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

# Advice Memorandum

DATE: December 20, 2007

TO: Alvin Blyer, Regional Director
Region 29

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

SUBJECT: Drywall Tapers & Pointers of Greater New York, Local 1974, affiliated with International Brotherhood of Painters and Allied Trades, AFL-CIO (Contractors Association of Greater New York)
Cases 29-CE-132, 29-CC-1496
29-CC-1497, 29-CC-1498,
29-CC-1499, 29-CC-1500

584-1200
584-1250-2500
584-1250-5000
584-2583-3300
584-3740-1700
584-5000
584-5042

Upon the conclusion of federal court litigation, these cases were resubmitted for advice as to whether the Respondent Union violated Section 8(b)(4)(A) by filing a lawsuit to enforce an arbitral body's decision that would require general contractors to subcontract all work within the Union's jurisdiction only to employers whose employees are represented by the Union. The Region further seeks advice as to whether a settlement agreement signed by contractors and the resulting consent orders violate Section 8(e). We conclude that the Region should dismiss the Section 8(b)(4)(A) charges because the Union's lawsuit, which has survived motions to dismiss, is reasonably based and thus cannot be deemed unlawful. Further, the Region should dismiss the Section 8(e) allegation because the award of work to Local 1974 that was initially granted by an arbitral body and subsequently codified in the consent agreements is protected under the construction industry proviso to Section 8(e).

## FACTS

The background facts to this case can be found in our February 7, 2006, Advice memorandum. Briefly, this matter concerns Respondent Drywall Tapers Local 1974's repeated attempts to resolve a long-running dispute between it and other unions regarding jurisdiction over certain drywall finishing work in New York City. In 1978, an arbitral body known as the New York Plan for the Settlement of Jurisdictional Disputes ("the Plan") awarded the work to Local 1974. Despite the award and subsequent judicial enforcements, since that time Local 1974's rivals have continued to represent drywall finishing employees.

To resolve Local 1974's most recent lawsuit for enforcement, on December 16, 2005, Local 1974 and various contractors entered into consent injunctions in which the employers agreed that they were enjoined from assigning drywall finishing work for projects located within New York in contravention of the Plan's award of the work to Local 1974. In addition to agreeing to be bound to the decisions of the Plan, each of the settlement agreements contained specific language setting the terms and conditions of employment for any employees performing drywall finishing work for the signatory employers, or their "affiliates, contractors, or subcontractors of any tier," including rates of pay and benefits for those employees. The agreements also required the employers to employ a Local 1974 steward at each jobsite, compensating the steward at the "standard wage and benefit package set forth in the applicable collective bargaining agreement[.]"

Charging Party Carpenters Local 52 and Nastasi & Associates, one of the contractors that executed a settlement agreement with Local 1974, separately appealed the district court's approval of the consent injunction. On May 16, 2007, the United States Court of Appeals for the Second Circuit denied Nastasi's appeal of the Consent Order, noting that such appeals by signatories are generally unavailable, being deemed as waived. Furthermore, inasmuch as the district court had not granted Local 52 intervenor status prior to its filing of an appeal to the entry of the Consent Order, the Second Circuit refused to rule on the merits of its appeal. Instead, the court remanded the matter to the district court, thereby restoring its jurisdiction and enabling it to adjudicate the merits of Local 52's original intervention motion. On September 18, 2007, the district court denied Local 52's Motion to Intervene on grounds that, inter alia, it was not timely filed. Rejecting Local 52's arguments, the judge found that a delay of nearly five months before Local 52 sought to intervene was due to the fact that it made a strategic choice in selecting the NLRB as the forum in which to assert its position. The net result of the appeals was that the Second Circuit never addressed the Charging Party's arguments that are central to our determination here, i.e., that Local 1974's attempt to enforce the jurisdictional award was not protected by the construction industry proviso to Section 8(e).

## ACTION

First, we conclude that Local 1974's lawsuit to enforce the Plan's award of work is not violative of Section 8(b)(4)(A) because it is reasonably based. In its

decision on remand in BE & K, a majority of 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.[1] In determining whether a lawsuit is reasonably based, the Board explicitly adopted the standard set forth by the Supreme Court in the antitrust context. That is, "a lawsuit lacks a reasonable basis, or is 'objectively baseless,' only if 'no reasonable litigant could realistically expect success on the merits.'"[2]

Here, Local 1974's lawsuit to enforce the Plan's jurisdictional award clearly is reasonably based. The lawsuit was meritorious, resulting in a judicial enforcement and culminating in the judicially-sanctioned Consent Orders of December 2005. Nevertheless, Local 52 and argue that this meritorious suit seeks to obtain and enforce an unlawful no-subcontracting clause that is not privileged by the construction industry proviso to Section 8(e). They contend that because they do not employ unit employees or otherwise have a collective bargaining relationship with Local 1974 or any other union that would bind them to the Plan, the jurisdictional awards are inconsistent with the Supreme Court's decision in Connell,[3] which requires that restrictive subcontracting clauses in the construction industry have some relation to a bona fide collective bargaining relationship. The district court has already rejected this argument in a September 9, 2005 order in which it determined that the Plan was an agreement arising out of a collective bargaining relationship between multi-employer and multi-union associations to which the parties were bound. Inasmuch as the Second Circuit did not and will not address the Charging Party's arguments to the contrary on appeal, they are unavailing here to establish that Local 1974's lawsuit was baseless and thus violative of Section 8(b)(4)(A).

Second, we conclude that the contention that the consent orders themselves contain an unlawful no-subcontracting clause under Section 8(e) is meritless. The provisions apply only to work performed at the site of a

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[1] BE & K, 351 NLRB No. 29 (September 29, 2007), slip op. at 1.

[2] Id. , slip op. at 7 (quoting Professional Real Estate Investors v. Columbia Pictures Industries, Inc., 508 U.S. 49, 60 (1993)).

[3] Connell Construction Co., Inc. v. Plumbers and Steamfitters, Local No. 100, 421 U.S. 616, 633 (1975).

construction project and thus falls under the construction industry proviso unless, as the Charging Parties contend, they bear no relation to a bona fide collective bargaining relationship. As set forth above, the district court has held that the Plan's award of work was made within the context of a collective bargaining relationship. Moreover, the consent orders themselves set terms and conditions of employment for employees working in the affected industry in New York. Thus, they set rates of pay and benefits for those employees, and designate the employment of a Local 1974 steward at each jobsite under contractually defined wages and benefits. Inasmuch as the consent injunctions on their face incorporate the results of bargaining over mandatory terms and conditions, they satisfy the Connell Court's requirements of a link to a collective bargaining relationship.

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

B.J.K.