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

Advice Memorandum

DATE: March 31, 2008

TO: Celeste J. Mattina, Regional Director
Region 2

FROM: Barry Kearney, Associate General Counsel
Division of Advice

SUBJECT: Mason Tenders District Council of Greater New York (M.A. Angeliades, Inc.)
Cases 2-CE-196, and 2-CC-2715

560-2575-6713
560-7520-7500
560-7520-7533
584-1250-5000
584-2588

These cases were submitted for advice as to whether the Mason Tenders District Council (the Union) (1) violated Section 8(e) of the Act by entering into and enforcing through arbitration an alleged "work preservation" provision of the applicable contract with M.A. Angeliades (the Employer); and (2) violated 8(b)(4)(ii)(B) by resorting to arbitration with an object of forcing the Employer to cease doing business with Hudson Meridian.

We conclude that the charges alleging a violation of Section 8(e) of the Act should be dismissed, absent withdrawal, since the subject clause is facially valid and the evidence failed to establish that either the Union's grievance or the arbitrator's decision was based on an unlawful interpretation of the facially valid provision. With respect to the 8(b)(4)(ii)(B) charge, since the evidence indicated that the Union's grievance and pursuit of the arbitration award were "reasonably based" under the Board's decision in BE & K Construction Co.,[1] and the conduct did not have an unlawful objective, the Union's actions were not violative of the Act, as alleged.

FACTS

The Employer, M.A. Angeliades, Inc., was established in approximately 1991 as a general contractor in the construction industry. The services offered by the Employer include construction management, design-building, project management and consulting in the public and commercial sectors. M.A. Angeliades does not perform

[1] 351 NLRB No. 29 (2007).

residential work. Its main offices are located in Long Island City, N.Y. Merkourious Angeliades is the president and sole share holder of the company. Irena Angeliades is a vice-president of the company and is in charge of the Employer's labor relations. Dimitri Malakidis is another Vice-President. He oversees the progress of various projects and he makes payments to owners and to suppliers' subcontractors. M.A. Angeliades and the Union have had a collective bargaining relationship for about 15 years.

Article II, Section 9 of the parties' collective bargaining agreement reads:

> In order to protect and preserve, for the Mason Tenders covered by this Agreement, all work heretofore performed by them, and in order to prevent any device or subterfuge to avoid the protection and preservation of such work, it is hereby agreed as follows: If and when the Employer shall perform any work set forth in the Article IV of this Agreement, under its own name or under the name of another, as a person, company, corporation, partnership, or any other business entity, including joint venture and sole proprietorship, wherein the Employer exercises either directly or indirectly any significant degree of ownership, management or control, the terms and conditions of this Agreement shall be applicable to such work: (a) where the two enterprises have substantially similar management, business purpose, operation, equipment, customers, supervision and/or ownership; or (b) where there exists between the Employer and such other business entity, interrelation of operations, common management, centralized control of labor relations and/or common ownership. In determining the existence of the aforementioned criteria, the presence of the requisite control or commonality at any level of management shall be deemed to satisfy those criteria. Should the Employer establish or maintain such other entity within the meaning of this Section, the Employer is further under the affirmative obligation to notify the Union of the existence and nature of the work performed by such other entity and the nature and extent of its relationship to the Employer.

Hudson Meridian Construction Group, LLC, (H.M.), was established in March 2002. H.M. employs about 115 project managers, superintendents and clerical employees, who provide construction management services to owners and

developers in the private and public sectors. H.M. does not directly employ craft workers at construction sites. Services offered by HM include general contracting, program managing, disaster recovery, and consulting services such as claims analysis, project performance review, and project scheduling. H.M. works on both commercial and residential projects. Its main offices are located in New York, NY.

On March 5, 2007, the Union received documentation from the New York City School Construction Authority that led Union representatives to believe there was a substantial relationship between M.A. Angeliades Inc., and Hudson Meridian Group. As a result of information obtained by the Union, on May 7, 2007, the Union filed a demand for arbitration against the Employer, H.M., Merkourious Angeliades and Irena Angeliades. In pertinent part, the Union sought a determination of whether M.A. Angeliades Inc., and Hudson Meridian LLC violated Article II, Section 9 and/or other provisions of the CBA by serving as alter egos, a single employer, joint venture, successor/predecessor companies and/or otherwise performing work as one another, without applying the CBA to such work on various Hudson Meridian jobs.

The hearings on the arbitration were held on July 6 and on September 24, 2007. The Arbitrator found that H.M. was an alter ego or single employer of Angeliades and, therefore, they both violated Article II, Section 9 of the CBA. The Award directed H.M. to apply the Union's collective-bargaining agreement to its future projects and imposed a joint and several liability on both companies due to the failure to apply the terms and conditions of the agreement to HM projects from November 2002 to the present.

In reaching its alter ego conclusion, the Arbitrator followed the NLRA criteria for finding alter ego: substantially identical ownership, management, business purpose, operations, equipment, customers and supervision.[2] The Arbitrator found common ownership between the two companies. He based his decision on the ownership interests in H.M. held by the Employer (25%) and by EMIS Mechanical, a holding company, with the same address as the Employer, owned by Employer Vice-President Dimitri Malakidis, (also 25%). The Arbitrator further found that Employer owner M.A. Angeliades controlled H.M. based on evidence that: 1) the only source of capital for H.M.

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[2] The Arbitrator cited and discussed, among other cases, Fugazzi and Buzzard Rentals, 273 NLRB 501 (1984); Kenton Transfer, 298 NLRB 487 (1990).

during its first three years was the Employer; 2) two of H.M.'s three officers are senior managers for Angeliades, and H.M. included the names of the senior managers of Angeliades in a vendor's questionnaire regarding the officers who exercise the most substantial degree of control over the submitting vendor.

Further, the Arbitrator determined that the Employer and H.M. had substantially identical management, business purpose, operations and customers. More specifically, the Arbitrator determined that since both companies list the other as an affiliate on their respective stationeries, and a press release identifies H.M. as a division of Angeliades, it follows that Angeliades is representing to the public that H.M. is controlled by Angeliades and that H.M. is a branch, division or subsidiary of Angeliades. The Arbitrator also considered that in printed and website publicity, both companies' lists of projects contain many identical projects. The Arbitrator found this evidence demonstrated that they were presenting themselves to the public as a single entity, rather than two separate employers. Next, the Arbitrator cites references in several documents, including vendor questionnaires and applications for development jobs, an attendance list for the pre-bid meeting, and OSHA inspection reports to the companies' common address and shared space and equipment, as well as to statements the companies and entities they deal with regard the companies as affiliated. The Arbitrator found this further evidence that the two companies constitute alter egos. Finally, the Arbitrator determined that these documents served to undercut the credibility of William Cote's testimony that Angeliades has no role in the daily operations or labor relations of H.M., and that there is no interchange of employees, supervisors or equipment between the two companies. Based on all the evidence presented at the hearings, the Arbitrator concluded that the Employer and H.M. are alter egos.

ACTION

We conclude that the charges should be dismissed, absent withdrawal. With respect to the 8(e) allegation, we would conclude that the Article II, Sec. 9 is lawful on its face. In addition, the evidence failed to establish that the Union's grievance and the arbitrator's decision were based on an unlawful interpretation of the facially valid clause so as to establish an unlawful "entering into" an 8(e) agreement. With respect to the 8(b)(4)(ii)(B) charge, since the evidence indicated that the grievance and pursuit of the arbitration award were "reasonably based" under the

Board's decision in BE & K. Construction Co.,[3] and the conduct did not have an unlawful objective, the Union's actions were not violative of the Act, as alleged.

Section 8(e) Allegation

The purported "work preservation" clause is not clearly unlawful on its face.

The clause at issue in this case, Article II, Section 9, is not clearly unlawful on its face. In NLRB v. International Longshoremen's Assn. (ILA 1)[4], the Supreme Court set forth a two part test to determine the lawfulness of a "work preservation" agreement: (1) the agreement must have as its objective the preservation of work traditionally performed by employees represented by the union, and (2) the contracting employer has the power to assign the employees to do the work in question – a "right of control" test.[5]

In the instant case, the express purposes of the disputed clause are to protect and preserve the work performed by the employees covered by this agreement, and to prevent any "device or subterfuge" to avoid the protection and preservation of the work. Thus, what the provision requires is that, if a signatory employer, under its own or some other identity, performs work covered by the contract, then that work must be performed under the terms of that contract. Therefore, the provision facially satisfies the first part of the ILA 1 test, a valid work preservation objective.

As to the second part of the ILA 1 test (the "right of control"), we find that the circumstances in which the clause is applicable over another entity provides for the requisite degree of control. Thus Article II, Sec. 9 provides for application of the signatory's contract to an entity where the signatory employer exercises "any significant degree of ownership, management or control. . . (a) where the two enterprises have substantially similar management, business purpose, operation, equipment customers, supervision and/or ownership; or (b) where there exists . . . interrelation of operations, common management, centralized control of labor relations and/or

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[3] 351 NLRB. No. 29 (2007).

[4] 447 U.S. 490 (1980) (ILA I).

[5] Id.

common ownership." The Board has found sufficient control to satisfy Section 8(e) in virtually identical language in Manufacturing Woodworkers Assoc.,[6] and Manganaro Corp. [7] The Board has explained that this language "reasonably means that the signatory employer must have the right or the power effectively to control the assignment of the work of [the other] entity's employees."[8] And further it applies only if the signatory employer "exercises" such control.[9]

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[6] 326 NLRB 321 (1998). The disputed clause read (id. at 323):

In order to protect and preserve, for the employees covered by this Agreement, all work heretofore performed by them, and in order to prevent any device or subterfuge to avoid the protection and preservation of such work, it is hereby agreed that if and when the Employer shall perform any work of the type covered by this Agreement, under its own name or under the name of another, as a corporation, company, partnership, or any other business entity, including a joint venture, wherein the Employer exercises either directly or indirectly any significant degree of ownership management or control, the terms and conditions of this Agreement including Fringe Benefits shall be applicable to all such work.

[7] 321 NLRB 158 (1996). The disputed clause read (id. at 161-162):

To protect and preserve, for the employees covered by this Agreement, all work they have performed and all work covered by this Agreement, and to prevent any device or subterfuge to avoid the protection and preservation of such work, it is agreed as follows: If the Con-tractor performs on-site construction work of the type covered by this Agreement, under its own name or the name of another, as a corporation, company, partnership, or other business entity, including a joint venture, wherein the Contractor, through its officers, directors, partners, owners or stockholders exercises directly or indirectly (including but not limited to management, control, or majority ownership through family members), management, control or majority ownership, the terms and conditions of this Agreement shall be applicable to all such work

[8] Manufacturing Woodworkers Assoc., 326 NLRB at 325.

[9] Ibid.

Therefore, under this analysis, we find that the work preservation provision is not unlawful on its face under the "right of control" test.

The Union has not interpreted the facially lawful clause in an unlawful manner.

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 are violative of Section 8(e).

A good example of this principle is Carpenters Local 745, (SC Pacific).[10] In this case, the Board found facially lawful under Section 8(e) a clause which prevented a signatory contractor from "illegally using an alter-ego operation to escape the obligations of its collective bargaining agreement."[11] 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 clause and obtaining the arbitral award accepting that unlawful interpretation.[13]

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[10] 312 NLRB 903 (1993), enfd. 73 F.3d 370 (9th Cir. Dec. 19, 1995).

[11] Id. at 904 fn 2.

[12] Id. at 903.

[13] See also Sheet Metal Workers Local 27,. 321 NLRB 540, 540 (1996) (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 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.

The Board made clear 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, the Union in the instant case did not argue an unlawful interpretation of the facially lawful clause to the arbitrator, and the arbitrator did not interpret the clause in an unlawful manner. Rather, the Union argued in its grievance that Angeliades and H.M. were alter egos, and, in finding the companies were alter egos, the arbitrator applied the appropriate alter ego criteria of common ownership, management/business purpose, operations, equipment, and customers. Thus neither the Union's theory nor the arbitrator's finding that the Employer and H.M violated Article II, Section 9 by failing to apply the contract to work performed by H.M. is an unlawful interpretation of the facially valid provision.

We acknowledge that it is arguable that the arbitrator did not correctly analyze the evidence before him in deciding that the Employer and H.M. are alter egos. We conclude, however, that this alleged failing does not create a Section 8(e) violation. As the Board noted in SC Pacific, the basis for finding an 8(e) violation with respect to a facially valid clause is whether the union's theory or the arbitral award amounts to "enforcing the clause as if it were the equivalent of a clause that would be unlawful on its face," not merely that the union's "understanding of the facts turned out to be wrong."[15] Accordingly, because the union did not seek or obtain an unlawful interpretation of the contract, the Section 8(e) charge should be dismissed.

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[14] SC Pacific, 312 NLRB at 903. 904.

[15] Id. at 903.

Section 8(b)(4)(ii)(B) Allegation

Since the Union's grievance and pursuit of the arbitration award were "reasonably based," and the conduct did not have an unlawful objective, the Union's actions were not violative of Section 8(b)(4)(ii)(B).

In BE&K Construction Co,[16] the Board held that the filing and maintenance of a "reasonably based" lawsuit does not violate the Act, regardless of whether the lawsuit is ongoing or completed, and regardless of the motive for the lawsuit. For all the reasons discussed above, given the legitimate legal theory and the evidence adduced in support of that theory, the union's claim that Angeliades and H.M. are single employers or alter egos is not baseless. Similarly, given that the union was enforcing a facially valid work preservation clause, the Union did not have an unlawful object in attempting to have H.M. apply the terms of the Angeliades' Union contract to employees working on H.M. jobsites.[17] Therefore, the Union did not violate the Section 8(b)(4)(B) by pursuing the grievance and obtaining the arbitration award.

Conclusion

In sum, Article II, Section 9 is a facially valid work preservation clause; the Union's grievance and the arbitrator's decision were not based on an unlawful interpretation of that provision. In addition, the Union's pursuit of its grievance was "reasonably based" under the Board's decision in BE&K Construction Co., and the Union's actions did not have an unlawful objective. Accordingly, we conclude that the Region should dismiss the charges, absent withdrawal.

B.J.K.

[16] 351 NLRB No. 29 (2007).

[17] Cf. Elevator Constructors (Long Elevator), 289 NLRB 1095 (1988), enfd. 902 F.2d 1297 (8th Cir. 1990).