Heartland Industrial Partners, LLC and United Steelworkers of America, AFL–CIO *and* Linda Kandel, Galen E. Raber, Juanita M. Miller, and Renate Croll. Case 34–CE–9

November 7, 2006

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER AND WALSH

On June 16, 2005, Administrative Law Judge Raymond P. Green issued the attached decision. The General Counsel and Charging Party filed exceptions and supporting briefs. The Respondents filed answering briefs, and the General Counsel and the Charging Party filed reply briefs. The Respondent Union filed cross-exceptions and a supporting brief. The General Counsel and the Charging Party filed answering briefs, and the Respondent Union filed a reply 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 and to adopt the recommended Order.

I. INTRODUCTION

Respondents Heartland Industrial Partners, LLC (Heartland) and United Steelworkers of America, AFL–CIO (the Union) have entered into an agreement governing union organizing at companies that Heartland may acquire. The complaint alleges that two clauses in the agreement require Heartland to cease doing business with another person or employer, in violation of Section 8(e) of the Act. For the following reasons, we find, in agreement with the judge, that the challenged clauses did not violate Section 8(e).

II. FACTUAL BACKGROUND

The facts, which are set forth more fully in the judge's decision, may be summarized as follows. Heartland is an investment firm that invests in manufacturing firms located in the Midwest. On November 27, 2000, Heartland and the Union executed the Heartland Agreement. It consists of two parts: a Side Letter and a Framework for a Constructive Collective-bargaining Relationship (Framework).

The Side Letter specifies the circumstances and conditions for applying the Framework to future acquisitions of Heartland known as "covered business entities" (CBEs). Specifically, section 3 of the Side Letter defines a CBE as one in which Heartland

> directly or indirectly: (i) owns more than 50 percent of the common stock; (ii) controls more than 50 percent of the voting power; or (iii) has the power, based on contracts, constituent documents or other means, to direct the management and policies of the enterprise. . . .

Section 2 of the Side Letter provides that no less than 6 months after Heartland has invested in a CBE, the Union may notify Heartland of its intent to organize that CBE. Heartland will then cause the CBE to execute a Side Letter and Framework with the Union that is, in form and substance, identical to the Heartland Agreement.

The Framework states that the CBE will adopt a position of neutrality during an organizing campaign; post a notice to its employees advising them of its neutral position; grant the Union access to its premises to distribute information and to meet with employees; furnish the Union with employee names and addresses; and recognize the Union based on a majority showing after a card check. Also, upon a showing of majority support, the CBE will bargain within 14 days of recognition, and will submit to interest arbitration any issues that remain open after 90 days of bargaining.

The Framework also includes a dispute resolution procedure. Under this procedure, either party can submit disputes involving the terms of the Framework to an arbitrator. The arbitrator's remedial authority includes "the power to issue an order requiring [a CBE] to recognize the Union when, in all the circumstances, such an order would be appropriate." The arbitrator's award is final and binding on the parties. The parties waive the right to seek judicial review of the award, but may seek its judicial enforcement.

In early 2001, Heartland acquired Collins & Aikman Corporation (Collins & Aikman), which is engaged in the manufacture of goods that serve the automotive industry. In January 2003, Heartland caused Collins & Aikman to enter into a Side Letter and Framework with the Union (Collins & Aikman agreement).

In June 2002, Heartland acquired Trimas Corporation (Trimas), which is engaged in the manufacture of engineered products such as fasteners and automobile accessories. On July 11, 2003, Heartland caused Trimas to enter into a Side Letter and Framework with the Union (Trimas agreement).

III. ANALYSIS

A. The 10(b) Issue

The complaint alleges that the Heartland Agreement was reaffirmed by the Trimas agreement on July 11, 2003, and that sections 2 and 3 of the Side Letter violate Section 8(e).[1] The Respondents contend that the com-

[1] The Board and the courts have interpreted Sec. 8(e) to prohibit not only the initial execution of the agreement, but subsequent reaffirmations as well. Accordingly, "the words 'to enter into' must be inter-

plaint is timebarred by Section 10(b) because both the original and amended charges are untimely.[2] For the reasons that follow, we find, in agreement with the judge, that the complaint allegations are supported by a timely filed charge.

The Charging Party filed the original charge on August 6, 2003, and an amended charge on September 24, 2004. The original charge alleged that the Heartland Agreement was reaffirmed by the Collins & Aikman agreement and that sections 2–7 and 11 of the Side Letter and section I(E) of the Framework violated Section 8(e). The amended charge alleged generally that the Heartland Agreement was reaffirmed when Heartland required its CBEs to enter into neutrality agreements with the Union and that sections 2–7 of the Side Letter and section I(E) of the Framework violated Section 8(e).

The original charge is not timely with respect to the Collins & Aikman agreement because that agreement was entered into in January 2003, more than 6 months before the original charge was filed in August 2003. However, the original charge is timely with respect to the Trimas agreement entered into in July 2003, even though the charge does not allege that the Trimas agreement was unlawful.[3]

The Supreme Court has held that

> [o]nce its jurisdiction is invoked [by the filing of a charge] the Board must be left free to make full inquiry under its broad investigatory power in order properly to discharge the duty of protecting public rights which Congress has imposed upon it. There can be no justification for confining such an inquiry to the precise particularizations of a charge.

NLRB v. Fant Milling Co., 360 U.S. 301, 308 (1959) (internal footnote omitted). Accordingly, a complaint alleging violations not specifically alleged in the charge is proper if the matters asserted in the complaint "are related to those alleged in the charge and . . . grow out of them while the proceeding is pending before the Board." Id. at 309 (quoting *National Licorice Co. v. NLRB*, 309 U.S. 350, 369 (1940)). In *NLRB v. Operating Engineers Local 925*, 460 F.2d 589 (5th Cir. 1972), enfg. in pertinent part 180 NLRB 759 (1970), the court agreed with the Board that a complaint allegation that a union failed to refer a dissident to a job with one employer was properly based on a charge alleging a failure to refer to a different employer. Noting that the refusals to refer the dissident were close in time and both were in reprisal for his dissident activity, the court reasoned that the charge adequately informed the union that its referral practices as to the dissident had been challenged, so that it did not "violate the purposes of 10(b) to permit the Board to include in its complaint allegations of other instances in which respondents refused to refer [the dissident] to a job in addition to the particular incident giving rise to the charge." Id. at 596.

Both the Collins & Aikman and Trimas agreements involve the same Heartland Agreement and the same parties, Heartland and the Union. The original charge clearly informed the Respondents that the Heartland Agreement had been challenged. Heartland and the Union make no claim that they were in any way prejudiced by the complaint's reliance on the Trimas agreement instead of the Collins & Aikman agreement. Moreover, Heartland and the Union would raise the same defenses to the alleged 8(e) violation regardless of whether the reaffirmation event was the Collins & Aikman agreement or the Trimas agreement. Thus, for 10(b) purposes, the Trimas agreement alleged in the complaint is sufficiently related to the Collins & Aikman agreement alleged in the original charge.

B. The 8(e) Issue

Section 8(e) of the Act generally forbids parties from entering into an agreement in which an employer "agrees to refrain from dealing in the product of another employer or to cease doing business with any other person."[4] *Iron Workers* (*Southwestern Materials*), 328 NLRB 934, 935 (1999). The General Counsel can establish the cease doing business element of Section 8(e) by "proof of prohibitions against forming business relationships in the first place as well as requirements that one cease business relationships already in existence." *Carpenters District Council of Northeast Ohio* (*Alessio Construction*), 310 NLRB 1023, 1025 fn. 9 (1993) (citing

preted broadly and encompass the concepts of reaffirmation, maintenance, or giving effect to any agreement which is within the scope of Section 8(e)." *NLRB v. Central Pennsylvania Regional Council of Carpenters*, 352 F.3d 831, 834 (3d Cir. 2003), quoting *Dan McKinney Co.*, 137 NLRB 649, 654 (1962).

[2] Sec. 10(b) empowers the Board to issue and serve complaints upon persons who have been charged with committing an unfair labor practice, "[p]rovided, [t]hat no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made . . . ." 29 U.S.C. § 160(b).

[3] The record clearly shows that the Heartland Agreement was reaffirmed in July 2003, when it was applied to the Trimas transaction, not in June 2003 as found by the judge. See GC Exh. 1(e), par. 13(b). This inadvertent error does not affect our decision.

[4] Sec. 8(e) provides in pertinent part:

> 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 any of the products of any other employer, or cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void[.]

Ets-Hokin Corp., 154 NLRB 839, 840 (1965), enfd. 405 F.2d 159 (9th Cir. 1968), cert. denied 395 U.S. 921 (1969)). Section 8(e)'s reach, however, is not limited to agreements that on their face require a total cessation of business relationships. See *Longshoremen ILA Local 1410* (*Mobile Steamship*), 235 NLRB 172, 179 (1978). Thus, to establish a violation of the cease doing business element, "it need not be shown that a cessation of business has occurred or is inevitable, it is enough to show that the agreement offers the alternatives of a cessation of business or of adopting other injurious courses of action. An agreement which presents neutral employers with such options gives them 'no real choice.'" *Teamsters Local 85* (*Southern Pacific Transportation Co.*), 199 NLRB 212, 215 (1972) (citations omitted).

In this case, the General Counsel does not challenge the neutrality and card check provisions of the Framework. Instead, the sole provisions alleged to be unlawful are sections 2 and 3 of the Side Letter, which define a CBE and require Heartland to cause a CBE to execute the Side Letter and Framework under specified conditions. According to the General Counsel, this requirement, as a matter of law, establishes a prohibited cease doing business object because it operates as a restriction on Heartland's investments. In the absence of record evidence sufficient to support the General Counsel's complaint, and in agreement with the judge, we reject the General Counsel's position.[5]

On their face, the challenged clauses do not limit Heartland's discretion to invest in or acquire any company it chooses. Indeed, the clauses impose no obligation whatsoever on Heartland either at the time of an investment or during the ensuing 6 months. Even after the 6-month period has expired, the clauses on their face do not require Heartland to cease doing business with anyone. Rather, Heartland's obligation is to cause the company it has invested in to execute a Side Letter and Framework, if the company qualifies as a CBE and if the Union requests that it do so. There is also no evidence that the challenged clauses have had the effect of causing Heartland to refrain from investing in any company. To the contrary, Heartland senior managing director Treadwell testified without contradiction that the obligation imposed by the clauses is irrelevant to, and has not limited any of, Heartland's investment decisions.

As noted above, the Board has found violations of Section 8(e) when a clause in theory allows an employer to do business with a nonunion firm but imposes a significant penalty if it does so. *Mobile Steamship*, supra at 179 ($2-per-ton royalty imposed on cargo unloaded by "other than ILA labor"); *Southern Pacific Transportation Co.*, supra at 215 (employer required to pay twice for work if nonunion labor used); *Raymond O. Lewis, et al.*, 148 NLRB 249, 253 (1964) (extra $.40-per-ton payment to retirement fund required for coal purchased from nonsignatory employer). Such clauses have a cease doing business object because, as was stated in *Southern Pacific Transportation Co.*, supra at 215, "an agreement which presents neutral employers with such options gives them 'no real choice.'" No dilemma of this character is presented in this case by the challenged clauses.

The Board has found that clauses that prohibit a signatory employer from being affiliated with a nonunion contractor violate Section 8(e). See, e.g., *Alessio Construction*, supra; *Sheet Metal Workers Local 91* (*Schebler Co.*), 294 NLRB 766 (1989), enfd. in part 905 F.2d 417 (D.C. Cir. 1990); *Operating Engineers Local 520* (*Massman Construction*), 327 NLRB 1257 (1999). Contrary to the argument advanced by the General Counsel, these cases are distinguishable and do not support finding a cease doing business object here.

The anti-dual shop clause in *Alessio Construction* prohibited the owners of a signatory employer from forming or participating in the formation of a nonunion company in the same general business. In *Schebler*, an "integrity clause" allowed the union to rescind its collective-bargaining agreement if the signatory employer owned, or was commonly owned with, a nonunion company in the same general business. In *Massman Construction*, the challenged clause prohibited a signatory employer from entering into a joint venture with a nonunion company.

In each case, the challenged clause effectively gave the signatory employer two alternatives: (1) induce another company to become unionized; or (2) sever its relationship with that company, i.e., cease doing business with it. See, e.g., *Sheet Metal Workers v. NLRB*, supra, 905 F.2d at 421. In *Alessio Construction*, the clause imposed this requirement by requiring any "dual shop" to be covered by all the terms of Alessio's collective-bargaining agreement with the union. 310 NLRB at 1025. In *Schebler*, the integrity clause effectively required the signa-

[5] An agreement is unlawful under Sec. 8(e) if "(1) it is an agreement of a kind described in the basic prohibition of that section—e.g., an agreement to cease doing business with another person, (2) it has secondary, as opposed to primary, work preservation objectives, and (3) it is not saved by coming within the terms of the construction industry proviso to Section 8(e)." *Alessio Construction*, supra at 1025. As noted above, we agree with the judge that secs. 2 and 3 of the Side Letter are not an agreement to cease doing business. We find it unnecessary to pass on the judge's further findings that Heartland's acquisition of other business enterprises did not constitute "doing business" for the purposes of Sec. 8(e) and that the "with another person" criterion was not met. We also find it unnecessary to pass on whether the instant agreement had secondary objectives and our dissenting colleague's argument that it did.

tory employer to cease its affiliation with a nonunion operation unless it signed a collective-bargaining agreement with the union. 294 NLRB at 771. In *Massman Construction*, the joint venture clause prohibited the signatory employer from entering into a joint venture or joint work undertaking unless all parties to the joint venture also signed collective-bargaining agreements. 327 NLRB at 1257. In each of these cases, the plain words of the clause at issue prohibited the signatory employer from establishing or continuing an affiliation with a nonunion firm.

The challenged clauses in this case are different. On their face, they do not require Heartland to choose between inducing a CBE to become unionized or severing its relationship with the CBE. Crucially, the challenged clauses also do not—on their face—require Heartland to sever its relationship with a CBE that does not become bound by the Side Letter and Framework.

Concededly, the Side Letter and Framework do provide for binding arbitration of disputes concerning violations of their terms. But neither the challenged clauses nor any other provision of the Side Letter and Framework specify the remedy to be imposed if a CBE does not become bound. The General Counsel argues that "there is no basis in the record to conclude that an arbitrator is *not* empowered to order a remedy that would include the cessation or altering of Heartland's relationship with the CBE should it not honor the conditions of the" Side Letter and Framework. (Emphasis added.) The absence of record evidence, however, falls well short of meeting the General Counsel's burden of proving that the challenged clauses have a cease doing business object. Settled Board law requires us to construe a challenged clause "to require no more than what is allowed by law" when it is not "*clearly* unlawful on its face." *General Teamsters Local 982* (*J. K. Barker Trucking Co.*), 181 NLRB 515, 517 (1970), affd. 450 F.2d 1322 (D.C. Cir. 1971). (Emphasis added.) Here, the challenged clauses on their face contain no provision that would allow an arbitrator to order Heartland to cease doing business with a CBE. Consistent with the principles set forth in *J. K. Barker*, we will not infer that an arbitrator will enter such an order but will instead construe the clause "to require no more than what is allowed by law."[6]

Our dissenting colleague concedes that the challenged agreement "does not literally require that Heartland cease doing business with such a CBE." He thus does not take issue with our finding that, on their face, the clauses do not limit Heartland's ability to acquire any CBE it wishes. The dissent nevertheless posits that a CBE would view the Side Letter and Framework interest arbitration and card check recognition procedures as onerous conditions on doing business with Heartland. Our colleague also raises the possibility that a CBE might not honor its obligations, and asserts that in those circumstances Heartland "can be made to pay" for the breach. Our colleague combines these possibilities and finds a violation of Section 8(e). We disagree.[7]

The basis on which the dissent would find an unfair labor practice is difficult to discern. Initially, our colleague argues that the challenged agreement may be found to violate Section 8(e) because it would deter potential CBEs from doing business with the signatory employer, Heartland. The dissent argues that a business relationship is a "two-way arrangement," and that an agreement that "calls for an interruption of that arrangement" is within the ambit of Section 8(e). However, Section 8(e), by its terms, only prohibits agreements between a union and an employer "whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or cease doing business with any other person . . . ." (Emphasis

[6] In any event, the following lengthy chain of contingencies would have to occur before a cease doing business object could be found on this basis: (1) Heartland acquires an entity that qualifies as a CBE; (2) at least 6 months later, the Union invokes the Framework and Side Letter; (3) Heartland fails to require the CBE to execute the Framework and Side Letter; (4) the Union demands arbitration; (5) the arbitrator finds a contract violation; and (6) the arbitrator orders, or effectively requires, divestiture of the CBE as a remedy. In *Manufacturers Woodworking Assn. of Greater New York, Inc.*, 345 NLRB 538, 541 (2005), the Board found that a similar chain of contingencies was too speculative to support a finding that an arbitration demand seeking to enforce an allegedly unlawful contract clause would interfere with employees' Sec. 7 rights. Similarly, any nexus here between the language of the challenged clauses and cessation of business between Heartland and a CBE is too attenuated to justify a finding that the clauses are unlawful on their face.

We acknowledge that if the challenged clauses were applied in the manner suggested by the General Counsel, the Board would be called upon to decide whether that application of the clauses violated Sec. 8(e). Without passing on that issue, which is not before us, we emphasize that our finding that the clauses are not unlawful on their face does not preclude the Board from finding a violation of the Act if they are subsequently applied in an unlawful manner. See *Painters District Council 51* (*Manganaro Corp., Maryland*), 321 NLRB 158, 168 fn. 39 (1996).

While Member Schaumber agrees with the above-stated proposition, he does not pass on whether *Manganaro* was correctly decided insofar as it found that the clauses at issue in that case were lawful.

[7] Member Schaumber is of the view that card check and neutrality agreements present important questions concerning the protection of employees' Sec. 7 rights. Any impact the challenged clauses may have on those rights, however, has no bearing whatsoever on whether they violate Sec. 8(e). Accordingly, it would be inconsistent with the text of the Act and the intent of Congress to use Sec. 8(e) to address the broader issues (which no party raises here) that card check and neutrality agreements present.

added.) Our colleague cites no precedent—because none exists—for the novel view that an agreement to cease doing business with someone, by the signatory employer, is not a prerequisite for finding a violation of Section 8(e).

The dissent also argues that "Heartland is subject to a breach-of-contract suit and to damages if it fails to require that a CBE observe neutrality and recognize the union based on cards." In fact, the challenged agreement states that Heartland would be liable for such remedy as an arbitrator might impose if Heartland failed to comply with its obligation to require a CBE to execute a Side Letter and Framework. If a CBE executed a Side Letter and Framework but thereafter violated its provisions, the agreement on its face calls for submission of the dispute to an arbitrator, who is empowered to issue a decision. There is no requirement that liability for such a violation be imposed on Heartland.

There is also no record evidence to support our colleague's opinion that the requirements established by the Side Letter and Framework are sufficiently onerous that either the duty to impose them or the obligation to accept them would rise to the level of an implied prohibition on the doing of business under extant Board law.[8] Indeed, the only evidence on point was that the challenged clauses had no impact whatsoever on Heartland's investment decisions. We need not pass on our colleague's view, however, because he also concedes that Heartland, by definition, controls any CBE and can require the CBE to "agree to the Union's demands." How, under those circumstances, a CBE could fail to comply with its obligations under the Side Letter and Framework, and thereby trigger a sequence of events that the dissent finds would result in a cessation of business, is not explained.

Finally, the dissent mischaracterizes our position, arguing that our decision means there cannot be a violation of Section 8(e) unless the challenged agreement expressly states that "the remedy for a Heartland breach is divestiture from the CBE,"[9] and that we have found that the agreement "is not facially unlawful because it does not literally require a cessation of business." To the contrary. We have not found these facts to be *dispositive* of the 8(e) issue, as our decision makes clear. Instead, having considered the text of the challenged clauses, as Board law requires, we conclude that the absence of an explicit remedy that would effectively require divestiture, and the absence of a literal requirement that Heartland cease doing business with anyone, are *relevant* to our determination of their facial validity. To the extent the dissent can be read to say that the absence of such provisions is irrelevant to the 8(e) issue, we disagree.[10] In light of these and the other considerations discussed above, we conclude that the General Counsel has failed to show that a cessation of business between Heartland and a CBE is sufficiently foreseeable to warrant a finding that the agreement, on its face, violates Section 8(e).

IV. CONCLUSION

In *NLRB v. Operating Engineers Local 825* (*Burns & Roe*), 400 U.S. 297, 305 (1971), the Supreme Court recognized that even "secondary activity could have such a limited goal and the foreseeable result of the conduct could be, while disruptive, so slight that the 'cease doing business' requirement is not met." Although we do not pass on whether the challenged clauses in this case have a secondary objective, the principle stated in *Burns &Roe* is, we think, applicable here. The challenged clauses do no more than require Heartland, at the Union's request, to cause a CBE to execute the Side Letter and Framework. That requirement "affects" Heartland's business because it requires it to take that action. However, we cannot say on this record that a "foreseeable result" of that requirement is that Heartland will cease doing business with anyone. We accordingly find that the General Counsel has not established that the challenged clauses violate Section 8(e), and we shall therefore dismiss the complaint.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

CHAIRMAN BATTISTA dissenting.

My colleagues have found lawful an agreement which obligates the signatory Employer (Heartland) to require companies with whom it does business (CBEs) to agree to certain demands of the Union. These demands in-

[8] Cf. *Masters, Mates & Pilots (Seatrain Lines),* 220 NLRB 164 fn. 2 (1975) (violation found where agreement prohibited sale of vessel unless purchaser signed contract with union, and union demanded "lost wages" as damages for breach); *Southern Pacific Transportation Co.,* supra; *Lithographers of America (Graphic Arts Employers Assn.),* 130 NLRB 985 (1961) (violation found where disputed clause allowed union to terminate entire contract if employer requested that employees handle struck or nonunion work), enfd. 309 F.2d 31 (9th Cir. 1962), cert. denied 372 U.S. 943 (1963).

[9] The dissent also posits a hypothetical scenario in which the Union pickets Heartland to force it to require a CBE to agree to neutrality/card check. This scenario is more akin to an attempt by the Union to enforce the challenged clauses in a breach of contract action, and thus says little about the legality of the clauses on their face. As discussed above, the permissibility of an effort to enforce the clauses is more properly addressed in a case challenging the legality of the clauses as applied.

[10] Likewise, we have properly considered the evidence that the agreement has not resulted in any cessation of business. While not determinative, this evidence also is relevant to our assessment of the agreement's foreseeable effects.

clude: (1) the CBE will be neutral in any union organizing campaign involving the CBE's employees; and (2) the CBE will recognize the Union upon proof of card majority status. In short, the CBE must give up its statutory rights to: (1) speak freely against the union campaign; (2) have a Board-conducted election to determine the representational desires of its employees; and (3) determine what contractual provisions it will agree to, i.e., the CBE will proceed to interest arbitration if it does not agree to the Union's contractual demands. Thus, the agreement between Heartland and the Union is aimed squarely at the labor relations of the CBEs. It is therefore a secondary agreement proscribed by Section 8(e). Indeed, the only distinction between this clause and a union-signatory clause is that the union-signatory clause requires the other company to have a present bargaining relationship with the union, while the instant clause requires the other company to recognize the union as the collective-bargaining representative, based on cards. Thus, just as union-signatory clauses are secondary and unlawful because they are addressed to the labor relations of the other company, so too is the instant clause secondary and unlawful.

I recognize that the agreement does not spell out the consequences that would follow if a CBE did not honor an agreement to neutrality and card-check recognition. That is, the agreement does not literally require that Heartland cease doing business with such a CBE. However, as a practical matter, Heartland controls the CBE and, as the judge found, can require the CBE to agree to the Union's demands.[1] My colleagues agree that, to establish an 8(e) violation, "it need not be shown that a cessation of business has occurred or is inevitable." Similarly, "the Board has long held that where an agreement permits the doing of business, but only under extremely onerous conditions, such an agreement impliedly prohibits the doing of business." See *Lithographers of America (Graphic Arts Employers Assn.),* 130 NLRB 985, 987–988 (1961), enfd. 309 F.2d 31 (9th Cir. 1962), cert. denied 372 U.S. 943 (1963). In the instant case, the condition of Heartland's doing business with a CBE is that the CBE must accept neutrality and card-check recognition, i.e. it must give up its right to speak freely and to a Board election. It must also accept interest arbitration, a nonmandatory subject of bargaining. These indeed are onerous conditions.

My colleagues disagree that these requirements are onerous. I believe that an employer's statutory right to speak freely and its right to a Board election are highly significant matters, and to take these away can reasonably be viewed as onerous.[2] The same can be said about an employer's right to negotiate its own contract. See Section 8(b)(1)(B) of the Act.

My colleagues then say that these conditions (card-check recognition, neutrality, and interest arbitration) are irrelevant because the condition is imposed on the CBE and not on the signatory (Heartland). In this regard, my colleagues say that a violation of Section 8(e) depends on an agreement whereby the signatory would cease doing business with the other company, as distinguished from the other company's cessation of business with the signatory. In my view, a business relationship is a two-way arrangement. If the agreement calls for an interruption of that arrangement, each of the parties ceases to do business with the other, and the agreement is therefore within the ambit of Section 8(e). In any event, in the instant case, signatory Heartland cannot invest in, i.e., do business with, a CBE unless the CBE will be bound to the neutrality and card-check clauses. Heartland is subject to a breach-of-contract suit and to damages if it fails to require that a CBE observe neutrality and recognize the union based on cards. In short, Heartland can be made to pay for the breach.

Relatedly, my colleagues suggest that an 8(e) violation may depend, inter alia, on whether the remedy for a Heartland breach is divesture from the CBE. There is no support for that view, and it is contrary to the principle that Section 8(e) is not dependent upon a literal cessation of business.

My colleagues also say that the clause is not facially unlawful because it does not literally require a cessation of business between Heartland and a CBE. However, as discussed above, Section 8(e) imposes no such requirement.

Finally, my colleagues cite evidence to the effect that Heartland is not in fact deterred by the alleged 8(e) provision in deciding whether to invest in a given CBE. This position is a bit curious because my colleagues also assert that the General Counsel's attack is on the face of the clause, not the manner in which it is applied. In my view, taking the General Counsel's attack as a facial one, it is clear that Heartland may not invest in a company unless that company will be bound to neutrality and card-check recognition. The fact that Heartland's investment decisions are not affected by the clause does not negate the facial invalidity of the abuse.

[1] Notwithstanding such control, it is clear, and my colleagues do not dispute, that the CBEs are separate employers from Heartland.

[2] I do not pass on the legality of a union's agreement with a primary employer that such rights are waived.

Because the Union achieves its labor objectives vis-à-vis CBEs through an agreement with Heartland, I would find the 8(e) violation.[3]

Jennifer F. Dease, Esq., for the General Counsel.
Peter D. Nussbaum, Esq. and *Danielle E. Leonard, Esq.,* for the Union
James M. Stone, Esq. and *David E. Weisblatt, Esq.,* for Heartland.
William L. Messenger, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. I heard this case in Hartford, Connecticut, on March 21, 2005. The charge and amended charge was filed on August 6, 2003, and September 24, 2004. The complaint was issued on February 9, 2005, and alleged:

1. That the Respondent Heartland, which is located in Greenwich, Connecticut, is a private equity firm that invests in industrial manufacturing companies.

2. That on or about November 27, 2000, Heartland by David Stockman, entered into an agreement with the Union which sets forth conditions under which Heartland's "covered business entities," shall enter into "neutrality agreements" with the Union.

3. That section 3 of a Side Letter defines covered business entities (CBEs) as being any enterprise in which Heartland:

> Directly or indirectly (i) owns more than 50% of the common stock; (ii) controls more than 50% of the voting power; or (iii) has the power, based on contacts, constituent documents or other means, to direct the management and policies of the enterprise. . . .

4. That Section 2 of the Side Letter provides in part

> If, at any time after six months following a transaction, the Union notifies Heartland in writing of its actual intent to organize any of the facilities of the CBE, then within ten days of such notification, Heartland will cause the CBE to immediately execute an agreement (hereafter known as the "Framework for a Construction Collective Bargaining relationship" or "Framework Agreement") between said CBE and the USWA. . . ., as well as the Side Letter, both of which shall also at that time be executed by the Union.

5. That Section I of the Framework requires a CBE employer to grant the Union access to distribute information and to meet with employees; provide the Union with the names and addresses of employees; grant recognition to the Union based on a card check procedure; bargain within 14 days of recognition and engage in interest arbitration of open issues within 90 days of bargaining.

6. That in June 2002, Heartland acquired Trimas as a CBE entity. Trimas is located in Bloomfield Hill, Michigan, and is engaged in the manufacture of engineered products such as fasteners and automobile accessories.

7. That on or about July 11, 2003, Heartland required Trimas to enter into an agreement with the Union that required Trimas to implement the substance of the Heartland Agreement. It is alleged that by such action, the Respondents Heartland and the Union reaffirmed the provisions of the Heartland Agreement.

8. That by entering into and maintaining the Heartland Agreement and reaffirming it on July 11, 2003, vis-à-vis Trimas, the Respondents have entered into an agreement by which Heartland has agreed to not do business with another person or employer and thereby the Respondents have violated Section 8(e) of the Act.

I. JURISDICTION

The parties agree and I find that the Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

The facts are not in dispute and the parties agree that this is a case of first impression.[1]

Heartland is a limited partnership located in Greenwich, Connecticut. It is principally a private investment vehicle somewhat similar in design and hopes of Berkshire Hathaway. It aggregates large amounts of capital and has sought to purchase controlling interests, primarily in old line industrial enterprises located in the Midwest. (Hence the name Heartland.) In the trade, this is called a leveraged buyout firm. Heartland itself, does not directly employ industrial workers, having a relatively small staff of people in Greenwich, Connecticut. Its direct employees are not represented by any labor organization.

Dan Tredwell, Heartland's senior manager director testified that inasmuch as many of the potential targeted enterprises were already unionized, it was decided at the outset, that Heartland would attempt to have good relationships with the large industrial unions in the United States.

In 1999, David Stockman, one of the founding partners, sometime after spending time as budget director in the Reagan administration, decided to establish Heartland. At that time, he and Tredwell entered into talks with Ron Bloom who was the special assistant to the president of the Steelworkers Union of America.

Bloom presented an agreement based on a model that the Steelworkers had negotiated with another company. That model was transmitted to Heartland as a proposed "Framework" and was modified, after negotiations, into a side letter. (This is referred to by the parties as "The Side Letter"). For whatever reasons, the parties refer to the "Heartland Agreement" as being the combination of the "Framework" and the "Side Letter."

[3] Another way to test and confirm that this case involves an 8(e) violation is to posit that the union pickets Heartland to get Heartland to require CBEs to agree to neutrality/card check. It is clear that the picketing would violate Sec. 8(b)(4)(B). It is equally clear that the Union is proscribed by Sec. 8(e) from accomplishing that objective through agreement with Heartland. Sec. 8(e) closed the prior loophole in 8(b)(4)(B). See *The Developing Labor Law*, p. 1751 fn. 22.

[1] I would like to express my appreciation for the excellent briefs filed by all parties.

There are in fact, two documents, both dated November 27, 2000.

In any event, there is no question but that there is an agreement between Heartland and the Steelworkers Union which has already been described above. Essentially, this agreement provides that if Heartland purchases the stock of an existing enterprise, and if it becomes the controlling entity, and if the Union decides, after 6 months from the acquisition date that it will seek to organize the employees of the controlled entity, and if the Union notifies Heartland of its intention to organize, then Heartland will (as the controlling entity), require the acquired entity to agree to recognize the Union based on a card check. And if the card check establishes a bargaining relationship and if no agreement is reached, then the parties will enter into interest arbitration.[2]

Notwithstanding the General Counsel's contention that the Heartland Agreement contains "investment restrictions," the documents themselves, by any normal use of the English language, do not contain any restrictions on the types of investments that can be made by Heartland. Nor is there any evidence to suggest that the Union's intention in reaching the agreement was to restrict the set of enterprises that Heartland could invest in or acquire. The agreement does not limit Heartland from negotiating only with unionized firms or with firms that would agree to become unionized. It does not prohibit Heartland from negotiating with firms who would vigorously fight any efforts to unionize or with firms whose managements may have never thought about unions at all. Whatever opinions about unions may have been entertained by the management of a firm being sought by Heartland, those opinions were simply irrelevant to Heartland and according to Tredwell, never played any part in its negotiations for an acquisition. Tredwell testified that Heartland has never disclosed its arrangement with the Union when it negotiates with targeted companies because; "It is none of their business."[3]

I note that this agreement between the Union and Heartland, encompasses a number of contingencies pursuant to which the Union might possibly become the recognized bargaining representative of the employees of an enterprise which has been acquired in such a way that Heartland acquires the controlling interest in that enterprise. There is nothing in the agreement that would require Heartland to cease doing business with any entity (including an acquired entity), that did not execute or agree to be bound by a collective-bargaining agreement with the Union. Therefore, it cannot be asserted that the agreement between Heartland and the Union is a "union signatory agreement," which is the type of contract which requires a company to only do business with other enterprises that either are signatory to or have agreed to be bound to a collective-bargaining agreement.

I further note that in a certain sense the agreement between the Union and Heartland does not really involve a third person at all inasmuch as that third party, although perhaps retaining its separate legal existence, would have ceased to exist as an independent separate entity once Heartland has acquired it.[4] Therefore, once Heartland becomes the controlling entity it simply carries out, vis-à-vis itself, the terms of the "neutrality" agreement that it had previously agreed to with the Union.

In June 2002, Heartland acquired a company called Trimas Corporation. In doing so, it acquired about 60 percent of the stock and controlled the majority of its Board of Directors. Heartland was also responsible for hiring the CEO and had the authority to fire him or determine his level of compensation. There can be no question but that Trimas, upon its acquisition by Heartland, not only became a CBE in terms of the union agreement, but also became, as a matter of practical reality, a controlled entity subject to the wishes and direction of Heartland's partners. If Stockman et al wanted their chosen CEO of Trimas to jump, they had the legal power and authority to do so.

Some time after the acquisition of Trimas, the Union gave notice that it intended to organize the employees and Heartland implemented the agreement via a letter executed in the name of Trimas that it would abide by the "neutrality" agreement. This letter was executed on July 11, 2003, and it is, according to the complaint and the General Counsel's theory, the triggering event for the alleged violation. By that I mean that the General Counsel contends that the July 11, 2003 transaction constitutes a re-entering into of an unlawful 8(e) agreement.[5]

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[2] The Charging Party's counsel contends that the agreement is an example of top down organizing. By this, I assume he means that it constitutes a form of assistance by an employer to a union in relation to the selection by employees of union representation. I don't agree and don't see the relevance of this contention in any event. The Heartland agreement, although providing that the employer will not actively campaign against a union and will allow access to employees, also provides for a mechanism whereby the employer when faced with a union organizing drive, will resolve a question concerning representation without invoking the procedures of the NLRB. The Union is still required to convince employees to sign union authorization cards. And a neutral person is designated to determine if the Union has achieved majority support within an appropriate bargaining unit. Under Board law, an employer can voluntarily recognize a union if it demonstrates majority support. There is nothing in the law that requires an employer to mount an anti-union campaign. Nor is there anything improper about establishing an interest arbitration procedure if, after union recognition, the parties reach an impasse and are unable to agree on the terms and conditions of an initial contract.

[3] The Charging Party's counsel suggests that the agreement would somehow hinder Heartland in relation to the pool of investible companies because there might be some companies whose managements might want to vigorously resist union organizational efforts because of "ideological" considerations or in order to protect any remaining stake that they might have in the company after its acquisition by Heartland. This assertion is speculative at best and there is no evidence to suggest that the owner/managers of Trimas or any of the other acquired companies either were told about Heartland's agreement with the Union or if they had known, that it would have made any difference to them.

Experience suggests that when owners or managers of an enterprise make their companies available for sale, the most compelling reason for making a deal is price and not ideology.

[4] Heartland's control may be exercised in a number of ways. It may own more than 50 percent of the acquired company's stock. It may have negotiated for an agreement whereby it has control over the Board of Directors or have supermajority or veto rights. It also can exercise control by having negotiated an agreement with the shareholders of the acquired company for the right to hire or fire the chief executive officer and/or the right to determine his or her level of compensation.

[5] Since its inception, Heartland has also acquired Collins & Aikman and another company called Metaldyne. The degree of control that

III. ANALYSIS

A. The Statute of Limitations Issue

The Respondents contend that the complaint is barred by the Act's statute of limitations in Section 10(b). While acknowledging that in cases involving Section 8(e), the 10(b) period will start to run not only from the time the original agreement is entered into, but from the time that agreement is re-entered, the Respondent contends that the complaint in this case is at substantial variance from the charges that were filed.[6]

The Respondents note that both the original and first amended charge, filed on August 6, 2003, and September 24, 2004, alleged that the Heartland Agreement was reaffirmed in relation to the acquisition of another company called Collins & Aikman and that the contested agreement was implemented in January 2003, more than 6 months before the filing of the charge and amended charge. In this respect, I would be inclined to agree that if the complaint relied on the transactions involving Collins & Aikman as the triggering event, then the complaint would be barred by the statute of limitations.

Nevertheless, the complaint alleges that the agreement was re-entered in June 2003, when the Heartland Agreement was applied to the Trimas acquisition. Therefore, the June 2003 reaffirmation clearly would be within the 10(b) period. Perhaps it would have been better form if a new charge had been filed, identifying the Trimas transaction as being the 8(e) triggering event. But I don't think this was necessary inasmuch as the essential allegations of the charge and complaint are (a) that it is the underlying agreement that is unlawful under 8(e) and (b) that it was reaffirmed within the 10(b) period. Since the implementation of the agreement can be reaffirmed irrespective of what acquisition company is involved, I think that the complaint's reliance on the Trimas transaction, instead of the Collins & Aikman acquisition, is sufficiently related to the charge and amended charge so as to fulfill the requirements of the Act's statute of limitation. *Redd-I Inc*., 290 NLRB 115 (1988); *Nickles Bakery of Indiana*, 296 NLRB 927 (1989); Ross Stores Inc., 329 NLRB 573 (1999); *Seton Co*., 332 NLRB 979 (2000), and *Kentucky Tennessee Clay Co*., 343 NLRB 931, 932 (2004).

B. The 8(e) Issue

The basic questions here are (1) whether the Heartland Agreement requires Heartland to cease doing business with anyone, and (2) if so, who?

Inasmuch as Section 8(e) of the Act was designed to close a loophole in the then existing secondary boycott provisions of the statute, it is necessary to understand its purpose by first considering the language and purpose of Section 8(b)(4)(i) and (ii)(B).

Section 8(b)(4)(i) and (ii)(B) makes it illegal for a labor organization to (i) induce or encourage any individuals employed by any person to engage in a work stoppage or a refusal to perform services or (ii) to threaten, restrain, or coerce any person for (B) an object of forcing or requiring any person to cease doing business with any other person. This section of the Act typically prohibits a union from striking, picketing, or otherwise coercing entity A (if it does not have a primary dispute with A), to force or require entity A to cease doing business (in whole or in part), with entity B. It should be noted that the Act also specifically states: "*Provided*, that nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing.[7]

Section 8(e) was enacted to get around a loophole in the Act as it became apparent that one way to get around the then existing secondary boycott provisions, was for a union having a strong or dominant relationship with certain employers, to require those employers to enter into agreements, whereby they agreed, in advance, not to do business with any other employers with whom the union had a dispute. In that situation, it no longer would be necessary for a union to call its members out on strike or put up picket signs or bother with any other kind of coercive conduct. A union could simply enforce the agreement, either in arbitration or through a lawsuit, and accomplish its aim.[8] In pertinent part, Section 8(e) states:

Heartland had in those other transactions was somewhat different than in the case of Trimas. But those acquisitions are not at issue in the present case, as neither is claimed to involve an illegal reaffirmation of the alleged 8(e) agreement.

[6] For cases dealing with the 10(b) statute of limitations being met by a reentering into within the limitations period, see for e.g. *Dan McKinney Co.*, 137 NLRB 649, 653–657 (1962); *Teamsters Local 77,* 335 NLRB 1031 (2001*); Carrier Air Conditioning Co. v. NLRB*, 547 F.2d 1178, 1185–1186 (2d Cir. 1976); *Los Angeles Mailers Union No. 9 v. NLRB*, 311 F.2d 121 (D.C. Cir. 1962).

[7] Sec. 8(b)(4)(i) and (ii)(A) makes in illegal for a union to engage in coercive conduct to force or require an employer to enter into an 8(e) agreement.

[8] In *Woodwork v. NLRB*, 386 U.S. 612, the Supreme Court described the purpose of 8(e) as follows:

> In *Local 1976, United Brotherhood of Carpenters, etc v. NLRB,* 357 U.S. 93 (1958), the Court held that it was no defense to an unfair labor practice charge under Sec. 8(b)(4)(A) that the struck employer had agreed, in a contract with the union, not to handle nonunion material. However, the Court emphasized that the mere execution of such a contract provision (known as a "hot cargo" clause because of its prevalence in Teamster Union contracts), or its voluntary observance by the employer, was not unlawful under Sec. 8(b)(4)(A). Section 8(e) was designed to plug this gap in the legislation by making the "hot cargo" clause itself unlawful. The *Sand Door* decision was believed by Congress not only to create the possibility of damage actions against employers for breaches of "hot cargo" clauses, but also to create a situation in which such clauses might be employed to exert subtle pressures upon employers to engage in "voluntary" boycotts.

Congress therefore intended that 8(e) was to supplement and not supplant the secondary boycott provisions of the Act. The use of the words "contract or agreement," does not appear to have been intended to encompass those situations where an employer, in the absence of a prior agreement, simply acquiesces in union pressure to cease doing business with a person with whom the union has a dispute, or voluntarily acquiesces in a simple request that it cease doing business with another person. Thus, in *NLRB v. Servette Inc.,* 377 U.S. 76, the Court held that a union could lawfully appeal to a secondary employer to agree to exercise its managerial discretion not to do business with a primary person so long as the request was not accompanied by threats or coercion. It therefore seems that the words "contract or agreement" as used in Section 8(e) contemplates the entering into of an agreement between a union and an employer, on a continuing basis, (and not as a one time transaction), whereby the employer enters into a contract to

> 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 any of the products of any other employer, or cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void.[9]

Taken together, Section 8(b)(4)(i), (ii)(A), and (B) and 8(e) constitute a comprehensive schema to prohibit secondary boycotts by either conduct or contract, but to continue to allow primary strikes, work stoppages, or other primary activities. In either case, the critical element for finding a violation is that the conduct or contract must be designed to force or require employer/person A to cease doing business, in whole or in part, with employer/person B.[10] If the conduct or contract does not have as an object, a cessation of at least some business between two or more separate and independent enterprises, then whatever else it may be, it is not a violation of the Act.

The most obvious type of 8(e) agreement is one that is embedded in a collective-bargaining agreement and provides that in the event that the contracting union has some dispute with another employer B, the contracting employer A will not deliver to, receive from or otherwise do business with the other employer. If enforced (either by a judge or by an arbitrator), that type of agreement would necessarily require the contracting employer to cease doing business with employer B.

There are, however, less obvious situations where the alleged 8(e) agreements are more ambiguous. For example, there is a line of cases where one must distinguish if a contractual provision has a cease doing business object or is simply designed to protect the work of the employer's bargaining unit workers. In *National Woodwork,* 386 U.S. 612, 644 (1962), the Supreme Court held that a union did not violate Section 8(e) by including in its collective-bargaining agreement a provision stating that none of its members would handle prefitted doors purchased by their employer. The Court held that although the provisions of the clause, if taken literally, would require the company to cease doing business with the door's vendors, the object of the clause was to preserve work traditionally assigned and done by the employer's own employees who were covered by the collective-bargaining agreement. In this respect, the Court stated that although a literal reading of 8(e) would lead to a conclusion that the clause in question had a cease doing business objective, the Court stated that Congress meant 8(e) and 8(b)(4)(B) only to prohibit "secondary objectives."

There exists a set of cases dealing with a union's attempt to prevent an employer from contracting out the work of bargaining unit employees to other companies. For example, an agreement that simply bars an employer from subcontracting existing bargaining unit work would be perfectly legal as it would have the object of preserving bargaining unit work even if would incidentally also preclude the contracting employer from doing business with others. *Teamsters Local 546 (Minnesota Milk Co.*), 133 NLRB 1314, 1316–1317 (1961), enfd. 314 F.2d 761 (8th Cir. 1963). On the other hand, a clause which permitted the employer to subcontract out bargaining unit work only to companies having a collective-bargaining agreement with the Union, would be considered to be illegal under 8(e) because in that case, the object (or intent), would principally be to affect the labor relations of the other employer and not merely to preserve the work of the contracting employer. (The Act only requires that an object be secondary in order for a violation to exist.) Such contract clauses, called union signatory clauses, are universally held to violate 8(e) in the context of subcontracting cases because their objective has been deemed to be secondary and not primary and their enforcement would require the contracting employer to cease doing business with its subcontractor. *Time Warner Cable of New York City*, 344 NLRB No. 36 (2005); *J & J Farms Creamery*, 335 NLRB 1031 (2001).

There also exists another set of cases where the Board has concluded that the clauses in question, although not explicitly requiring one entity to cease doing business with another, can be interpreted as implicitly requiring such a result.

In *Raymond O. Lewis,* 148 NLRB 249 (1964) remanded on other grounds sub nom. *Lewis v. NLRB*, 350 F.2d 801 (D.C. Cir. 1965), the Board held that a contract provision that imposed a substantial penalty to be paid by the contracting employer if it purchased coal from a nonunion signatory company violated Section 8(e). The Board opined that although the clause in question purported to allow the contracting employer to do business with others, the penalty provisions made the exercise of that right so onerous as prevent the company from doing business with another company. Similarly, in *Teamsters Local 728 (Brown Transport Corp.)*, 140 NLRB 1436, 1438–1439 (1963), the Board held that a penalty clause was "an implied agreement" to cease doing business because it had the effect of making it difficult, expensive, and unlikely for an employer signatory to the agreement to insist that his employees handle 'hot cargo' goods or equipment."

In *Teamsters Local 85,* 199 NLRB 212 (1972), the contract between the union and an employer required its unionized employees to load and unload goods and if the employer's customers insisted on using their own employees to do that work, the signatory employer would be required to pay a penalty in the form of "runaround" wages to the union employees who lost the work. The Board held that the use of a penalty as an alternative to requiring the use of a union employer, constituted an implied agreement to cease doing business. It stated that "it need not be shown that a cessation of business has occurred or is inevitable," but that "it is enough to show that the agreement offers the alternatives of a cessation of business or of adopting

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cease doing business with other persons with whom the Union may have a present or future disputes.

[9] I have left out the two provisos to 8(e) which deal with agreements made in the construction and garment industries. These are not relevant to the present case.

[10] The *Supreme Court in NLRB v. Operating Engineers, Local 825,* 400 U.S. 297, 305 (1971) stated that Sections 8(b)(4)(B) and 8(e) do not require a total cancellation of a business relationship. See also Board decisions in *Sheet Metal Workers Local 91,* 294 NLRB 766, 767 (1989); and *International Longshoremen's Local 1410,* 235 NLRB 172, 179 (1978).

other injurious courses of action." The Board noted that these "injurious alternatives" were prohibited by 8(e) because they presented the contracting employer with "no real choice" other than to cease doing business. (Emphasis added.) See also *Teamsters Local 282,* 139 NLRB 1077, 1088 (1962), for the Board's use of the phrase "no real choice."

Relying on the *Raymond O. Lewis* and *Southern Pacific Transportation*, the Board in *Mobile Steamship*, 235 NLRB 172 (1978), held that a clause requiring the signatory employer to pay a penalty of $1000 per cargo load upon using any nonunion labor to load or unload ships, constituted a violation of 8(e) as it impliedly required the company to cease doing business with another. The Board stated: "The fact that the penalty has not, to date, resulted in any actual cessation of business, so far as this record shows, is not of controlling significance. It is enough that its inherently deterrent character is such that it may foreseeably have that effect under certain circumstances."

A brief aside. Both Section 8(b)(4)(B) and 8(e) require that there be a cease doing of business. (Even if that means that something less than a total cessation of business is required.) However, the former deals with union conduct, typically in the form of strikes, work stoppages, and picketing, while the later deals with contract enforcement through judicial or arbitration means. There is, in my opinion a conceptual difference.

In the context of Section 8(e), we are dealing with an agreement between a union and employer/person A intended to force or require it to cease or at least diminish its business with a separate employer/person B. There are no other people on the scene. In that context, the agreement either requires A to cease or lessen its business with B or it does not. Hypothetically, if there was an agreement with employer A that said that if it did business with B, against whom the union was engaged in a strike, that the employer would allow its employees to appear on the local cable network to say that A was not supporting union workers, such an agreement could hardly be said to require, explicitly or implicitly, that A cease doing business with B. That is, although the intention of the agreement might be to provide moral suasion on A to support the union's actions against B, the agreement itself would not require any cessation of business between the two enterprises.

Where a union engages in a strike or work stoppage against employer A, in circumstances where it wants to put pressure on employer B, it is not really necessary to show that an object of that conduct is to force or require a cessation of business between A and B. This is because when this type of conduct is taken against employer A, it necessarily causes a cessation or some diminution of business between employer A and all of its other suppliers and customers who we can label as employers C, D, and E . . . . That is, where a union engages in a strike or work stoppage against employer A, that conduct automatically causes some cessation of business between that employer and all other persons with whom it does business. Therefore, in an 8(b)(4)(B) case, the real question is not whether the proscribed conduct has a cease doing business result (it does), but whether the conduct, notwithstanding that result, constitutes a primary strike or picketing.

There are also a set of cases where the Board has held that certain limited business transactions do not constitute "business" within the meaning of Section 8(e). In *Cascade Employers Assn.*, 221 NLRB 751 (1975), the Board stated that "the sale or transfer of an enterprise has been viewed not as a business transaction but as a substitution of one entity for the other while the conduct of business continues without interruption." The Board therefore concluded that a successorship clause, which required an employer to condition the sale of its business on the purchaser's adoption of the union's contract, did not violate Section 8(e). See also *Mine Workers,* 231 NLRB 573 (1977) enfd. on this point 639 F.2d 545, 550 fn. 12 (10th Cir. 1980); and *Teamsters Local 814*, 225 NLRB 609 fn. 1 (1976) (Holding that an agreement requiring the purchaser of all or part of its moving and storage operations to assume the collective-bargaining agreement, was not a violation of 8(e)).

A seeming exception to the above, might be the Board's decision in *Maritime Union,* 196 NLRB 1100, 1101 (1972), enfd. 486 F.2d 907 (2d Cir. 1973), cert. denied 416 U.S. 970 (1974). In that case, *Commerce Tankers Corp.* had agreed to bound to a multiemployer association contract that had a provision requiring it to obtain a written undertaking from the purchaser of a vessel that it would recognize the NMU as the representative for the vessel's unlicensed seamen and would agree to be bound by the terms of the existing collective-bargaining agreement. (This would be a typical union signatory clause.) The union contended that the sale and transfer of a vessel did not constitute "doing business" within the meaning of Section 8(e) of the Act and the Board disagreed. Unlike cases involving the sale, in whole or in part, of a business entity, the Board noted

> [I]n the maritime industry the sale of a vessel is a fairly common occurrence. Thus, in the years 1964 to 1971, approximately 400 American flag vessels. . . averaging 50 per year were sold from one U.S. company to another. Similarly, during this same period approximately 150 U.S. flag vessels were transferred foreign, excluding vessels sold foreign for scrapping. Accordingly, the transactions involved herein do not represent a novel situation but occur in the normal course of doing business in the maritime industry. In these circumstances we conclude that in the maritime industry buyers and sellers of ships are doing business with each other with the meaning of Section 8(e). As it is unnecessary to our decision, we have not considered questions concerning the applicability of this section to the sale of capital assets in other industries or in other circumstances.

It is quite clear to me that the decision in *Commerce Tankers*, which involved the sale of large boats, did not purport to overrule the decisions in *Cascade*, *Lone Star*, and *Bader Bros.*, which involved the sale, in whole or in part, of a business enterprise. It seems to me that the Board's decision in *Commerce Tankers* was limited to the maritime industry and the particular set of facts involved in that industry. I am not aware of any cases which purport to overrule *Cascade,* et al.

One might think that if the sale of a business enterprise does not constitute doing business within the meaning of Section 8(e), that it would necessarily follow that the purchase of a business enterprise would also not constitute doing business within the meaning of Section 8(e). But that is what the General Counsel seems to be contending in this case. This case does not

involve an ongoing series of business transactions between Heartland and the companies it has bought. This is not a situation where one company is a licensee or contractor to another, such as was the case in *Amax Coal Co*., 614 F.2d 872 (3d Cir. 1980). Here Heartland purchased the controlling interest of Trimas in a one time transaction.

If the sale or purchase of a business enterprise does not constitute "doing business" within the meaning of Section 8(e) of the Act, the inquiry must end here and the complaint should be dismissed.

Nevertheless, the General Counsel and the Charging Party cite to another set of cases dealing with "anti-dual shop" clauses whereby the provisions in a union contract with an employer A, sets up an impediment to that company making an investment in another nonunion company. Typically, these clauses require that the unionized company A, if it invests in nonunion company B, to require the latter either to adopt company A's union contract or pay the same wages and offer the same terms and conditions as the union contract.[11] If not explicitly required by the contracts, the Board has concluded that the clauses in question required company A to terminate its relationship with company B. (The no choice theory.) In all of these cases, the Unions contended that the reason for the provisions was to prevent company A from diverting work from its own unionized work force to the nonunion work force of another company.[12] This work preservation rationale cannot apply to the present case as Heartland itself does not directly employ any workers whose work would be adversely affected by the acquisitions.

In *Carpenters District Council of Northeast Ohio (Alessio Construction),* 310 NLRB 1023, the issue was whether the union violated Section 8(b)(3) by insisting, as a condition of reaching agreement, on the inclusion of a clause called an "anti-dual-shop clause," aimed at "prohibiting or discouraging a unionized employer's maintenance of an affiliation with a nonunion company in a so-called double-breasting arrangement." The Board found that the union violated Section 8(b)(3) because it insisted upon a provision that the Board construed as a "hot cargo" clause unlawful under Section 8(e) of the Act. The proposed clause stated:

> In the event that the partners, stock holders or beneficial owners of the company form or participate in the formation of another company which engages or will engage in the same or similar type of business enterprise in the jurisdiction of his Union and employs or will employ the same or similar classifications of employees covered by this Collective Bargaining Agreement, then that business enterprise shall be manned in accordance with the referral provision herein and covered by all the terms of this contract.

The Board stated:

> It is an 8(e) clause because, by requiring the extension of the collective-bargaining agreement to Alessio's affiliates as it defines them, (1) it is calculated to cause Alessio to sever its ownership relationship with affiliated firms that seek to remain nonunion or to forebear from forming relationships with such firms, even though those firms are separate employers under court approved Board law, and (2) it is aimed not a preserving the work of Alessio's union-represented employees but rather at satisfying "union objectives elsewhere,", i.e., the objective of affecting the labor relations between the nonunion affiliated companies and their employees over which Alessio has no right of control. Such an attempt to impose a contract on separate employers of employees in "work units far removed from the contractual unit" is plainly secondary and is unlawful under Section 8(e), absent proviso protection.

Notwithstanding the discussion of Section 8(e) in the context of a complaint alleging an 8(b)(3) violation, I note that in reaching this decision, the Board did not examine the actual relationship between Alessio and any company that it had or intended to affiliate with. The clause was dealt with as an abstraction and the Board's findings were based on the hypothetical assumption that the clause "is not limited to cases in which common control or diversion of work is demonstrated." There was no discussion of how this clause would be treated if a transaction involved the sale or acquisition of a business enterprise and it does not appear that any of the parties, or the Board, considered its previous decisions in *Cascade*, *Lone Star*, and *Bader Bros*., supra.

In *Operating Engineers Local 520 (Massman Construction Co.),* 327 NLRB 1257 (1999), the issue was whether the union engaged in a strike against Massman in an effort to compel that employer to agree to an 8(e) clause. The proposed contract clause stated:

> The Employer shall require as a condition for entering into any joint venture or joint work undertaking or arrangement for construction work that all parties to the contract for such undertaking or arrangement accept and agree to be bound by this Agreement. The Employer shall be responsible for compliance with the requirements of this provision.

The Board, relying on *Alessio*, concluded that the proposed clause was an illegal hot cargo clause and was not protected by the construction industry proviso to Section 8(e). The Board stated:

> [W]e find no evidence that joint venture clauses like the clauses at issue in this case were part of the pattern of bargaining in the construction industry at the time of the proviso's enactment in 1959. The disputed clauses are not subcontracting agreements of the sort previously found lawful by the Board and the courts, but instead like the anti-dual shop clause found unlawful in Alessio, are an attempt to control the

[11] If instead, a contract provision prohibited subcontracting to companies that did not meet area standards or who did not have equivalent labor costs, the outcome might be entirely different. It would, in my opinion, be appropriate for a union to seek to limit subcontracting by limiting it to firms that did not have a labor cost advantage so long as the union did not seek to also determine how those costs would be allocated to the subcontractors employees, by way of specific wages, and other terms and conditions of employment.

[12] This result might have been legally obtained without requiring the second company to, in effect, accept the identical terms and conditions of company A's union contract, but merely to abide by area standards. Cf. *Teamsters Local 107 (S&E McCormick Inc.)*, 159 NLRB 84 (1966).

> signatory employer's business relationships. . . . [Footnotes omitted.]

Unlike the facts in *Alessio*, the administrative law judge noted that there was a history of business transactions that would give "a framework in which to consider the contractual provision that Local 520 sought to impose on Massman. . . ." He noted that Massman has been a party to a number of joint ventures in order to lessen its financial exposure or to obtain financial support for its performance of large projects. Using the Clark Bridge project as a recent example, the judge noted that Massman had entered into an arrangement with Ben Hur Construction Company whereby these two unequivocally separate business entities (Massman being unionized and Ben Hur being nonunion), set up a joint venture for the purpose of directing the construction, and pursuant to which Massman would be one of its subcontractors. The judge noted that when the joint venture won the bid it hired employees (none of whom were union workers), it let subcontracts, it obtained its own telephone number at the project site, and it acquired its own stationary (which gave as the joint venture's address and telephone number the address and telephone number of Massman's headquarters).

In *Massman*, it is obvious that based on the past history of doing business, *Massman*, as a normal part of its business operations, entered into joint venture arrangements with other independent companies for construction work which could involve the use of labor that was not represented by the Union having a contract with *Massman*. That case, unlike the present case, did not involve a factual pattern which entailed the acquisition of another company. And once again there is no indication that the Board intended to overrule *Cascade*, *Lone Star*, and *Bader Bros.*, supra.

In *Sheet Metal Workers Local 91 (Schebler Co.),* 294 NLRB 766 (1989) (predating *Alessio*), one of the questions was whether a union violated Section 8(b)(4)(ii)(A) and (3) by striking a company called Winger Contracting Company and insisting, as a condition of reaching a collective-bargaining agreement, that it execute a so called "Integrity Agreement." The facts are complex and I will attempt to summarize. For many years, the union and contractors having agreements with it, worked in a market where there was significant competition from nonunion companies. Also, it appears that many of the union companies had set up separate companies that operated as nonunion entities. In order to preserve work for union members, the union agreed that it would grant concessions to union contractors when they had to bid against nonunion companies. However, in order to prevent abuse by employers having dual operations, the Union insisted that a signatory employer agree to a clause that would subject it to a fine of $500 per day or the rescission of the collective-bargaining agreement if it had an ownership interest in a corporation or business entity that used employees whose wages and working conditions were inferior to those set forth in the collective-bargaining agreement. As the clause was obviously a "union signatory clause" inasmuch as the sanctions could be avoided if the affiliated company was bound by the union's contractual terms, the Judge concluded that the clause, instead of having a work preservation object, had a secondary object of imposing union terms and conditions on separate nonunion companies. The Judge noted that the Union did not argue that the clause's application would be limited to those situations where two companies constituted a single employer and he noted that "the Integrity Clause, as written, was not limited to influencing the relationship between entities which come within the single employer definition." In this regard, the judge stated that "The Integrity Clause requires only that the signatory employer have a limited ownership interest in the affiliate which must then apply union terms and conditions."

As in the previously cited cases, the facts in *Schebler* did not deal with a situation involving the sale or acquisition of a business enterprise. Nor does it appear that anyone raised or discussed *Cascade*, *Lone Star*, and *Bader Bros.*, supra.

In *Carpenters (Novinger's, Inc.),* 337 NLRB 1030 (2002), the Board held that a union violated 8(e) when, within the 10(b) period, it reaffirmed an 8(e) agreement by taking steps to pursue a grievance alleging a violation of the clause in question. In that case, the contracting employer, Novinger Inc., was a wholly owned subsidiary of Novinger Group, Inc. (N.G.), which also owned another subsidiary company called Kelly Systems, Inc. The employer and Kelly, both of whom were owned by James Novinger, were both engaged in the installation of dry wall, board walls, and ceilings in the construction industry and, to an extent, shared some equipment commonly used in the drywall construction industry. The union and Novinger Inc. were parties to a collective-bargaining agreement covering its carpenters, but Kelly had operated for some time as a nonunion entity. (This is a classic "double breasted" operation where two companies that have common ownership operate separately and have separate units, one employing union labor and the other non-union labor.) The contract between the union and the employer contained a provision that stated:

> The employers stipulated that any of their subsidiaries or joint venture to which they may be parties when such subsidiaries or joint venture engage in multiple dwelling, commercial, industrial or institutional building construction work shall be covered by the terms of this agreement. . . . It is agreed that any dispute relating to the above Recognition and Union Security clause cannot be resolved between representatives of the Keystone Contractors Association and the Central Pennsylvania Regional Council of Carpenters shall be submitted to arbitration.

As noted, the union invoked the grievance machinery against Novinger Inc. in an effort to compel Kelly to be bound by the terms of the agreement when it did business within its geographic jurisdiction. Among other defenses, the union contended that Novinger and Kelly constituted a single employer based on the ownership relationship between the companies. The judge opined that there was an absence of evidence to show that either entity controlled, in any measurable way, the labor relations of the other entity. He noted that there was no evidence that the workers of each worked interchangeably or that there were any management personnel common to all entities who could affect their labor relations.

Notwithstanding the judge's conclusion that there was a lack of evidence showing common control, the Board did not rely on the judge's discussion of the Respondent's single-employer defense and held instead that the clause violated Section 8(e) on its face, "i.e., by its express terms it authorizes unlawful secondary conduct, without regard to its actual effect on any particular entity."

To repeat myself, the facts in *Novinger's* did not involve a sale or acquisition transaction and the cases dealing with that type of business transaction were not discussed.

Finally, in *Iron Workers (Southern Materials)*, 328 NLRB 924 (1999), the Board found that a union violated 8(e) by seeking to enforce, by judicial means, contract clauses with an employer (Edwin G. Smith, Inc.) that stated in substance, that the collective bargaining would be "effective in all places where work is being performed or is to be performed by the Employer or any person, firm or corporation owned of financially controlled by the Employer . . . and the Employer agrees to sublet any work under the jurisdiction of the Association or its local unions to any person, firm or corporation not in contractual relationship with this Association or its affiliated Local Unions."

In that case, the contracting employer, Edwin G. Smith Inc., was the business entity that emerged after a series of mergers and restructurings. The original firm (also named Edwin G. Smith), had maintained a collective-bargaining relationship with the union since 1959 after which it was acquired by the Cyclops Corporation. Without describing the ins and outs of the corporate arrangements, suffice it to say that by 1986, Edwin G. Smith was one subsidiary that operated as a union contractor and Southwestern Materials was another subsidiary of Cyclops that had been operating for some time as a nonunion contractor. By this date, both corporations had been performing work in the construction industry and the Union began to suspect that at a number of construction sites, Smith was subcontracting bargaining unit work to Southwestern.

The basic argument that ensued in the Board litigation, apart from the 10(b) and *Bill Johnson's* contentions,[13] centered on the Union's contention that the clauses had valid work preservation objectives. Finding that the unambiguous language of the provisions required work subcontracted to any person, firm, or corporation owned or financially controlled by the Employer, only if it was a "union signatory," it is not surprising that the Union did not prevail in its work preservation argument. But again, this situation did not involve a business enterprise acquisition transaction and did not require a discussion of *Cascade, Lone Star,* and *Bader Bros*., supra.

In light of the above, I am going to recommend that this complaint be dismissed. I do so for the following reasons:

First, it is my opinion that the Heartland Agreement essentially is an agreement that relates to the acquisition by Heartland of other business enterprises. To the extent that it could conceivably impose any type of restriction on its desire or ability to acquire industrial enterprises, this type of single event transaction would not constitute "doing business" with the meaning of Section 8(e) of the Act.

Second, there is nothing in the agreement itself, which restricts Heartland from making any transaction it chooses to make. The evidence shows that the terms of the agreement did not play any role in Heartland's decision to acquire a business enterprise or that its content even entered into the negotiations for a sale. (Of for that matter that the management of the seller is even notified of the agreement.) If Heartland does acquire the controlling interest in a company it can unilaterally require the acquired entity to abide by the Heartland Agreement and there is no reason to, and no mechanism to effectuate a termination of the purchase or otherwise cause either to cease doing business with the other. Hypothetically, in the event that the Union notified Heartland that it is going to attempt to organize employees, if any of the former owners or managers wished to mount an antiunion campaign, they simply would not have any say in the matter and their desires would be irrelevant. In this instance, the "no choice" theory regarding implicit agreements to cease doing business, could not apply.

Third, the General Counsel and the Charging party argue that the agreement between Heartland and the Union, to the extent that it requires Heartland to force any acquired controlled business to abide by the neutrality agreement is, in effect, an agreement whereby Heartland has agreed to not do business (either in whole or part), with another person. But if the acquired entity is controlled by Heartland (as in the case of Trimas), then the neutrality agreement would simply be an agreement, by Heartland, to cease doing business with itself. It would not be an agreement by an employer to cease doing business with any other person. In this regard, the Charging Party relies heavily on *Painters District Council 51 (Manganaro Corp., MD)*, 321 NLRB 158 (1996), where the Board, in a case with a complex fact pattern and an even more complex discussion, essentially distinguished *Alessio* and held that an anti-dual-shop clause was lawful where the clause, on its face, preserved bargaining unit work of the signatory employer, and where the signatory employer had the effective right to control the dual shop.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[14]

ORDER

The complaint is dismissed.

I note here that the dismissal of this 8(e) complaint would not preclude the employees of Trimas, or any other future acquired Covered Business Entity (CBE), from challenging, under Section 8(a)(1), (2), or (3) or 8(b)(1)(A) and (2), any application of the Heartland Agreement that resulted in illegal assistance or in an illegal grant of recognition to the Union. (The companies involved here, and those that are likely to be involved in the future, are not engaged in the construction indus-

[13] Referring to *NLRB v. Bill Johnson's Restaurants*, 461 U.S. 730 (1983).

[14] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

try where, pursuant to Section 8(f), prehire recognition agreements are legal.)

Notwithstanding an agreement to be bound by a card check, a charging party, subject to the statute of limitations provisions of the Act, would still be free to prove that an employer gave illegal assistance if the actions or statements of its supervisors or managers were of a kind to interfere with, coerce, or restrain employees in the choice of union representation. A charging party could assert and prove that notwithstanding a card check, any recognition accorded was not supported by an uncoerced majority of the employees in an appropriate unit. Thus, it could be shown that the Union never actually obtained majority status. A charging party could show that recognition was invalid by evidence that the unit in which the count was made, excluded employees who should have been counted. Or vice versa. Any recognition could be challenged by evidence showing that statements made by the Employer's supervisors or the Union's agents coerced employees into signing the authorization cards used for the count. It could be shown that in soliciting cards, union representatives made substantial misrepresentations regarding the card's purpose. Or it could be shown that a determinative number of the cards were solicited by company supervisors.