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

Advice Memorandum

DATE: May 21, 2010

TO : Richard L. Ahearn, Regional Director
Region 19

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

SUBJECT: ILWU Unit 60
(American President Lines, Ltd.)
Case 19-CE-114

560-2575
560-2575-6713
560-7520-7500
560-7520-7533
560-7540
584-1250-5000
584-2588
584-3700
584-3740-5900

The Region submitted this Section 8(e), 8(b)(4)(ii)(A) and (B) case for advice as to whether a series of arbitration decisions enforce lawful work preservation clauses contained in the parties' collective bargaining agreement or whether these arbitration decisions create a de facto "hot cargo" and/or "union signatory" agreement in violation of the Act.

We conclude that the Section 8(e) allegations should be dismissed, absent withdrawal, because the evidence fails to establish that either the Union's grievance was based on an unlawful interpretation of the contract's facially valid work preservation provisions, or that the arbitrator's decision created an unlawful hot cargo or union signatory agreement. We also conclude that there is no merit to the 8(b)(4)(ii)(A) and (B) allegations, because the Union's grievance and pursuit of the arbitration award were "reasonably based" under the Board's decision in BE & K Construction Company,[1] and did not have an unlawful objective.

FACTS

Background

American President Lines, Ltd. ("APL") is a Delaware Corporation that operates ocean-going vessels and marine terminals involved in the transportation of cargo between west coast ports of the United States and ports in various foreign countries. APL is part of a multi-employer bargaining association known as the Alaska Maritime Employers Association

[1] 351 NLRB 451 (2007).

("AMEA"). The AMEA (and APL as one of its members) is, in turn, party to a collective-bargaining agreement, the All Alaska Longshore Agreement, or AALA, with the International Longshore & Warehouse Union Alaska Longshore Division Unit 60 ("Union" or "ILWU"), covering a multi-employer unit of longshore workers in the ports of Alaska.

APL's large ocean-going vessels cannot call at many of Alaska's small remote ports, as these remote ports are only accessible by barge and, in some locations, by truck. Because APL does not own barges, it enters into agreements with various independent barge operators, such as Samson Tug and Barge ("Samson"), to perform the inter-port work and bring the export product from the approximately 27 remote Alaskan ports, including Seward, to APL's Dutch Harbor location. Dutch Harbor, which is located toward the western end of the Aleutian Islands, serves as APL's deep water port and main loading location.

Specifically, APL contracts with Samson to move export product from Seward to Dutch Harbor. Pursuant to the AALA, at Dutch Harbor APL employs ILWU labor to load its empty containers onto Samson's barges. Samson then transports these containers by barge to Seward. Once in Seward, Samson employees, who are members of the Marine Engineers' Beneficial Association (MEBA), off-load the empty containers at the Seward Railroad dock. APL's customers, the seafood harvesting entities that utilize its transport services, fill or "stuff" the containers with export product, and Samson's MEBA-represented employees then load the filled containers back onto a Samson barge. Samson then transports the loaded barges with the filled containers to APL's Dutch Harbor terminal where APL's ILWU workforce unloads them.

Samson has never been a member of the AMEA and has never been a part of AMEA's multi-employer bargaining unit with the ILWU. Samson has never directly employed ILWU labor in Seward. In 2001-2002, Samson used North Star Stevedore ("North Star"), which employs ILWU labor, as a contractor to perform APL work in Seward. Prior to 2003, North Star was a member of the AMEA, but in 2003 withdrew from both the AMEA and the multi-employer bargaining unit. Samson has not used North Star for any of APL's cargo work in Seward since approximately 2003.

Relevant Contractual Provisions

The AALA has existed for decades, and its provisions regarding recognition and work preservation have remained unchanged during this time. Section 1 of the AALA describes in detail the nature and scope of traditional ILWU longshore work in the ports of Alaska. Section 1.81 binds APL, as an AMEA member, to the AALA Master Agreement. Section 1.9 has at all material times included Seward as "an ILWU port" covered by the

AALA. Section 7.641 contains a broad work preservation clause, stating in full:

> In further consideration of the terms and conditions set forth in this Contract the Employer hereby assures the Union that it will use its best efforts and act in good faith in preserving as much as possible all the work covered by this Contract for the registered work force.

The registered work force, as referenced in Section 7.641 and throughout the AALA, refers to the longshore workers jointly registered by ILWU and the Employers to perform cargo-handling work in each of the ILWU ports described in Section 1.9.

Arbitration History

On August 17, 2006, the Union filed a grievance against APL protesting the use of non-ILWU employees to offload 50 APL containers from a Samson barge in Seward. The Union claimed that, under the AALA, Seward work should be assigned to ILWU-bargaining unit members because bargaining unit members had previously performed the Seward work through an another AMEA member employer, North Star, and APL's agreement with Samson permitted APL to control the Seward work. The grievance progressed to an Area Arbitrator for Alaska ("Alaska Arbitrator") under the AALA. In the first proceeding before the Alaska Arbitrator, the parties waived an evidentiary hearing and submitted the matter on briefs. APL argued that requiring it to award the Seward work to the Union would constitute a violation of Section 8(e) of the Act.

In a decision dated December 3, 2006, the Alaska Arbitrator held that APL had violated the AALA by having non-ILWU personnel load and unload APL containers in Seward. As to a remedy, the decision stated, "[t]his decision requires that the work of loading and unloading APL cargo be assigned to ILWU Unit 60." In reaching his decision, the Alaska Arbitrator specifically found that, under the contract, the unloading and loading of containers at Seward was ILWU-bargaining unit work; bargaining unit members had previously performed the APL work in Seward through a stevedore signatory to the AALA (North Star); and that APL has control of the work performed by Samson. The Alaska Arbitrator also noted that nothing in his decision required APL to cease doing business with Samson or any other contracting carrier so long as ILWU-bargaining unit employees performed the loading and unloading of APL containers in Seward, and that nothing in the record indicated that the Union was attempting to require those who contract with APL to adhere to the AALA.

APL appealed the Alaska Arbitrator's decision to the Coast Arbitrator. The Coast Arbitrator decided on April 7, 2008, to remand the case to the Alaska Arbitrator to conduct an

evidentiary hearing. Accordingly, the Alaska Arbitrator held an evidentiary hearing on June 8, 2008, during which testimony was taken under oath from APL and Union witnesses. The Union presented evidence, in the form of both documents and testimony, to establish that ILWU-bargaining unit members had traditionally performed the work in controversy through an AALA signatory stevedore under the terms of the AALA, and that APL had the right to control the Seward work. On November 18, 2008, the Alaska Arbitrator issued a second decision, affirming his findings from his December 3, 2006 decision and again awarding the Seward work to the Union. In July 2009, the parties agreed to submit the grievance to the Coastal Arbitrator for a final and binding determination. On September 22, 2009, the Coastal Arbitrator ruled that an appeal on the merits was not proper unless and until APL sufficiently implemented the Alaska Arbitrator's decision by assigning the cargo-handling work in Seward to the Union's workforce. The Coastal Arbitrator declined to address the NLRA issues and directed APL to take such issues to the Board.

The Charge

Pursuant to the Coastal Arbitrator's instruction, on March 18, 2010, APL filed this charge, alleging that the Union has sought and obtained a final arbitration award for the unlawful purpose of work acquisition and to force APL to cease doing business with Samson. APL also alleges that the Alaska Arbitrator's award created a de facto union signatory agreement because it requires Samson to become an AALA signatory.

ACTION

We conclude that the Section 8(e) allegations should be dismissed, absent withdrawal, because the evidence fails to establish that either the Union's grievance was based on an unlawful interpretation of the contract's facially valid work preservation provisions, or that the arbitrator's decision created an unlawful hot cargo or union signatory agreement. We also conclude that there is no merit to the 8(b)(4)(ii)(A) and (B) allegations, because the Union's grievance and pursuit of the arbitration award were "reasonably based" under the Board's decision in BE & K Construction Company,[2] and did not have an unlawful objective.

I. Section 8(e) Allegations

Section 8(e) prohibits a union and an employer from entering into any agreement where the employer agrees to cease doing business with any other person or employer. Section 8(e) does not, however, prohibit all coercion or agreements that may

[2] 351 NLRB 451.

result in a cessation of business with another employer, but rather distinguishes between lawful "primary" and unlawful "secondary" activity.[3] "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."[4] Work preservation clauses which restrict the performance of "unit work, or at least fairly claimable unit work, to unit members in the employ of the contracting employer are not violative of Section 8(e). . . . These clauses are considered primary even though they may have the incidental effect of causing the employer to cease doing business with other persons."[5] Hence, Section 8(e) does not prohibit conduct or agreements seeking to preserve or acquire traditional bargaining unit work for bargaining unit employees— "fairly claimable" work—so long as the contracting employer has the power to assign the disputed work to the unit employees.[6]

Accordingly, despite Section 8(e)'s broad language, the Board has held that work preservation clauses are lawful even though they have an incidental effect of limiting those with whom the signatory employer may do business.[7] For a union's agreement to be found primary and lawful, it must: (1) have as its objective the preservation of work traditionally performed by employees represented by the union, rather than some secondary goal;[8] and (2) be directed at work that the contracting employer has the power to give employees (the right to control test).[9]

---

[3] National Woodwork Mfrs. Assn. v. NLRB, 386 U.S. 612, 635 (1967) (contract clause with work preservation object did not violate Section 8(e), and strike against employer for allegedly violating the contract clause did not violate 8(b)(4)(B)).

[4] Id. at 645.

[5] Retail Clerks Local 1288 (Meads Market), 163 NLRB 817, 818-819 (1967), enfd. 390 F.2d 858, 861 (D.C. Cir. 1968).

[6] NLRB v. Longshoreman ILA, 447 U.S. 490, 504 (1980).

[7] Associated General Contractors, 280 NLRB 698, 701 (1986).

[8] National Woodwork Mfrs. Assn. v. NLRB, 386 U.S. at 645; Teamsters Local 814 (Santini Bros.), 208 NLRB 184, 198-199 (1974).

[9] NLRB v. International Longshoreman's Ass'n (American Trucking Ass'n) (ILA II), 473 U.S. 61 (1985); Pipe Fitters Local 438 (George Koch Sons, Inc.), 201 NLRB 59, 62-63 (1973), enfd. 490 F.2d 323 (4th Cir. 1973). See also United Food and Commercial Workers Union Local No. 367 (Quality Food Centers, Inc.), 333 NLRB 771, 772 (2001) ("The right to control test resolves—after

A. Because the Union was seeking to preserve "fairly claimable work" rather than acquire work, the Union has not interpreted the facially lawful clause in an unlawful manner and the Arbitrator has not applied the clause in an unlawful manner

Here, no party argues that any provision of the AALA is unlawful on its face under Section 8(e), and we similarly conclude that the provisions of the AALA are lawful work preservation clauses. However, that conclusion does not end our analysis, because although a work preservation provision may be lawful on its face, a union can violate Section 8(e) by pursuing an unlawful interpretation of a facially valid clause, and obtaining an arbitral award that applies the clause in circumstances that violate Section 8(e).[10]

For example, in Carpenters Local 745 (SC Pacific),[11] the Board found facially lawful under Section 8(e) a clause that prevented a signatory contractor from "illegally using an alter-ego operation to escape the obligations of its collective bargaining agreement." The union filed a grievance contending that signatory employer S & M had contravened this provision by using nonunion SC as a "double-breasted operation." The union's theory was that the provision prohibited double-breasting altogether, that is, a signatory was prohibited from common ownership with any non-signatory entity, without regard to common management or common control of labor relations. The arbitral panel upheld the grievance and the union sought court enforcement of the award.[12] The Board found that the union violated 8(e) by urging this unlawful interpretation of the valid clause and obtaining the arbitral award accepting that unlawful interpretation.[13]

---

the work has been found fairly claimable—whether the union exerted pressure on the proper (primary) employer.").

[10] Newspaper and Mail Deliverers' Union of New York, 337 NLRB 608, 609 (2002), citing Sheet Metal Workers Local 27 (Thomas Roofing), 321 NLRB 540 (1996) ("A facially valid contract provision may violate Section 8(e) if it is authoritatively construed by an arbitrator as having a meaning that is inconsistent with Section 8(e). Such a construction will provide the necessary 'agreement' for an 8(e) violation.").

[11] 312 NLRB 904 fn. 2 (1993), enfd. 73 F.3d 370 (9th Cir. 1995).

[12] Id. at 903.

[13] Id. See also Sheet Metal Workers Local 27, 321 NLRB at 540 (union violated Section 8(e) by filing a grievance and obtaining an award based on its unlawful interpretation of a facially valid union signatory subcontracting clause regarding the prefabrication of custom kitchen equipment; the unit employees

In SC Pacific, the Board clarified that it was not finding a violation simply because, as it turned out, the union's "understanding of the facts [regarding the targeted employer's relationship to the signatory] turned out to be wrong." Rather, the violation was grounded in the union's theory of the grievance: "Our decision turns on our finding that the Respondent's theory of what would constitute a contract violation amounted to enforcing the clause as if it were the equivalent of a clause that would be unlawful on its face," that is, that the clause prohibited a signatory employer from merely "*owning* another company that does business in the same industry unless that other company is brought under the master agreement."[14]

Unlike SC Pacific, here the Union did not pursue an unlawful interpretation of the facially lawful clause, and the arbitrator did not interpret the clause in an unlawful manner. Rather, the Union argued that the Seward work was ILWU-bargaining unit work under the contract and that ILWU-represented employees should perform this work. The Alaska Arbitrator agreed, based on evidence that bargaining unit members had previously performed the Seward work through a stevedore signatory to the AALA, and that APL has control of the Seward work. Accordingly, inherent in the Alaska Arbitrator's decision was the conclusion that the Seward work was fairly claimable,[15] as it was work traditionally performed by bargaining unit members and APL had the power to give it to them.

B. The Alaska Arbitrator's decision does not create an unlawful union signatory agreement

Contract clauses which prohibit subcontracting entirely, or require subcontractors to employ unit employees, have a primary preservation object and are lawful.[16] However, the Board has found that agreements that require adoption of union recognition and security, grievance procedures, and other noneconomic terms

---

had never fabricated the custom kitchen equipment at issue and the union therefore did not establish a valid work preservation claim under the subcontracting clause).

[14] SC Pacific, 312 NLRB at 904.

[15] Newspaper and Mail Deliverers' Union (Hudson County News Co.), 298 NLRB 564, 566 (1990) ("Fairly claimable work is work that is identical to or very similar to that already performed by the bargaining unit and that bargaining unit members have the necessary skill and are otherwise able to perform.").

[16] Newspaper and Mail Deliverers (Hudson News), 298 NLRB 564 (1990); Milk Drivers Union Local 753 (Pure Milk Assoc.), 141 NLRB 1237, 1240 (1963), enfd. 335 F.2d 326 (7th Cir. 1964).

that are not needed to preserve work opportunities for unit employees constitute unlawful union signatory clauses rather than lawful union standards clauses.[17]

Here, APL argues that although the AALA does not contain a union signatory clause, the Alaska Arbitrator's decision and award has created a de facto union signatory agreement because the award requires Samson to become a party to the AALA. However, the arbitrator's decision itself belies such a contention. First, the Alaska Arbitrator specifically stated that nothing in the record indicated that the Union was attempting to require those who contract with APL to adhere to the AALA. Second, the agreement requires only that if APL performs work in Seward that ILWU-represented employees perform the loading and unloading of APL's containers. The Alaska Arbitrator's award pointed out that this assignment could be effectuated by any number of alternatives including sending an APL manager to supervise the work, and states that APL can modify its agreement with Samson if necessary. Therefore, by its very terms, the Alaska Arbitrator's decision does not require that Samson take any affirmative action, let alone require that Samson become a signatory to the AALA.

II. The Sections 8(b)(4)(ii)(A) and (B) Allegations

A grievance seeking an unlawful secondary interpretation of a contract may violate Sections 8(b)(4)(ii)(A) or (B).[18] Whether a grievance is coercion within the meaning of Section 8(b)(4)(ii) is generally determined under the principles of Bill Johnson's Restaurant v. NLRB,[19] as interpreted and modified in BE & K Construction Company.[20] That is, a grievance is unlawful coercion only if it is both objectively and subjectively baseless at the time it was filed,[21] or if it has an unlawful

---

[17] See Retail Clerks Union 770 (Hughes Markets), 218 NLRB 680, 683 (1975); Electrical Workers (IBEW) Local 437 (Dimeo Construction Co.), 180 NLRB 420, 421 (1969).

[18] Elevator Constructors (Long Elevator), 289 NLRB 1095, 1095 (1988), enfd. 902 F.2d 1297 (8th Cir. 1990) (union violated Section 8(b)(4)(ii)(A) by pursuing a grievance premised on a contract interpretation that necessarily would constitute a de facto hot cargo provision in violation of Section 8(e)).

[19] 461 U.S. 731, 743-745 (1983).

[20] 351 NLRB 451.

[21] BE & K Construction Co., 351 NLRB at 455. See also Longshoremen ILWU Local 7 (Georgia-Pacific), 291 NLRB 89, 93 (1988), review denied 892 F.2d 130 (D.C. Cir. 1989); Teamsters Local 483 (Ida Cal), 289 NLRB 924, 925 (1988) (no 8(b)(4)(ii)(A) violation where union grieved and sought to compel arbitration

object.[22] As to the latter, a grievance has an unlawful object if it is predicated on a reading of the contract that would be unlawful.[23] Given our discussion and conclusions above that the Union pursued a lawful work preservation object and that APL has the right to control the Seward work, we further conclude that the grievance and arbitration were clearly not baseless nor in pursuit of an unlawful object. Accordingly, the Union did not violate Sections 8(b)(4)(A) and (B) by pursuing the grievance and obtaining the arbitration award.

CONCLUSION

In sum, the Union's grievance and the arbitrator's decision were not based on an unlawful interpretation of the AALA's lawful work preservation provisions. Additionally, the arbitrator's interpretation of the AALA does not create an unlawful union signatory agreement. Finally, the Union's pursuit of its grievance was "reasonably based" under the Board's decision in BE & K Construction, and the Union's actions did not have an unlawful objective. Accordingly, we conclude that the Region should dismiss the charge, absent withdrawal.

B.J.K.

---

through a Section 301 action over whether owner-operators were covered by labor agreement, where union's contention that owner-operators were employees was reasonable, union did not strike or picket, and there had been no prior adjudicatory determination regarding the owner-operators' status); Teamsters Local 83 (Cahill Trucking), 277 NLRB 1286, 1290 (1985) (grievance filed to enforce a colorable contract claim is not coercion within meaning of Section 8(b)(4)(ii)(A) or (B)); Heavy, Highway, Bldg. and Constr. Teamsters, 227 NLRB 269, 274 (1976) (same).

[22] Long Elevator, 289 NLRB 1095; Service Employees Local 32B-32J (Nevins Realty), 313 NLRB 392, 392, 401-402 (1993), enfd. in pert. part 68 F.3d 490 (D.C. Cir. 1995). See also Bill Johnson's Restaurant v. NLRB, 461 U.S. at 737 n.5.

[23] Long Elevator, 289 NLRB at 1095 (union violated Section 8(b)(4)(ii)(A) by pursuing a grievance premised on a contract interpretation that necessarily would constitute a de facto hot cargo provision in violation of Section 8(e)). Compare Teamsters Local 483 (Ida Cal), 289 NLRB at 925 (absent a clearly unlawful object, grievance was not coercive under Section 8(b)(4)(ii)(A)).