Miscellaneous Drivers, Helpers, Healthcare and Public Employees Union Local No. 610, affiliated with the International Brotherhood of Teamsters, AFL–CIO *and* Kutis Funeral Home, Inc. Cases 14–CC–2181 and 14–CE–77

December 16, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS OVIATT AND RAUDABAUGH

On March 2, 1992, Administrative Law Judge Nancy M. Sherman issued the attached decision. The General Counsel filed exceptions and a supporting brief and the Respondent filed an answering 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 and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

I. INTRODUCTION

The Employer, a funeral establishment, is in the business of providing funeral services in the St. Louis, Missouri area. The Respondent has represented a bargaining unit of the Employer's limousine and hearse drivers for over 40 years. The parties' most recent collective-bargaining agreement was effective from July 1, 1989, to June 30, 1992.

The complaint alleges that the Respondent violated Section 8(b)(4)(i) and (ii)(A) and Section 8(e) of the Act by entering into an agreement, by maintaining a grievance, and by seeking to enforce through arbitration and judicial action a provision (art. XVI, sec. 18) in the parties' bargaining agreement that provides:

> Any funeral establishment hiring full time chauffeurs may make first call body removals for all other Employers who also hire full time chauffeurs, and may do the same for other non-hiring firms. In all other respects, *the previous practice of renting and trading livery equipment between all signatories to the contract shall prevail*. [Emphasis added.]

The General Counsel contends that this provision, as interpreted at arbitration, has an impermissible ''cease doing business'' secondary objective favoring union signatories at the expense of nonsignatory entities and that the provision is not privileged by any work-preservation interest.

The judge dismissed the complaint. Although she found that the provision had a cease-doing-business objective with respect to nonsignatory firms that fell literally within the proscription of Section 8(e), the judge concluded that the provision was lawful because it sought to preserve work for drivers, known as ''extra board'' drivers, and this, in turn, also benefited the Employer's regular drivers. The General Counsel contends that the judge's findings with respect to work preservation are erroneous.[1] For the reasons described below, we find merit to the General Counsel's exceptions and find that the Respondent violated the Act, as alleged.[2]

II. FACTS

The Employer employs three drivers. Because it has more limousines and hearses than it has drivers, it is not uncommon for the Employer to require additional drivers and vehicles (livery) to service its customers on busy days. On occasions when it requires an additional driver to drive a vehicle that it owns, the Employer uses a driver from a permanent board of extra drivers known as the ''extra board.'' The extra board is administered by a joint committee of the Respondent's representatives and representatives of funeral service establishments signatory to bargaining agreements with the Respondent, including the Employer. The extra board is composed of approximately five or six drivers. These drivers are available to employers whose need for drivers and vehicles, like the Employer's, may fluctuate and exceed available drivers on hand.

The 1989–1992 bargaining agreement between the Employer and the Respondent sets forth terms and conditions of employment covering extra board drivers. This agreement, as well as other bargaining agreements with union signatories, requires signatory employers either to call an extra board driver directly when seeking additional drivers or to use a referral service operated by the Respondent. The agreements give referral preference to extra board drivers. The Employer partici-

[1] The Respondent filed no exceptions and does not take issue with the judge's finding that the contractual provision, as interpreted, literally constitutes an agreement to cease doing business with nonsignatory firms. In its answering brief, the Respondent's argument is limited to the contention that the provision is privileged by work-preservation interests.

[2] The General Counsel excepts to the judge's finding that the General Counsel conceded, in its brief to her, that the Sec. 8(b)(4)(i) and (ii)(A) complaint allegations are barred by Sec. 10(b) of the Act. The General Counsel contends that, contrary to the judge's finding, he pointed out in his posthearing brief that, because both the arbitration award and the Respondent's Sec. 301 suit to enforce it fell within 6 months of the filed charges, Sec. 10(b) was not an issue. We find merit to that contention. The complaint alleges, inter alia, that the Respondent unlawfully ''entered into'' the trading provision and reaffirmed the provision by obtaining an arbitration award. We agree with the General Counsel that, by obtaining the award, the Respondent reentered into the 8(e) agreement within the 10(b) period. We also note that the Respondent sought to enforce the award by judicial action within the 10(b) period. *Carpenters District Council of Los Angeles (Coast Construction)*, 242 NLRB 801, 804 (1979), enfd. 709 F.2d 532 (9th Cir. 1983).

pates, along with other signatories, in making monthly fringe benefit contributions on behalf of extra board drivers and in administering the board. In the event of layoff, the Employer's drivers have the contractual right to go on the extra board.

On occasions when the Employer needs extra drivers *and* vehicles, it initially attempts to borrow manned equipment by trade from other signatories with the understanding that the favor will be returned by trade, if possible, on occasions when the trading partner so requests. When equipment is not available by trade, however, the Employer must secure equipment and drivers elsewhere. Prior to April 1990, the Employer generally met its needs in such circumstances by renting drivers and equipment from Hoppe Livery Company (Hoppe), with whom the Respondent had a collective-bargaining relationship. When employees represented by the Union were unavailable, Hoppe assisted the Employer in obtaining drivers and equipment from nonunion sources or the Employer did so directly. In April 1990, however, Hoppe went out of business. Thereafter, if the Employer was unable to secure drivers and equipment from its usual trading partners, it simply used nonunion personnel as it had in the past.

After Hoppe's demise, the Respondent insisted that, before using drivers not represented by it, the Employer must first attempt to trade with Hoffmeister Mortuaries, Inc. (Hoffmeister), a union signatory, pursuant to the aforementioned trading provision of the Employer's bargaining agreement with the Respondent. When the Employer declined to trade with Hoffmeister because it had not done so in the past and because Hoffmeister was its major business competitor, the Respondent filed a grievance against the Employer seeking an award that the Employer must obtain, as needed, ''equipment and drivers from other signatories to the labor agreement.'' It is undisputed that, by virtue of this grievance, the Respondent claimed that the Employer could not use livery and drivers from nonunion firms before seeking to trade with Hoffmeister.

On April 10, 1991, the arbitrator found that the trading provision in the bargaining agreement ''prohibits all signatory establishments from hiring non-union livery without first resorting to trading.'' The arbitrator ordered that the Employer ''is required to attempt to trade with Hoffmeister prior to resorting to hire of non-union livery.'' When the Employer refused to comply with the award, the Respondent filed suit under Section 301 of the Act seeking enforcement of the award in the United States District Court for the Eastern District of Missouri. That action has been stayed pending disposition of the instant case.

III. DISCUSSION

At the outset, we agree with the judge that the trading provision, as interpreted by the arbitrator in his award, constitutes an agreement to ''cease doing business'' with nonsignatory, nonunion firms. Under the arbitrator's interpretation, the provision requires the Employer to trade with and give preference to union signatories, such as Hoffmeister, before obtaining livery and drivers elsewhere. Put another way, the provision requires the Employer to cease doing business with nonunion livery firms in favor of union signatory Hoffmeister. Thus, the provision falls literally within the proscription of Section 8(e) making it an unfair labor practice ''to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees . . . to cease doing business with any other person.''

Nevertheless, because Section 8(e) applies only to agreements with secondary objectives, an agreement with primary objectives, such as the preservation of existing unit work, does not violate Section 8(e) even if a literal application of the Section's terms seems to prohibit the agreement. As the Supreme Court stated in *National Woodwork Mfrs. Assn. v. NLRB*, 386 U.S. 612, 645 (1967): ''the touchstone is whether the agreement or its maintenance is addressed to the labor relations of the contracting employer vis a vis his own employees'' or is intended to benefit union members generally. The issue in this case, therefore, is whether the award requiring the Employer to trade with Hoffmeister before using nonunion livery is addressed to the labor relations of the Employer or to union interests generally.

Before we examine whether the provision, as interpreted, is addressed to the labor relations of the Employer, we first consider the scope of the arbitration award. The award, as noted, requires the Employer to trade with signatory Hoffmeister rather than doing business with nonsignatory entities. The award on its face does not pertain to the Employer's use of the extra board or, for that matter, to Hoffmeister's use of the extra board. Accordingly, when assessing whether the provision, as interpreted by the award, raises a primary (work-preservation) interest, it is important to bear in mind that the award's scope pertains to the Employer's *trading with Hoffmeister*, not to the Employer's use of the extra board. It follows, therefore, that if the provision is privileged by work-preservation interests, there must be a correlation between the Employer's trading with Hoffmeister (in lieu of using nonunion signatories), and the Employer's use of the extra board.

In dismissing the complaint, the judge in effect found that such a correlation existed and, thus, that the Respondent acted to enforce the contractual trading

provision for valid work-preservation reasons. The judge reasoned as follows: that the provision preserved work opportunities for drivers on the extra board because these drivers had contractual rights to drive vehicles traded or rented between signatory employers; that extra board drivers become employees of the Employer covered by negotiated wage rates contained in the bargaining agreement; and that the preservation of job opportunities for extra board drivers benefited the Employer's regular employees because these employees had the contractual right to be placed on the extra board during periods of layoff. The judge concluded, therefore, that the extra board drivers were part of the ''relevant work unit'' for work-preservation purposes, citing *Operating Engineers Local 12 (Griffith Co.)*, 212 NLRB 343 (1974), revd. and remanded 545 F.2d 1194 (9th Cir. 1976), cert. denied 434 U.S. 854 (1977), and *Electrical Workers IBEW Local 46 (Puget Sound NECA)*, 303 NLRB 48 (1991).

Contrary to the judge, we find that any benefits that inure to the extra board drivers by virtue of the trading provision's application to Hoffmeister do not establish a work-preservation interest with respect to the *Employer's* own employees. First and foremost, the provision, as interpreted by the arbitrator, has no direct bearing on the *Employer's* use of the extra board. Thus, the Respondent did not seek an award pertaining to the Employer's decision to use, or failure to use, the extra board. Rather, the award is directed to the Employer's failure to trade vehicles and drivers with Hoffmeister. Further, the role of the extra board is, at best, peripheral to the contractual provision at issue in the award. Thus, use of the extra board by Hoffmeister in the trading process would only arise if Hoffmeister's own employees were unavailable and Hoffmeister placed extra board employees on its payroll.[3] As a result, the primary effect of the trading provision is to benefit Hoffmeister's regular employees and not the Employer's.

Accordingly, we find the provision benefits and serves union interests generally. Indeed, that this was the overriding objective of the Respondent's conduct is demonstrated by the Respondent's brief to the arbitrator, in which it contended that the Employer's failure to trade with Hoffmeister eventually could lead to the following scenario:

> If a signatory employer has available equipment which sits idle while non-signatory equipment and drivers are used, eventually the equipment which sits idle will be eliminated. Ultimately full-time drivers whose employers are unable to support a full-time driver with its own business will have to eliminate such positions unless by trading with other signatories a sufficient level of combined business exists to justify the continued employment of the driver and maintenance of the equipment.

We are not persuaded by the judge's comment that this contention ''is attributable to the fact that regular drivers would be contractually entitled to keep their jobs even when the extra board is unemployed.'' Irrespective of that fact, the Respondent clearly was concerned that the failure to trade with Hoffmeister would lead to the eventual loss of jobs for full-time drivers outside the unit of the Employer's drivers.

Further, any benefit flowing to the extra board by virtue of the trading provision's application to Hoffmeister is highly attenuated with respect to the extra board's relationship to the Employer. The Employer's employees and Hoffmeister's employees are in separate bargaining units covered by separate bargaining agreements. If Hoffmeister secures an employee from the extra board and puts that employee on its payroll, for its own use or for trading purposes, that employee is covered by the terms of Hoffmeister's bargaining agreement, just as extra board employees secured by the Employer are paid by the Employer and are covered by the Employer's bargaining agreement. Accordingly, the arbitration award, even if it is viewed as pertaining to the extra board, concerns the extra board vis-a-vis its use by Hoffmeister, not by the Employer. In these circumstances, the provision does not satisfy the requirement of *National Woodwork* that it be ''addressed to the labor relations of the contracting employer vis a vis his own employees.''

We also find that the contractual right of the Employer's employees to be placed on the extra board during periods of layoff is insufficient to establish a work-preservation interest that would save the clause in question. Thus, there is no record evidence indicating that there *are* laid-off employees of the Employer on the extra board and, indeed, it is undisputed, as the judge found, that it is ''virtually impossible'' to layoff employees under the guaranteed employment provisions of the Employer's bargaining agreement.

Finally, we disagree with the judge that the contractual trading provision, as interpreted by the arbitration award, is privileged, as applied to the Employer's trading with Hoffmeister, on the basis that the extra board drivers are part of a ''relevant work unit'' within the meaning of *Griffith*, supra. First, the factors enumerated by the judge to show a close relationship or community of interest between the extra board drivers and the Employer's drivers concern instances, as the judge found, when the Employer itself calls for an extra board driver and puts that driver on its payroll. The Respondent's grievance (and the award) however, does not, as we have noted, pertain to instances when the Employer itself calls for an extra board driver. The

[3] The judge made no finding specific to Hoffmeister with regard to the extent of Hoffmeister's use of the extra board in conjunction with the trading process.

award concerns the failure to trade with Hoffmeister and the use of nonunion livery. Accordingly, much of the judge's rationale for finding a work-preservation objective based on the ''relevant work unit'' is inapplicable to the conduct actually alleged as a violation in the complaint.

We also find that *Griffith* and *Puget Sound*, supra, relied on by the judge to find a relevant work unit, are inapposite. Both *Griffith* and *Puget Sound* are cases involving the construction industry, an industry which has been given special consideration under the Act because of its unique nature. Thus, in *Griffith*, the Board found that a clause that required employer-members of a multiemployer benefit fund to cease doing business with other members who were delinquent in their contributions to joint trust funds did not have an unlawful secondary objective because employees of all the employers had a common interest in the stability of the trust funds, given that the employees went from job to job and employer to employer with no certainty that they would remain employed in any particular unit for any period of time.

In *Puget Sound*, the Board found that a union did not pursue a contractual grievance in violation of Section 8(e) when it sought to forbid an employer association from operating job referral and apprenticeship systems for nonunion employers parallel to the union's contractually established systems for union employers. The Board concluded that the employer association's conduct undermined the established systems in virtually the same manner as if it were to hire employees outside the hiring hall notwithstanding the hall's availability of qualified individuals. And in *Puget Sound*, as it had in *Griffith*, the Board emphasized the unique circumstances of the construction industry.[4] In *Puget Sound*, supra at 51, the Board noted:

> We are particularly reluctant to find that the Union's efforts to protect its hiring hall arrangements violate Section 8(e) in view of the unique statutory treatment afforded such arrangements in the Act. By adding Section 8(f) to the Act, Congress specifically approved of the use of hiring halls in the building and construction industry—notwithstanding the fact that an exclusive hiring hall agreement plainly restricts a signatory employer's ability to ''do business'' with alternative referral services.

In the instant case, the record is devoid of any evidence indicating that the circumstances here—the failure to trade with Hoffmeister—are analogous to the acts of the construction industry employers in the above-cited cases. Further, there is nothing in the Act with regard to ''doing business'' in the funeral industry that is equivalent to the unique statutory treatment afforded the construction industry. Accordingly, we find that *Griffith* and *Puget Sound* do not lend support to a finding that the Respondent's conduct was primary in character. We find, therefore, that the Respondent has violated Section 8(b)(4)(A) and Section 8(e) of the Act, as alleged in the complaint.

[4] Indeed, in *Griffith*, the Board specifically did not pass on the validity of any similar restrictive agreements that may have existed in industries outside the construction industry. 212 NLRB at 344.

CONCLUSIONS OF LAW

1. By reentering into a collective-bargaining agreement which effectively provides in article XVI, section 18, that the Employer must cease doing business with nonsignatory employers, or cease doing business with any other employer in violation of Section 8(e) of the Act; by maintaining a grievance, obtaining an arbitration award, and filing for court enforcement of the award in order to force or require the Employer to enter into an agreement prohibited by Section 8(e), the Respondent has engaged in unfair labor practices in violation of Section 8(b)(4)(i) and (ii)(A) and Section 8(e) of the Act.

2. The above unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the purposes of the Act.

ORDER

The National Labor Relations Board orders that the Respondent, Miscellaneous Drivers, Helpers, Healthcare and Public Employees Union Local No. 610, affiliated with the International Brotherhood of Teamsters, AFL–CIO, St. Louis, Missouri, its officers, agents, and representatives, shall

1. Cease and desist from reentering into, enforcing, or giving effect to the trading provisions of article XVI, section 18, of its collective-bargaining agreement with Kutis Funeral Home, Inc., which forces or requires Kutis Funeral Home, Inc. to cease or refrain, or to agree to cease or refrain, from handling, using, selling, transporting, or otherwise dealing in the products of any other employers, or from doing business with any other employer or person, in violation of Section 8(e) of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Withdraw all grievances against Kutis Funeral Home concerning the trading provisions of article XVI, section 18, of its collective-bargaining agreement with Kutis Funeral Home.

(b) Withdraw its cause of action against Kutis Funeral Home filed in the United States District Court for the Eastern District of Missouri, Eastern Division in Civil Action No. 91-1134-C-4 pursuant to Section 301 of the Act seeking to enforce an arbitration award sustaining the Respondent's grievance and adopting the Respondent's interpretation of the trading provisions of its collective-bargaining agreement with Kutis Funeral Home.

(c) Post at its offices and meeting halls in St. Louis, Missouri, copies of the attached notice marked ''Appendix.''[5] Copies of the notice, on forms provided by the Regional Director for Region 14, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Furnish to the Regional Director for Region 14 signed copies of the notice for posting by Kutis Funeral Home, Inc. if it is willing, in the places where notices to employees are customarily posted. Copies of the notice, to be furnished by the Regional Director for Region 14, after being signed by the Respondent's representative, shall be forthwith returned to the Regional Director for such posting.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

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

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT enter into, enforce, or give effect to the trading provisions of article XVl, section 18, of our collective-bargaining agreement with Kutis Funeral Home, Inc., which forces or requires Kutis Funeral Home, Inc. to cease or refrain, or to agree to cease or refrain, from handling, using, selling, transporting, or otherwise dealing in the products of any other employers, or from doing business with any other employer or person in violation of Section 8(e) of the Act.

WE WILL withdraw all grievances against Kutis Funeral Home concerning the trading provisions of article XVI, section 18 of our collective-bargaining agreement with Kutis Funeral Home.

WE WILL withdraw our cause of action against Kutis Funeral Home filed in the United States District Court for the Eastern District of Missouri, Eastern Division in Civil Action No. 91-1134-C-4 pursuant to Section 301 of the Act seeking to enforce an arbitration award sustaining our grievance and adopting our interpretation of the trading provisions of our collective-bargaining agreement with Kutis Funeral Home.

MISCELLANEOUS DRIVERS, HELPERS, HEALTHCARE AND PUBLIC EMPLOYEES UNION LOCAL NO. 610, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL–CIO

Michael T. Jamison, Esq., for the General Counsel.
George O. Suggs, Esq., of St. Louis, Missouri, for the Respondent.
Alan I. Berger, Esq., of St. Louis, Missouri, for the Charging Party.

DECISION

STATEMENT OF THE CASE

NANCY M. SHERMAN, Administrative Law Judge. These consolidated cases were heard before me on November 14, 1991, pursuant to charges filed on August 20, 1991, by Kutis Funeral Home, Inc., (KFH) against Respondent Miscellaneous Drivers, Helpers, Healthcare and Public Employees Union Local No. 610, affiliated with the International Brotherhood of Teamsters, AFL–CIO (Respondent or the Union) and a consolidated complaint issued on September 18, 1991, and amended on October 25, 1991. The complaint as amended alleges that Respondent violated Section 8(b)(4)(i) and (ii)(A) of the National Labor Relations Act (the Act) by obtaining an April 1991 arbitrator's award sustaining a grievance filed in May 1990 by the Union against KFH, which award adopted the Union's interpretation of a January 1990 bargaining agreement between the Union and KFH so as to require KFH to cease or refrain from doing business with other employers not signatory to the January 1990 bargaining agreement (see infra fn. 12). The complaint before me further alleges that the Union violated Section 8(e) of the Act by filing with a United States District Court a May 1991 complaint against KFH seeking to enforce the arbitrator's award.

On the basis of the entire record, including the demeanor of the witnesses who testified before me, and after due consideration of the briefs filed by Respondent, KFH, and counsel for the General Counsel (the General Counsel), I make the following

FINDINGS OF FACT

I. JURISDICTION

The Union is a labor organization within the meaning of Section 2(5) of the Act. KFH is a corporation with its prin-

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

cipal office and place of business in St. Louis, Missouri, where it provides funeral services. During the 12-month period ending on August 31, 1991, KFH derived gross annual revenues in excess of $500,000 and purchased and received at its St. Louis facilities products, goods, and materials valued in excess of $50,000 directly from points outside Missouri. I find that, as Respondent Union concedes, KFH is engaged in commerce within the meaning of the Act, and that assertion of jurisdiction in this case will effectuate the policies of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

The Union has represented KFH's limousine and hearse drivers (also referred to in the record as chauffeurs) for more than 40 years. Beginning on an undisclosed date prior to 1972, and continuing until an undisclosed date prior to November 1976, bargaining agreements with respect to KFH drivers were negotiated with an employer association. The resulting contracts covered limousine and hearse drivers employed by KFH and by other firms in the area, probably in a multiemployer unit. This association became defunct on an undisclosed date prior to November 1976. Thereafter, the ''non-hiring'' firms (that is, firms who obtained equipment and drivers from ''hiring'' firms but themselves had no equipment or drivers) and the small ''hiring'' firms negotiated one or two contracts through a law firm other than the law firm which, after the association became defunct, represented the other employers (including KFH) which had been in the association. After the ''non-hiring'' firms stopped negotiating with the Union, the remaining firms (including KFH) whose employees were represented by the Union negotiated contracts with the Union as a group. Before each set of post-1976 negotiations began, the employers told the Union that they were negotiating together, but would sign separately.

At all times relevant here, there has been in existence an ''extra board'' which consists of drivers available for use by funeral homes under contract with the Union, and (perhaps) by other funeral homes as well; the functioning of this extra board is described infra. At all times relevant here, funeral homes under contract with the Union have been contractually required (for the purpose of providing drivers with health, welfare, prescription-drug, and pension benefits) to make certain payments to a board of trustees, which in turn forwards these payments, in the form of a single monthly check, to the Central States, Southeast and Southwest Areas Pension Fund/Health and Welfare Fund (Central States). A contractually specified amount has been so paid on behalf of each of the drivers, including each of those on the extra board. Until about 1985, the total amount payable on behalf of the extra-board drivers was paid equally by all the funeral homes under contract with the Union; thereafter, the employers decided among themselves how much each would have to contribute to the amount due to the trustees on behalf of the extra board.

In 1972, the Union had bargaining relationships with almost 30 funeral homes in the St. Louis area, and represented about 51 drivers, including the extra board. During a period which began no later than 1980, the Union had a bargaining relationship with Kriegshauser Mortuary & Southern Funeral Home, which negotiated as part of the group. In 1985 or 1986, the Union called a strike among Kriegshauser's drivers. Upon Kriegshauser's filing of a representation petition on March 29, 1988, Kriegshauser and the Union entered into an election stipulation stating that the appropriate unit consisted of the drivers of Kriegshauser alone. The Union lost this election by a vote of three to zero, with three challenged ballots. Nobody voted who was not employed by Kriegshauser.

In 1989, the contracts covering the funeral homes (including KFH) whose drivers were still represented by the Union were due to expire by their terms. After the beginning of bargaining negotiations with respect to succeeding agreements, one of these funeral homes, Bopp, told the Union that Bopp would not negotiate with the Union because Bopp had only one driver. In addition, Fitzinger Funeral Home, which also employed only one driver, told the Union, without giving a reason, that it would no longer negotiate an agreement with the Union. The Union thereupon struck Bopp and Fitzinger, but none of the other funeral homes. The Union did not contract with either Bopp or Fitzinger, and filed no charges against them with the NLRB.

B. *The 1989–1990 Bargaining Negotiations*

By the end of contract negotiations which began in 1989, the Union was recognized, as the representative of funeral drivers, by nine firms, eight of which (including KFH) operated funeral homes; the ninth firm (Hoppe Livery Company, herein called Hoppe) did not operate a funeral home but did provide ''livery service'' (drivers and equipment) to funeral homes. Negotiations with respect to the drivers of these nine firms began shortly before the June 1989 expiration of the contracts to which these firms were parties. One of the eight funeral homes, Hoffmeister Mortuaries, Inc. (Hoffmeister), which had previously negotiated with the other employers as a group, in 1989–1990 negotiated separately through Hoffmeister's own attorney. The remaining employers, including KFH, were represented by Attorney Alan I. Berger, who told the Union, before negotiations began, that the employers represented by him were meeting as a matter of convenience and to economize on attorneys' fees, and would talk to the Union as a group first, but that they were going to finalize and negotiate the final details of the contract independently.

Hoffmeister and the Union orally reached an agreement with the Union during the first week of November 1989, and executed it on February 28, 1990. As to the other 8 employers, including KFH, oral agreements were reached within a few days of each other, about the last week in November 1989; the final proposal to the Union from the seven employers other than KFH consisted of a page stating that because their wages differed from KFH's wages, their final proposal differed from KFH's. The KFH contract was executed on January 26, 1990; inferentially, the other contracts negotiated through Berger were executed at about the same time as the KFH contract.

All the contracts have the effective date of July 1, 1989. The Union's contract with Lupton Chapel, Inc., had an expiration date of November 1, 1991, because Lupton's business had declined and its only driver did not want a ''fight'' prior

to his impending retirement. The record suggests that all the other contracts are effective until June 30, 1992.[1]

All the contracts, including the Hoffmeister contract, state that the parties to the agreement are the Union and the particular employer which has signed the agreement. All the contracts except the Hoffmeister contract recognize the Union ''as the exclusive bargaining agency for all of the driver employees of the Signatories to this contract.'' The Hoffmeister contract recognizes the Union ''as the exclusive bargaining agency for all of its driver employees within the scope of this Agreement.'' Under the heading ''Scope of Agreement,'' the Hoffmeister contract states that the agreement ''covers funeral car drivers of Hoffmeister.'' The other contracts, including KFH's contract, state:

> Scope of Agreement
>
> Covering all Funeral Directors, brokers for funeral service, service establishments, trade embalmers, livery companies and livery organizations engaged in any phase of funeral industry, who owns, operates, rents or leases (as Lessee or Lessor) motor livery equipment consisting of hearses, limousines, flower cars and . . . first call equipment and all equipment that is driven for hire or for remuneration to the Funeral Home or Director.

The wage rates in all the contracts (including Hoffmeister's) are the same, except for the KFH contract. Each of the contracts contains different work rules. With the foregoing exceptions, all the contracts except the Hoffmeister contract are identical so far as the record shows; and laying to one side the differences previously referred to and a few others discussed infra, the Hoffmeister contract does not differ from the others in any respect material here.

Central States requires a participation agreement from every employer that has employees who are participating in the Central States fund. At all material times, as to funeral drivers represented by the Union, only one participation agreement has been sent to Central States as to health, welfare, and pensions. This participation agreement is signed by a union trustee of the pension fund (Union President Barney Vaughn) and by an employer trustee. On June 4, 1990, Vaughn and employer trustee Del Sherman (no kin to me) signed a pension participation agreement as to the eight employers still in business (Hoppe having gone out of business a few weeks earlier).[2] This consists of a printed form with certain blanks. The blank calling for the employer's name contains the entry ''St. Louis Funeral Car Drivers;'' the blank calling for the employer's address contains the Union's office address; and only one number is specified in the blank calling for the Federal employer number. Only Sherman's signature appears after the printed entry, ''If Employer is signed to Group Contract, give name of such Contract.''[3]

C. *Substantive Contractual Provisions*

Each funeral home's need for drivers and vehicles varies sharply and unpredictably. At all times relevant here, the Union, and the firms whose funeral drivers are represented by it, have attempted to address this problem, among others, by the establishment of an ''extra board'' of drivers whom any of such firms may use. This extra board has at all material times been administered by a committee whose membership is equally divided between the Union and representatives of the signatory firms, and whose administration expenses are included as part of the health and welfare payments made by all the signatory firms (including KFH and Hoffmeister) on behalf of the regular drivers. Thomas Kutis, who is KFH's president and chief executive officer, testified that when KFH uses extra-board employees, it treats them as employees for the purposes of its payroll, and withholds Federal employment taxes and income taxes from their wages. I infer that the same practice is followed by the other firms which use extra-board drivers pursuant to a contract with the Union.

All of the contracts provide, in part:

> *Guaranteed Employment*
>
> The signatories agree that all regular full time positions in existence on July 1, 1975 shall be guaranteed positions and shall not be reduced by deaths, retirements, resignations, or discharge except that the Employer shall have the right to reduce his work force annually on the anniversary date of this contract through the use of a Formula for Reduction of Work Force . . . .
>
> Any chauffeur may be transferred to . . . any other Signatory Employer who would then assume the guarantee for the employee, and the original Employer shall be released from guaranteed employment.
>
> A. Any firm which loses a chauffeur or guaranteed position and in the future requires a chauffeur shall assume the guaranteed position and the previous driver shall be offered the opportunity to return.
>
> B. Drivers from within the industry prior to 7/1/75 shall fill guaranteed positions prior to other drivers.
>
> . . . .
>
> This guarantee of positions applies only to full time regular positions as of July 1, 1975, and it does not apply to any additional or new full time regular chauffeurs who are employed after the effective date of this Agreement.

Of KFH's three regular drivers, one has been its employee since before 1975.

All the contracts except the Hoffmeister contract further provide:

[1] Only the KFH and Hoffmeister contracts are in evidence. My findings in this sentence are otherwise based on inferences from Union President Barney Vaughn's uncontradicted testimony that the employers other than KFH stated that their final proposal differed from KFH's because their wages differed. As discussed infra, Hoppe went out of business in April 1990.

[2] The participation agreement does not specify the year it was executed. My inference that it was 1990 is based on Vaughn's testimony that he signed this agreement for the contracts entered into in 1990.

[3] The participation agreement calls for increases effective July 1, 1992, and July 1, 1993, in required payments into the pension fund. However, the last increase specified by the KFH bargaining agreement is effective on July 1, 1991.

> The Formula for Reduction of Work Force states that every Signatory Company shall, upon showing that fifty percent (50%) or more non-productive time occurred in the case of given individual man or men during the year preceding each annual anniversary date of this Agreement, be entitled to reduce the working force as to this individual man or men . . . .

The Hoffmeister contract contains the same language, except that the term ''Employer'' is substituted for the term ''Signatory Company.''

Union President agent Barney Vaughn testified before me that ''in the case of some high-volume firms'' it may be virtually impossible to lay off employees because there is so much work for the drivers; and according to the arbitrator's decision (offered and received without limitation or objection), both Vaughn and Kutis testified that the collective-bargaining agreement made it virtually impossible to lay off employees.

During the initial meetings which led to the execution of the 1989–1992 contracts for all the firms except Hoffmeister, all the employers had questions regarding the number of signatories, an issue which was of importance because of donations made to the health and welfare funds for the extra-board employees. On behalf of all the employers which were negotiating through Attorney Berger, KFH President Kutis stated that they did not want to execute a contract before Hoffmeister did, because they anticipated that Hoffmeister ''was going to put [the union employees] on the streets,'' the remaining employers did not want to wind up having to pay for Hoffmeister's drivers plus all the extra board, and the remaining employers thought that the parties needed to find out what was going to happen. The major issues between the parties were wages and the size of the extra board.

Under the contracts as finally agreed upon, an employer who desires new or additional help is contractually required either to call in an extra-board driver directly, or to use the Union's referral service. Further, the contracts give preference to extra-board drivers in referral. ''Any regular chauffeur who registers [with the dispatch office] on his seventh day shall be dispatched as an Extra Board chauffeur on a trip basis after all regular Extra Board chauffeurs have been dispatched but not to his regular employer.'' Any regular full-time chauffeur who leaves his job for any reason is automatically placed on the extra board, according to his ''industry seniority.'' Also, ''If a layoff is necessary, industry seniority of all men on the Extra Board shall apply. Any Extra Board chauffeurs laid off shall be placed on the Special Board in order of seniority and be dispatched after the Extra Board is exhausted and maintain recall rights on the regular Extra Board. All decreases and increases shall be on the basis of seniority.'' These provisions to one side, all the contracts afford seniority for purposes of layoff and recall to drivers from ''within the industry'' before July 1975 over drivers thereafter ''added to the industry''; and otherwise base seniority for such purposes on length of continuous service with the contracting employer. The Hoffmeister contract provides that in filling a vacancy for a full-time regular chauffeur or in adding full-time regular chauffeurs, the employer is to prefer chauffeurs on the extra board or ''regular drivers working as Extra Board members.'' The other contracts (including KFH's contract) call for preference to chauffeurs on the extra board or ''full time regular chauffeurs employed by other Signatory Employers to this Agreement.''

All the contracts call for a joint hiring committee ''composed of an equal number of Employer and Union representatives . . . . The Employer representatives shall be selected on a pro rata basis, in proportion to the number of Signatories each representative represents as to the total number of Signatories.''[4] The joint hiring committee handles the prearbitration steps as to grievances filed by drivers on the extra board. Further, all the contracts empower the joint hiring committee to determine the qualifications, ability, and physical fitness of all the drivers on the extra board; to remove from the extra board any driver who fails to meet these requirements; to establish regulations and work rules with respect to the duties and performance of work of the extra-board drivers; to investigate and determine complaints by ''any Employers'' (the Hoffmeister contract) or ''any Signatory Employer'' (the other contracts) with respect to any extra-board driver's work and adherence to rules and regulations; and to determine and administer any discipline, including discharge, determined appropriate; committee deadlocks as to discipline or discharge are to be referred to arbitration.[5]

All the contracts contain a schedule relating the signatory employer's number of ''day shift chauffeurs'' with ''steady employment'' to the number of vehicles which may be operated by the employer; the number of vehicles is roughly double the number of regular drivers. The permissible ratio of vehicles to regular drivers is increased if the employer adds a new position. The contract with Hoffmeister ''by special agreement'' permits Hoffmeister to operate up to 12 pieces of equipment (rather than the 5–6 pieces otherwise permitted to employers with 3 regular drivers) and, if Hoffmeister hires a fourth regular driver, permits it to operate up to 14 pieces of equipment (rather than the 10 pieces otherwise permitted to employers which increased the number of their regular drivers from 3 to 4).

In addition, all the contracts except the Hoffmeister contract provide:

> The parties have agreed to eliminate the Extra Board by attrition. A maximum of six (6) members of the Extra Board shall be eligible for Health and Welfare benefits. Only drivers in the industry prior to 6/30/89 [the expiration date of the preceding bargaining agreements] shall be entitled to return to the Extra Board. Said drivers may use industry seniority to bump into the six (6) spots available for benefits. Drivers returning to the Board after 6/30/89 who decline the offer of a regular position shall earn referral rates.[6] Said open position shall be offered to said drivers in inverse order of seniority. Refusal to fill said position shall be reason for removal from the industry. Drivers on the [Extra]

[4] Kutis credibly testified in November 1991 that the hiring committee then consisted of four union representatives and four representatives of employers which had signed a contract in 1990. He described the four employer members as ''forced volunteers.''

[5] However, KFH President Kutis, who as of November 1991 had been a member of the hiring committee for a period undisclosed by the record, credibly testified that he could not recall the hiring committee's ever taking action against any extra-board employee.

[6] Referral drivers receive 75 percent of the trip or block rates paid extra-board drivers.

> Board prior to 6/30/89 shall be red circled and not required to take regular positions. The Employer shall make the required contributions.

The Hoffmeister contract contains the same language, except that the following sentence is inserted between the second and third quoted sentences: ''The Special Board shall consist of all Extra Board members over the maximum of six (6) eligible for Health and Welfare benefits.''

All the contracts except the Hoffmeister contract contain the following language:

> Effective July 1, 1989, the total monthly contribution by each hiring firm on behalf of each full time chauffeur for the Health and Welfare Fund, Retirement Fund and Prescripticare Fund shall be seven hundred and sixty dollars ($760.00) per month plus a portion of the cost of Health and Welfare and Pension for the Extra Board, based on cases handled by each firm. Effective July 1, 1990, the contribution shall be seven hundred ninety-eight dollars and twenty-four cents (($798.24), and effective July 1, 1991, the contribution shall be eight hundred twenty-eight dollars ($828.00) per month.
>
> The Employer's portion of the Extra Board cost shall be renegotiated if the number of contributing Employers shall decline to seven (7) or fewer.
>
> . . . .
>
> . . . Any firm adding a new driving position and hiring from the Extra Board shall be relieved of the Extra Board payment [to Central States] for the life of this Agreement.

The Hoffmeister contract is identical, except that (1) to the first sentence are added the words ''signatory to the 1985–1989 Agreement, as calculated pursuant to the past-practice of the Union and the Employers,'' (2) the last date is July 1, 1993;[7] and (3) in the last quoted sentence, the words ''If the Employer adds'' appear instead of the words ''Any firm adding.''

When asked how the parties resolved the extra-board issue which was a major issue in negotiations, Vaughn testified without objection, ''There was a limit set of the six people who were presently on the board, that [the employers] would not be required to pay benefits on more than six and though attrition the board would disappear unless Mr. Kutis' employees got laid off or something, they went on the board.'' All the contracts also provide that ''In an attempt to provide an incentive for reduction of the Extra Board, the participating Employers'' will pay a $500 bonus to any driver who retires under the pension plan before his 61st birthday. When such a retirement takes place, all the signatory firms contribute to the retiree's bonus.

All the contracts differentiate between regular and extra-board drivers as to certain matters, including pay and vacations, and least impliedly treat them alike as to other matters, such as the nature of their duties.

[7] Because all the contracts except the Lupton contract (which expired in November 1991) expire in July 1992, I am inclined to think that the Hoffmeister 1993 date is a typographical error for 1991. However, any such error would be immaterial to the issues here. Cf. supra, fn. 3. All the contracts contain provisions for automatic renewal absent notice of a desire to terminate or modify.

In addition, all the contracts contain the following provision, which is the subject of the instant complaint and is herein referred to as article XVI Section 18 or as the trading/renting clause:

> Any funeral establishment hiring full time chauffeurs may make first call body removals for all other Employers who also hire full time chauffeurs, and may do the same for other non-hiring firms. In all other respects, the previous practice of renting and trading livery equipment between all signatories to the contract shall prevail.

Each of the contracts, including those agreed to by KFH and Hoffmeister, was ratified by a combined vote of the drivers on the regular payroll of any of the nine employers, plus the drivers on the extra board. During negotiations, Hoffmeister's attorney asked Vaughn who he thought was entitled to vote on the Hoffmeister agreement. Vaughn replied that he thought all the drivers for all the funeral homes, and all the extra-board drivers, were entitled to vote, because of the required contributions by all the employers to retirement bonuses for any drivers (whether or not employed by Hoffmeister, and including extra-board employees) who retired before age 61, and to payments made to the trust funds on behalf of extra-board drivers. Hoffmeister's attorney replied that legally this was probably true.

D. *The Union's Grievance Against KFH*

KFH has more limousines and hearses than it has regular drivers. When all of KFH's drivers are busy and it needs a driver to drive a vehicle owned by it, it uses the extra board first, and, after the extra board is used up, either goes to the referral board (see supra, sec II,C) or uses nonunion persons in KFH's regular employ.[8] When KFH needs extra equipment (almost invariably, a limousine rather than a hearse) with a driver, KFH initially attempts to obtain the equipment from one of several signatory funeral homes with which KFH has a longstanding practice of ''trading''—that is, each will lend KFH such manned equipment, perhaps without seeking money payment but with the at least tacit understanding that KFH will similarly accommodate similar future requests from the other funeral home. However, these firms are all much smaller than KFH, and are frequently unable to meet KFH's needs. In view of Kutis' testimony that almost all funeral homes under contract with the Union have more equipment than drivers, and Vaughn's testimony that there had never been a problem about a funeral home's failing to attempt to initially obtain unmanned equipment from a firm under contract with the Union, I infer that the lending firm will frequently man a piece of equipment through the extra board before lending it.[9]

[8] The April 1991 arbitrator's award, offered and received without limitation or objection, states that KFH used this last option on only one occasion, because its nonunion staff is insufficiently experienced in this work.

[9] While counsel were making their opening statements, and before being sworn as a witness, Kutis stated from counsel table that KFH never used another firm's driver without that firm's equipment, and that the driver would remain on the payroll of the firm for which he worked.

Before April 1990, if KFH was unable to borrow a needed driver and limousine, KFH usually rented drivers and equipment from Hoppe, which operated a livery firm but not a funeral home; Hoppe was under contract with the Union and used the extra board but, when union livery was exhausted, would with the Union's permission act as a broker in providing drivers and equipment from nonunion sources. If KFH was unable to obtain drivers and equipment from these sources, KFH, without attempting to obtain drivers and equipment from Hoffmeister, would use drivers and equipment from nonunion firms. After Hoppe went out of business in April 1990, if KFH was unable to borrow drivers and equipment from its traditional trading partners, KFH used the same nonunion firms it had used in the past, and also used Bopp, a signatory firm until about June 1989 but not thereafter. At no time has KFH ever traded with or used livery from Hoffmeister. Hoffmeister is KFH's chief competitor; the two firms are the largest funeral homes in the area.

About April 1990, Vaughn received reports that two firms which were parties to the foregoing contracts with the Union—KFH and John Stygar & Son, Inc. (Stygar)—were using limousines ''from outside the industry.'' After some investigation, which disclosed that KFH was not using the Hoffmeister equipment, Vaughn telephoned both KFH and Stygar. Vaughn credibly testified that both these firms were told

> to comply with the procedure that has been in the industry for years. Once they comply with that, they can get their equipment anywhere they want. The thing is, we have a guaranteed employment clause in that contract, and if Mr. [Stygar's] or Mr. [Kutis'] drivers sit around all afternoon and don't do anything, then they can request that they lay them off. So by using each other's equipment it keeps everybody busy and we don't get any requests for layoffs.

Although the Union represents employees in the area other than funeral drivers, the Union does not represent any funeral drivers other than those covered by the nine contracts executed in 1990. Vaughn never asked Kutis to see if he could not get some of the nonunion firms he was using, to sign a union contract.

Before the filing of the grievance against KFH which gave rise to this case, and inferentially after Vaughn had telephoned KFH and Stygar about the matter, Vaughn and Kutis attended a meeting of the hiring committee, of which both are members. Vaughn said that he was thinking of filing a complaint against KFH because he believed it was violating the agreement in that KFH was not using Hoffmeister's livery. Kutis told Vaughn that KFH had never used Hoffmeister's equipment or its drivers. Kutis went on to say that for many years, Hoffmeister had not let its equipment or its drivers out, and had obtained excess livery from Hoppe and (he assumed) from other places, just as KFH did. Kutis said that Hoffmeister had never contacted KFH to get any price list or make any changes in the two firms' relationship; but that even if Hoffmeister had done so, Kutis did not want to use Hoffmeister, that it was KFH's main competitor. Vaughn said that KFH was required by the contract to use the Hoffmeister firm.

Inferentially about May 4, 1990, the Union filed a grievance against Stygar alleging that it had violated the trading/renting clause (art. XVI, sec. 18) of the labor agreement (see supra, sec. II,C). Stygar thereupon agreed to first attempt to use the equipment ''in the industry''—that is, the equipment of ''People who are signatories to the contract'';[10] Vaughn credibly testified that thereafter Stygar complied with this undertaking and, on occasion, ''has used non-union livery and all we expect them to do is follow the procedures.''

On May 4, 1990, the Union filed a similar grievance against KFH. Thereafter, during a telephone call from Vaughn to Kutis, Vaughn said that he knew KFH was trading with the other signatories, that Hoffmeister was the only one KFH was not using, and that the purpose of the grievance was to change KFH's practice with respect to Hoffmeister. Kutis replied that KFH had never used the Hoffmeister firm, that Hoffmeister had never traded livery with anyone else, that Hoffmeister had made no attempt to contact Kutis to trade livery, and that KFH had no intention of using Hoffmeister's equipment or drivers. My findings as to the content of the hiring-committee and post-grievance conversations between Kutis and Vaughn about KFH's alleged violations of the trading/renting clause are based on Kutis' testimony. To the extent inconsistent with such testimony by Kutis, I discredit for demeanor reasons Vaughn's testimony that until he learned otherwise at the arbitration hearing, he believed that KFH was failing to try to trade with other contract signatories generally, and did not realize that KFH was only failing to contact Hoffmeister. However, Kutis testified that he understood that the Union was telling him, and was contending at the arbitration, that as long as KFH first attempted to get its livery from the seven other signatories, it could thereafter use anyone else it wanted.

KFH President Kutis' written rejection of the grievance states, inter alia, that KFH did not want to use Hoffmeister's livery because the two firms directly competed with each other, KFH and other locally owned firms had been involved in a continued public relations dispute with Hoffmeister and other ''large conglomerates,'' and, therefore, KFH feared that Hoffmeister drivers on loan to KFH would disparage KFH to its clientele and provide poor service at KFH funerals. Kutis' response further stated that the usefulness to KFH of Hoffmeister's services was substantially diminished by Hoffmeister's perceived customary reservation of the right to cancel the leasing of livery on 24 hours' notice. The arbitrator's decision, offered and received into evidence without objection or limitation, states that KFH objected to using Hoffmeister's livery for the further reasons that its general manager had been ordered to cease all communication with KFH, thereby interfering with its ability to resolve any problems relating to such trades, and that KFH did not want to accept the inferior equipment a competitor would be expected to lend. Eventually, KFH and the Union agreed to go to arbitration on the matter.

Following the arbitration hearing, the Union filed with the arbitrator a brief which stated, in part:

[10] The quotations are from Vaughn's testimony. It is unclear from the record whether Stygar's grieved conduct involved a failure to attempt to use Hoffmeister equipment.

> The Union's reading of the contract provides for the protection of the work of the drivers which are represented by the Union which includes either person [sic] regularly employed or those who work from the Extra Board. While the Union agrees that no individual represented by the Union lost work or pay as a result of the failure of the Company to use Hoffmeister rather than a non-signatory employer, the Union's concern is not for the short term consequences but instead is for the eventual loss of jobs.
>
> If a signatory employer has available equipment which sits idle while non-signatory equipment and drivers are used, eventually the equipment which sits idle will be eliminated. Ultimately full-time drivers whose employers are unable to support a full-time driver with its own business will have to eliminate such positions unless by trading with other signatories a sufficient level of combined business exists to justify the continued employment of the driver and maintenance of the equipment.
>
> The facts of this case illustrate the eventual problem. [KFH] has taken work which was previously performed by either Hoppe (the livery company), Ziegenhein or Lupton[11] and now allows non-signatory employers to perform a portion of the work. As the event which triggered the use of non-signatory employers was the demise of Hoppe, it is reasonable to conclude that the work, or at least a portion thereof previously performed by Hoppe with persons covered by the contract, is now being performed by the employees of non-signatory [employers]. Jobs at Hoppe covered by the collective bargaining agreement have been converted to jobs with non-signatory firms, a fact which threatens all the benefits of the collective bargaining agreement which have been established over the years. The Union clearly has a legitimate interest in enforcing its contractual work and preservation rights. The situation which is presented to the Arbitrator does not constitute, as claimed by [KFH], a case of ''no harm - no foul.'' While the harm is not immediate or specific to any individual, there is harm nonetheless.

E. *The Arbitrator's Award; the Union's Section 301 Suit to Compel KFH to Comply Therewith*

The arbitrator's award, issued on April 10, 1991, stated, in part, that the trading/renting clause in KFH's bargaining agreement

> prohibits all signatory establishments from hiring non-union livery without first resorting to trading.
>
> . . . .
>
> . . . The evidence does not suggest that the practical aspects of trading with Hoffmeister Mortuaries are likely to represent the bleak picture [KFH] is painting . . . Nothing in this award requires [KFH] to put itself at risk of non-delivery of required driver and equipment by Hoffmeister because of less than a firm commitment on trading by Hoffmeister in each individual case; nothing in this award requires [KFH] to do more than make a trading request in a businesslike manner; and nothing in this award requires [KFH] to use Hoffmeister drivers or equipment if there is not a good faith cooperation by that signatory employer. Of course, if there is a lack of cooperation, the facts may have to be aired in another arbitration involving a refusal to trade, or arbitrations, involving cases of individual trading. With these qualifications, the grievance must be sustained. [KFH] is required to attempt to trade with Hoffmeister prior to resorting to hire of non-union livery.

KFH refused to comply with this award. On May 24, 1991, the Union filed in the United States District Court for the Eastern District of Missouri, Eastern Division, a complaint, seeking enforcement of the arbitrator's award, under Section 301 of the Act. On September 18, 1991, while the district court complaint was still pending, the Board's Regional Director issued the complaint in the case at bar, alleging that the Union had violated Section 8(b)(4)(i)and(ii)(A) of the Act by obtaining the arbitrator's award and had violated Section 8(e) by bringing the district court action to enforce the award.[12] In addition, the General Counsel filed a petition to enjoin the Union's prosecution of the Section 301 suit. Pursuant to an agreement between the General Counsel, KFH, the Union, and the district court, further proceedings on the Section 301 suit were stayed pending the Board's determination in the case before me.

F. *Analysis and Conclusions*

Section 8(e) of the Act provides:

> It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in the products of any other person, or to cease doing business with any other person.

At least as interpreted by the arbitrator, the trading/renting clause in KFH's bargaining agreement with the Union, by requiring KFH to give preference to Hoffmeister before obtaining livery elsewhere, constitutes an agreement to ''cease doing business'' with the nonsignatory firms with which KFH has previously dealt in preference to Hoffmeister. See *Teamsters Local 710 (Wilson & Co.)*, 143 NLRB 1221, 1227 (1963), approved in relevant part 335 F.2d 709, 717 (D.C. Cir. 1964); see also *NLRB v. Operating Engineers Local 825 (Burns & Roe)*, 400 U.S. 297, 304-305 (1971). However, not every bargaining contract with a ''cease doing business'' objective that comes literally within the proscription of Section 8(e) is necessarily unlawful. The Board and the courts have

[11] Ziegenhein and Lupton are both signatory firms; KFH has traded with Ziegenhein, at least.

[12] The complaint further alleges that the Union violated Sec. 8(b)(i)and(ii)(A) by entering into art. XVI, sec. 18, in January 1990, and by filing a grievance against KFH in May 1990. The charges which underlie the complaint were not filed until August 1991, and the General Counsel's brief concedes (p. 9 fn. 4), in effect, that these allegations are barred by Sec. 10(b) of the Act. No contention is made that Sec. 10(b) bars the complaint allegations described in the text. See *Retail Clerks Local 770 (Hughes Markets)*, 218 NLRB 680, 683 fn. 11 (1975).

held that a union may lawfully require a contracting employer to cease or refrain from doing business with another employer if the union's objective properly falls within certain carefully delineated exceptions, such as work preservation, maintenance of union standards, and (the Board has held) preserving the existence and solvency of employee trust funds to which both of such employers contribute. In determining whether a contract clause violates Section 8(e), the contractual context and the relationships of all those affected must be taken into account. *Electrical Workers IBEW Local 46 (Puget Sound NECA)*, 303 NLRB 48 (1991); *Operating Engineers Local 12 (Griffith Co.)*, 212 NLRB 343 (1974), reversed and remanded 545 F.2d 1194 (9th Cir. 1976), cert. denied 434 U.S. 854 (1977).[13]

In the case at bar, the Union seeks to defend its conduct, in connection with the trading/renting clause and the arbitrator's award, on the ground, inter alia, that such conduct sought to preserve work for drivers on the extra board. The General Counsel and KFH seek to respond on the ground, essentially, that the contractual bargaining unit is at least allegedly confined to KFH's regular drivers and the existence of the extra board is legally irrelevant.

Initially, it is clear that as interpreted by the arbitrator, the trading/renting clause preserves work opportunities for the extra-board drivers, who have certain contractual rights to drive vehicles traded or rented between the signatory employers. I perceive no record support for the General Counsel's factual assertion, on which he mostly rests his claim that the extra-board drivers' work preservation interests are immaterial, that these drivers are ''fully employed and there is no likelihood that any would ever be laid off'' (Br. p. 11).[14] The materiality of the extra-board drivers' work preservation interests is disputed by KFH on the ground, inter alia, that ''the Extra Board drivers are *not* [KFH's] employees any more than they are Hoffmeister's employees or the employees of any other signatory to a Local 610 contract in the funeral industry. If the regular drivers of five (5) of these funeral homes filed separate petitions to decertify Local 610, would the Board include—as eligible voters—the Extra Board drivers in each decertification election? Of course not!'' (pp. 11–12, emphasis in original, footnotes omitted.) However, at least after KFH calls for an extra-board driver and puts him on its payroll, that extra-board driver obviously becomes an employee of either KFH alone or (as the Union contends) of KFH and the other signatory employers jointly, and becomes entitled to the wage rates which KFH's contract with the Union specifies for extra-board drivers. Moreover, at least assuming (with the General Counsel and KFH) that no joint-employer relationship exists, the instant record fails to show whether any or all the extra-board drivers would be entitled to vote in a decertification election with respect to KFH's drivers, because the record fails to show how many hours or how regularly any of the extra-board drivers works for KFH; see *Berea Publishing Co.*, 140 NLRB 517, 518-519 (1963); *Pat's Blue Ribbons*, 286 NLRB 918 (1987); *Trump Taj Mahal Casino Resort*, 306 NLRB 294 (1992).[15]

In any event, the arguments tendered by the General Counsel and KFH disregard the fact that because regular KFH drivers have the contractual right to be placed on the extra board during periods of layoff by KFH, the preservation of job opportunities for the extra-board benefits KFH's regular drivers, who are undeniedly in the contractual bargaining unit. Moreover, the General Counsel and KFH err in their basic assumption that an agreement falls within the work-protection exceptions to Section 8(e) if, but only if, the employees sought to be protected are employees of the contracting employer within an appropriate unit represented by the contracting union. While this accurately describes most cease-doing-business agreements which have been held not violative of Section 8(e), not all such lawful agreements meet these criteria. Thus, in *Puget Sound*, supra, the Board held lawful a union's effort to obtain an arbitrator's award forbidding an employer association to provide for its nonunionized employer members a separate referral service and apprenticeship program whose absence would allegedly cause such nonunionized employer members to withdraw from the employer association. The Board so held even though the association may not have been a party to the multiemployer bargaining agreement which established a union referral service and apprenticeship program, on the ground that the association had signed that agreement on behalf of its unionized employer members, the grievance presented to the arbitrator sough to maintain the skilled employee pool available for referral under the contractually established referral service and to protect that service and the contractually established apprenticeship program, and the employees enrolled in the contractually established apprenticeship program and working for employers under the agreement (which called for their hire by and transfer between the employer parties) had a common interest in the stability of that arrangement. On the other hand, the Board held violative of Section 8(e) a contract clause which in effect prohibited a new subcontractor from working on a project unless and until his predecessor on that project had paid the wages and fringe benefits called for by the collective-bargaining agreement, even though the employees of both subcontractors were part of the multiemployer unit covered by that bargaining agreement, on the ground that employees of one of the covered subcontractors had no direct economic interest in assuring that other covered subcontractors paid their employees wages or fringe benefits. *Painters Local 36 (Stewart Construction)*, 278 NLRB 1012, 1013–1015 (1986). Finally, in *Griffith*, supra, 545 F.2d at 1201, the court of appeals (after stating that primary cease-doing-business clauses ''must confer benefits on the members of a relevant 'work unit' and not on some larger group such as members of the Union generally''), specifically rejected the proposition that the relevant work unit is equivalent to the respective bargaining unit.[16]

[13] Decision on remand, 243 NLRB 1121 (1979), enfd. and affd. 660 F.2d 406 (9th Cir. 1981), cert. denied 457 U.S. 1105 (1982). The decisions cited in this footnote are irrelevant to the instant case.

[14] Accordingly, I need not and do not consider the relevance vel non of any such evidence.

[15] KFH's position as to the extra-board drivers' voting eligibility vel non is not assisted by the Kriegshauser election. The record fails to show whether Kriegshauser ever used any extra-board drivers, or whether such drivers cast any of the unopened challenged ballots.

[16] The court stated that the proposition thus rejected by it had been adopted by the Board in the decision under review. My spontaneous reading of the Board's decision in *Griffith* led me to conclude that

Continued

This approach indicates that the relationship between the extra-board employees, KFH, the Union, the bargaining agreement, and the regular KFH drivers in the bargaining unit is sufficient to render the extra-board drivers part of the relevant work unit within the meaning of *Griffith*, supra, 545 F.2d at 1201. Thus, the extra-board drivers, when on KFH's payroll, perform the same work as KFH's regular drivers; the bargaining agreement between KFH and the Union governs the extra-board drivers' wages and affords them certain retention and hiring rights, including certain preferences in filling vacancies in jobs as regular KFH drivers; KFH is contractually required to participate in making monthly fringe benefit payments of about $800 (distributed among eight employers) on behalf of each of the five or six employees on the extra board; all the drivers on the extra board participated in the vote to ratify the Union's contract with KFH; regular drivers who are laid off by or who otherwise leave KFH have the right to go on the extra board; KFH's president is one of four signatory-employer members of a union-employer committee which administers the referral of extra-board drivers, entertains their grievances, and has the power to discipline or discharge them; and KFH defrays part of the cost of administering this committee.

It may well be that laying to one side the protection which the trading/rental clause affords to the extra-board drivers and (through them) to KFH's regular drivers, the clause as interpreted by the arbitrator would violate Section 8(e) because it has a purpose of preserving the jobs of regular drivers who work for signatory employers other than KFH—specifically, Hoffmeister. See *Wilson*, supra, 143 NLRB at 1227, and cases cited. However, the job protection which this clause affords members of the relevant work unit (that is, a relevant work unit which includes the extra board) renders the clause lawful unless the main purpose of this clause is secondary in nature. See *Sheet Metal Workers Local 91 (Schebler Co.)*, 294 NLRB 766, 770 (1989), approved in material part 905 F.2d 417 (D.C. Cir. 1990); *AGC of California*, 280 NLRB 698, 701–702 (1986). I conclude that the record fails to show that the main purpose of the clause as so interpreted was to protect the jobs of regular drivers employed by firms other than KFH. KFH mostly relies upon union counsel's assertion, in his brief to the arbitrator, that if the trading/renting clause is not enforced, ''Ultimately full time drivers whose employers are unable to support a full time driver with its own business will have to eliminate such positions unless by trading with other signatories a sufficient level of combined business exists to justify the continued employment of the driver and maintenance of the equipment.'' However, union counsel's reliance on this ''Ultimately'' argument is attributable to the fact that regular drivers would be contractually entitled to keep their jobs even when the entire extra board is unemployed. As to the sincerity and substantiality of the Union's concern with the job security of the extra board, I note that union counsel's brief to the arbitrator (as well as his arguments to me) specifically expressed that concern;[17] the size of the extra board was one of the two main issues during the negotiations which led up to the 1990 contracts; of the 19 drivers eligible to participate in the contract ratification vote, almost a third were on the extra board and more were on the extra board than worked as regular drivers for any of the individual employers;[18] and the extra-board drivers are contractually more vulnerable to unemployment than the regular drivers.

The complaint allegations that the Union violated Section 8(b)(4)(i)and(ii)(A) rest entirely on the claim that as interpreted by the arbitrator, the trading/renting clause violated Section 8(e). My finding that the clause did not run afoul of Section 8(e) calls for dismissal of the complaint in its entirety.

Conclusions of Law

1. Respondent is a labor organization within the meaning of Section 2(5) of the Act.

2. The Charging Party is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

3. Respondent has not violated the Act in the respects alleged in the complaint.

[Recommended Order for dismissal omitted from publication.]

as to this issue, the Board had agreed with the court of appeals; more specifically, that the Board had found the cease-doing-business agreement to be lawful even though the alleged primary and secondary employers were not included in a single, multiemployer unit. See 212 NLRB 343 (''Accepting, as we [do], the administrative law judge's conclusion that the record will not support a finding of a single, industrywide bargaining unit, the answer to [the critical] question [in this case] must be in relation to multiple units of employees''). However, in *Puget Sound*, supra, fn. 11, the Board described *Griffith* as involving a multiemployer unit.

[17] However, as to the job protection which this clause affords regular drivers of employers other than KFH, union counsel's opening statement in the case at bar lays about the same stress as did his brief to the arbitrator.

[18] Hoppe, the largest employer of regular drivers, had five on its payroll; the extra board them consisted of six drivers. At the time of the November 1991 hearing, KFH had three regular drivers.