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

Advice Memorandum

DATE: April 11, 2008

TO : Alvin P. Blyer, Regional Director
Region 29

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

SUBJECT: Laborers Locals 1010, 1018 and
General Contractors Association, Inc. 560-5000
Cases 29-CE-138, 139 560-5028

These Section 8(e) cases were submitted for advice on whether a union signatory subcontracting provision contained in multiemployer association bargaining agreements was not protected under the construction industry proviso because the association and some of its contractor members do not currently employ unit employees and thus do not have a sufficient collective-bargaining relationship under Connell.[1]

We conclude, in agreement with the Region, that the subcontracting provisions are proviso protected because they were entered into in the context of collective-bargaining relationships embodied by complete collective-bargaining agreements containing terms and conditions of employment, and were not entered into between the Unions and a "stranger" contractor.

FACTS

General Contractors Association (GCA), a multiemployer association in the building and construction industry, negotiates collective-bargaining agreements on behalf of its employer members. Some GCA members do and some do not currently employ construction unit employees; GCA itself has no unit employees. GCA on behalf of its members is signatory to collective-bargaining agreements with Laborers Locals 1010 and 1018 (Unions). These construction industry agreements appear to embody Section 8(f) relationships,[2] and

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[1] Connell Construction Co. v. Plumbers & Pipefitters Local 100, 421 U.S. 616 (1975).

[2] For example, Section II, Recognition and Jurisdiction, Section 1(a), of the GCA agreement with Local 1018 explicitly accords recognition pursuant to Section 8(f). That agreement also contains a seven-day union security clause.

the Charging Party does not contend to the contrary. Both agreements contain the following union signatory restriction on the subcontracting of on-site work:

> The terms, covenants and conditions of this Agreement shall be binding upon all Subcontractors at the site to whom the employer may have sublet all or part of any contract entered into by the Employer. The Employer shall guarantee payments on behalf of its subcontractor(s) for wages and contributions set forth in this Agreement subject to the timely notification by the Union of the delinquency in the payment of wages and benefits fund contributions . . .

ACTION

The subcontracting provisions are protected by the construction industry proviso because they arose in the context of collective-bargaining relationships embodied in complete collective-bargaining agreements; the fact that some association members do not currently employ unit employees is consistent with the parties' Section 8(f) relationships and Section 8(f) pre-hire agreements, and thus does not show the absence of collective-bargaining relationships.

In Connell, the Supreme Court added a nonstatutory requirement for construction industry proviso protection for union signatory subcontracting provisions.[3] The Court reasoned that Congress could not have intended to permit a union to approach a "stranger" contractor and obtain a binding agreement not to deal with nonunion subcontractors, despite the unqualified language in the proviso protecting all subcontracting clauses. The Court therefore held that proviso protection extended only to subcontracting agreements "in the context of collective-bargaining relationships."[4]

That context exists where an employer has historically been party to a master labor agreement between various employer associations and the union and is negotiating over new terms of such an agreement; it exists, as well, when, even though an employer has not previously had a collective

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[3] Connell Const. Co., 421 U.S. at 633. The Court also posited that such agreements might be valid to address the problem of union and nonunion labor working shoulder-to-shoulder on a common-situs.

[4] Id. at 627-30.

bargaining relationship, the union seeks the signatory subcontracting clause as part of complete collective bargaining agreement on behalf of the employer's employees.[5] This is true even if the relationship the parties contemplate is a Section 8(f) relationship resulting from a Section 8(f) pre-hire agreement when the employer has no employees.[6] Thus, as the Board explained in D & E, it is the employer's participation in a complete bargaining relationship covering unit employees that entitles it to the protection of the proviso:[7]

> [S]ubcontracting restrictions in the context of a collective bargaining relationship . . . represent [a union's] interest in protecting employees within the contract unit and furnishing those employees continuity of work and stable jobsite relationships. Although [the employer] does not itself employ [unit employees], it is a signatory to the MLA and as such is bound by the restrictions which apply to the entire contract unit. Accordingly, we conclude that the clauses herein are within the context of a collective-bargaining relationship and are therefore entitled to the protection of the 8(e) proviso.

To be sure, not every demand for an 8(f) agreement is within the proviso. For example, in St. Joseph Equipment Corp.,[8] the Board held that a Section 8(f) agreement was not negotiated in the context of a collective-bargaining relationship because the union entered into that agreement with the employer solely to guarantee fringe benefit payments, and was well aware that the employer had never employed union represented employees nor engaged in work within the union's jurisdiction.[9]

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[5] Los Angeles BCTC (Donald Schriver), 239 NLRB 264, 268 (1978), enfd. 635 F.2d 859 (D.C. Cir. 1980).

[6] Los Angeles BCTC (Donald Schriver), 239 NLRB at 269-279.

[7] Southern Cal. Conf. of Carpenters (D&E Corp.), 243 NLRB 888, 890 (1979)

[8] 302 NLRB 47, 48 (1991).

[9] See also Ironworkers Dist. Council of the Pacific Northwest (Hoffman Construction Co.), 292 NLRB 562, 563 note 5, 578 (union unlawfully sought subcontracting agreement outside collective-bargaining relationship where signatory employer had no unit employees, did not intend to employ any in the future, and union admitted it only wanted to "tie [the employer] to the subcontract clause.")

Similarly, in Glen Falls Building & Construction Trades Council (Indeck Energy) ("Indeck II"),[10] the Board concluded that agreements between a labor council of various craft workers, and a developer and a general contractor on a project, fell outside proviso protection because of the absence of collective-bargaining relationships. The labor council and the developer agreed that the developer would build the project with union labor and would instruct its general contractor to execute a Project Labor Agreement (PLA). In the event, the general contractor did not execute the PLA, but the labor council and the general contractor agreed that all project subcontractors would sign the PLA. The Board held that the labor council agreements were not negotiated in the context of collective-bargaining relationships where the parties understood that the developer had no employees, and neither the developer nor the general contractor would employ any council craft workers on the jobsite. The Board also noted that nothing in either agreement related to terms and conditions of employment for any of the employees of the developer or general contractor; the sole purpose of the agreements was to bind the developer to select a subcontractor who would subcontract work only to employers who would sign the PLA; and neither the developer nor the general contractor were themselves subject to the PLA.[11]

In contrast, in the instant case, GCA and the Unions clearly are not Connell "strangers." To the contrary, they are involved in long standing collective-bargaining relationships, embodied in complete collective-bargaining agreements, which fully satisfied the Connell test. The mere fact that some GCA employer members do not currently employ unit employees does not at all indicate that the parties were not involved in collective-bargaining relationships. To the contrary, the parties' 8(f) collective-bargaining relationships and pre-hire 8(f) agreements are fully consistent with employer members having no current unit employees.

Accordingly, the Region should dismiss these charges, absent withdrawal.

B.J.K.

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[10] 350 NLRB No. 42 (2007).

[11] Id., slip op. at 5.