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

Advice Memorandum

DATE: May 24, 2002

TO : Elizabeth Kinney, Regional Director
Harvey A. Roth, Regional Attorney
Gail Moran, Assistant to the Regional Director
Region 13

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

SUBJECT: Chicago and NE Illinois District
Council of Carpenters
(D & H Energy Management Co.) 560-7540-8001
Case 13-CC-2363 560-7540-8040

This Section 8(b)(4)(B) case was submitted for advice on whether the Union's picketing of a contractor constituted secondary activity where the picket signs protested the primary employer's delinquent contractual trust fund contributions. We conclude that the Union's picketing was secondary because the contractor is not an alter ego or a single employer with the primary employer.

FACTS

K. Reinke, Jr. & Co., a residential insulation installation contractor, had a Section 8(f) collective-bargaining relationship with the Chicago and NE Illinois District Council of Carpenters Local 1307 ("the Union") through an employer bargaining association. A Union audit conducted after Reinke's timely 2001 withdrawal from that association alleged that Reinke owed at least $142,000 in fringe benefit contributions. On about October 21, 2001, the Chicago District Council of Carpenters Pension Fund, Welfare Fund, and Apprentice and Trainer Program Fund filed an ERISA action in district court against Reinke seeking the alleged delinquent fund contributions.

The Union never filed any unfair labor practice charges over Reinke's alleged delinquent contributions. Instead, on October 23, 2001 the Union struck Reinke for those delinquent contributions. The Union's strike included picketing which, according to former Reinke General Manager Rakow, caused a 50 percent decrease in its business. About a month after the strike began, Rakow, who had been Reinke's general manager for about 18 years, filed articles of organization for D & H Energy Management Company, LLC. On December 14, Rakow quit Reinke.

On January 4, 2002, Rakow began operating D & H as a residential insulation installation contractor and began hiring Reinke employees. On January 4, Reinke and D & H entered into an agreement for D & H to lease trucks and ladders from Reinke. The leased trucks displayed the D & H name, although the ladders continued to display Reinke's name until the D & H name appeared.

On January 4, A & I Supply submitted a bid to supply materials to D & H. Rakow then negotiated for Reinke to supply materials to D & H at a price which was 10 percent less than that offered by A & I Supply and 10 percent over cost. Reinke currently acts as a supplier only for D & H, although it states that it intends to begin serving as a supplier for other companies. Finally on January 4, Rakow also agreed to recognize Production Workers Local 707 based on a card check, and entered into a collective-bargaining agreement, effective January 21, 2002 to January 20, 2003.

The Region has determined that the lease and supply negotiations between D & H and Reinke were conducted at arm's length. D & H leased the trucks at a cost of [*FOIA Exemption 4*] per day per truck, paying Reinke [*FOIA Exemption 4*] for January rentals and [*FOIA Exemption 4*]for February rentals, for a two-month total of [*FOIA Exemption 4*]. The supplies D & H purchased from Reinke in January cost about [*FOIA Exemption 4*
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On February 20, the Union began picketing at job sites where D & H was installing or was scheduled to install insulation. The picket signs read:

Chicago and Northeast Illinois
District Council of
CARPENTERS LOCAL #1307

_____
ON STRIKE

_____
against
REINKE INSULATION
D.B.A.
D & H ENERGY MANAGEMENT COMPANY LLC
FAILURE TO PAY FRINGE
BENEFITS CONTRIBUTIONS

Reinke and D & H do not have common ownership, common management, or centralized control of labor relations, and the two entities maintain separate payroll and other records. Reinke and D & H use the same registered agent and attorneys. All D & H insulation installers, with one exception, are former Reinke employees.

The contacts Rakow had made with area builders as the Reinke general manager enabled him to secure for D & H insulation work at area housing developments. However, most of D & H's work initially had been contracted to Reinke. D & H actually assumed one Reinke job with an area builder, Del Webb, without submitting any bid.[1] D & H thereafter continued on this same complex for Del Webb and performed new insulation installation work that had not been part of the original Reinke contract. D & H received about $75,300 for the Del Webb work, part of which represents the sum paid to complete the unfinished Reinke work. D & H won other former Reinke jobs after bidding on them. By April 4, D & H had received about $184,290 for that work, making its total receipts about $259,600 for work on former Reinke projects.

D & H contends that it has an arm's length relationship with Reinke and that the picketing is unlawful secondary activity. The Union contends that because Reinke and D & H constitute either an alter ego or single employer, the picketing is primary and lawful.

ANALYSIS

We conclude that the Union does not have a primary dispute with D & H because Reinke and D & H are not alter egos or a single employer.

A. Relationship between the Two Entities - Alter ego/Single employer

We conclude, in agreement with the Region, that the two entities do not constitute an alter ego or single employer.

In assessing whether two entities are alter egos, the Board weighs whether they "have substantially identical ownership, management, business purpose, operation, equipment, customers, and supervision."[2] The Board may

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[1] There is no evidence that Reinke played a role in bringing D & H onto this or any other former Reinke job. Rather, D & H negotiated its own agreements to perform insulation work.

[2] NYP Acquisition Corp., 332 NLRB No. 97, slip op. at 9 (2000), enf'd sub nom. Newspaper Guild of New York Local 3 v. NLRB, 261 F.3d 291 (2d Cir. 2001) (citing Advance Electric, 268 NLRB 1001, 1002 (1984)).

also consider whether the alleged alter ego was formed with an illegal motive to evade the Act, although this factor is not controlling.[3] To determine whether two entities constitute a single employer, the Board considers whether the operations are interrelated, and whether there is common management, common ownership, and centralized control of labor relations. No one factor is controlling, and not all factors need be present.[4]

No common ownership exists between Reinke and D & H. The purpose of both entities has been residential insulation installation, and D & H's customers and virtually all of its employees were once those of Reinke. However, there is no centralized control of labor relations and the two do not have common management or supervision. Regarding management, although Rakow briefly continued as general manager of Reinke after forming D & H, Rakow left Reinke about three weeks before he began hiring employees on January 4. Moreover, although D & H leases trucks and ladders from Reinke, D & H trucks and ladders now display the D & H name only. There is no evidence of integration of operations beyond the reliance of D & H on Reinke for its supplies and for lease of equipment. It is also not clear from the evidence presented, other than the timing of the formation of D & H, that D & H was formed so that Reinke could evade statutory obligations. Under all the circumstances, D & H is not an alter ego of or a single employer with Reinke.

B. Application of 8(b)(4)(B) to Alleged Neutral D & H

Section 8(b)(4)(B) aims to "preserv[e] the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and [to] shield[] unoffending employers and others from pressures in controversies not their own."[5] The Region has already

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[3] APF Carting, Inc., 336 NLRB No. 4, slip op. at 1 n.4 (2001); NYP Acquisition Corp., 332 NLRB No. 97, slip op. at 9.

[4] See Hartman Mechanical, Inc., 316 NLRB 395, 401 (1995) (common management alone insufficient to find single employer); Mine Workers (Boich Mining Co.), 301 NLRB 872, 875 (1987) (common ownership, common products, interrelationship of operations show single-employer, nonneutral status), enf. denied on other grounds, 955 F.2d 431 (6th Cir. 1992).

[5] NLRB v. Denver Building Trades Council, 341 U.S. 675, 692 (1951).

determined that D & H is not performing struck work for Reinke, which otherwise would have established D & H's lack of neutrality.[6] We have also concluded that Reinke and D & H are not alter egos or single employers. D & H is thus an unconcerned third party, an essential element of secondary picketing.[7]

Accordingly, the Region should issue complaint alleging that the Union's picketing of D & H violated Section 8(b)(4)(B), and should also institute Section 10(l) proceedings, absent settlement.

B.J.K.

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[6] See, for example, Graphic Arts Local 277 (S & M Rotogravure Service, Inc.), 219 NLRB 1053, 1054-1055 (1975), enf'd sub nom. Kable Printing Co. v. NLRB, 540 F.2d 1304 (7th Cir. 1976) (employer which performs "struck work" for the primary employer is not entitled to the protection of Section 8(b)(4)(B)).

[7] See NLRB v. Denver Building Council, 341 U.S. at 692. Section 8(b)(4)(B) protects "some third person who has no concern in it." IBEW Local 501 v. NLRB (Samuel Langer), 181 F.2d 34, 37 (2d Cir. 1950)(Hand, J.), aff'd, 341 U.S. 694 (1951). Cf. Service Employees Local 525 (General Maintenance), 329 NLRB 638, 639-640 (1999) (majority holds that union did not meet its burden under Section 8(b)(4)(B) of showing that the targeted employer lost its neutrality).