comprised 90% of the new Cablevision employee complement. Local 25, IBEW, formerly represented the Broadway employees; Local 3 disclaimed representation of these employees upon their employment by Cablevision. Bargaining with Local 25 commenced but then Cablevision withdrew recognition. The General Counsel alleged, and the Board agreed, that when Cablevision terminated its subcontract, and hired Broadway's employees, Cablevision became a successor to Broadway and was obligated to recognize and bargain with Local 25.

The result in Cablevision, viz., exclusion of the subcontractor's employees from the existing unit, is inapplicable to the instant case. It was Cablevision's predecessor, and not Cablevision itself, who had initially performed and then subcontracted the work, and the subcontract was of longer duration. More importantly if any contract covered the former Broadway employees, the contract arguably was Cablevision's contract with Local 3, which had, however, disclaimed. This disclaimer left no basis for arguing that Broadway's employees should be unit employees because they were returning to perform unit work.

Similarly distinguishable is Saks Fifth Avenue,[5] where the Board treated the employer which had terminated its subcontract as a successor. Saks had subcontracted its alterations work for an unspecified number of years, perhaps as many as 25. It is not clear whether Saks had ever itself performed the subcontracted work until it terminated the subcontract, and no other basis existed for arguing that the successor's employees should be the employees of some extant

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[4] 251 NLRB 1319 (1980), enfd. 671 F.2d 737, 109 LRRM 3102 (2d Cir. 1982), cert. den. 459 U.S. 906.

[5] 247 NLRB 1047 (1980), enfd. 634 F.2d 681, 105 LRRM 3274 (2d Cir. 1980).

unit. In Greyhound Lines, Inc., Case 28-CA-11564, Advice Memorandum dated February 15, 1993, the subcontracting of work by commission agents' employees had existed for 3 1/2 to 6 years. We concluded that the commission agents' employees had been severed from the larger unit and that Greyhound, as the successor to the commission agents, was not obligated to bargain as to the former employees. In both Saks and Greyhound, different circumstances existed warranting the treating of employees hired from a former subcontractor as not constituting unit employees returning to perform unit work. Thus, Cablevision and these other cases provide insufficient guidance about an employer's bargaining obligation about work returned to the unit after subcontracting. Similarly, inasmuch as the certified unit herein was necessarily appropriate, cases such as Canteen Service Company, Case 7-CA-33117, Advice Memorandum dated June 12, 1992, in which a change in the employer's operation destroyed the historical bargaining unit, are also inapposite.

Moreover, after the contract expired, the Employer could not challenge the inclusion of the drivers and helpers in the certified unit. Cases in which the historical unit included professional employees, supervisors or guards provide the Employer no defense because such units could not been certified and an employer may always challenge such a unit after, but not before, contract expiration. For example, in Corporacion de Servicios Legales, 289 NLRB 612, 613 (1988), the Board held that a contract covering both professional employees and other employees was a bar to a rival petition, although the professional employees had never been granted a self-determination election. Edison Sault Electric Co., supra, held that a UC petition which sought to remove supervisors from a unit was untimely filed. In Arizona Electric Power Co., 250 NLRB 1132 (1980), during the term of the contract, the employer withdrew recognition from the union as to load dispatchers, ultimately found not to be supervisors, and the lead load dispatcher, a stipulated supervisor. The Board at 1133, found that the employer had violated Section 8(a)(5) both as to the load dispatcher and the lead load dispatcher, on the grounds that inasmuch as the Board would refuse to clarify the unit midcontract to exclude the supervisors, it would be far more disruptive to permit the employer to withdraw recognition during the term of the contract, thus unilaterally modifying the scope of the contract mid-term. The Board found it sufficiently important to protect the contractual bargaining relationship as to warrant the issuance of a bargaining

order in that case, although the Board could not certify the unit because of the presence of the supervisors in it.

Here, however the contractual unit was appropriate both before and after the contract expiration because the contractual unit was the same as the certified unit. Thus, the Employer was obligated to honor the contract and bargain as the drivers and helpers as part of the unit.

2. Waiver

A waiver of a statutory right must be clear and unmistakable.[6] This standard is applicable to a union waiver of rights acquired under a certification.[7] To date, it has not been held that a union's agreement either to a subcontracting clause such as the one in this case or to the implementation thereof is also a clear and unmistakable permanent waiver of the union's right to represent the employees whose work was subcontracted upon the return of the subcontracted work to the unit. Thus, we find no merit to the Employer's claim that the Union waived its right to represent the drivers and helpers forever by agreeing to the subcontracting clause and its implementation.

Turning now to the Union's conduct during the subcontracting, rarely is it incumbent upon a union to seek to organize or represent any given group of employees.[8] The Employer claims that the Union's failure to attempt to organize or represent the RDL drivers and helpers is a waiver of the right to represent the Employer's drivers and helpers upon their return. The Employer's argument is deficient because it cannot show that the Union's failure to try to organize the RDL employees meets the waiver standard set forth above. In summary, neither the Union's consent to the subcontracting nor the Union's failure to try to organize the subcontractor's employees terminated the Employer's obligation to bargain with the Union when the work was returned to the bargaining unit.

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[6] E-Systems, Inc., 318 NLRB 1009, 1012 (1995), citing Metropolitan Edison Co. v. NLRB, 460 U.S. 693, 708 (1983).

[7] Hunt Brothers Construction, Inc., 219 NLRB 177 fn.1 (1975).

[8] See Sheet Metal Workers Local 80 (Limbach Co.), 305 NLRB 312, 314-315 (1991).

3. Deferral

The issue herein should not be deferred to the grievance-arbitration provisions of the expired collective-bargaining agreement.

Inasmuch as the issue herein has to do with the scope of the unit and with the representative status of the Union, deferral is inappropriate.[9] The Board does not defer to arbitration in cases presenting an issue of representation, accretion, or the appropriate scope or composition of the unit. See, e.g., Hill-Rom Co., Inc., 297 NLRB 351, 357 (1989), enforcement denied on other grounds, 957 F.2d 454 (D.C. Cir. 1992) (deferral to an arbitration award unwarranted where issue was one of unit scope); Paper Mfrs. Co., 274 NLRB 491, 494-496 (1985), enforced, 786 F.2d 163 (3d Cir. 1986) (deferral to an arbitration award unwarranted because accretion issues have been traditionally reserved for the Board and because the arbitrator did not properly apply the Board criteria).[10] The reason the Board does not defer in such circumstances is that the definition, description, scope or size of the bargaining unit is a permissive subject of bargaining and can be altered only upon the mutual agreement of the parties or through appropriate Board proceedings. Hill-Rom Co., supra, 297 NLRB at 357, and cases cited.[11]

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[9] McDonnell Douglas Corp., 312 NLRB 373 (1993), remanded 59 F.3d 230, 149 LRRM 2842 (D.C. Cir. 1995).

[10] Cf. St. Mary's Medical Center, 322 NLRB No. 175 (1997), where a regional director deferred to an arbitrator's construction of a contract clause describing certain jobs but the regional director then independently clarified the bargaining unit to include the newly created position.

[11] Kellogg Company, Case 4-CA-20790, Advice Memorandum dated November 30, 1992, is a rare exception to the general rule. There the parties enjoyed a long and productive history of dispute resolution over a variety of subjects. Moreover unlike this case, which involves a class of employees clearly covered by the Union's certification, Kellogg involved a dispute which could be characterized as either a unit scope or a work transfer question and the parties had previously resolved similar disputes through arbitration.

In summary, the Employer violated Section 8(a)(5) by refusing to apply the contract to, and bargain with the Union on behalf of, the drivers and helpers when this work, which had originally been included in the Union's certification was returned to the bargaining unit upon the termination of the Employer's subcontract with RDL.

B.J.K.