THE LEGALITY

OF THE

"ANTI-DUAL SHOP" CLAUSE

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I

INTRODUCTION

The "anti-double-breasting" or "anti-dual shop" clause takes many textual forms, but all forms seek the same objective -- in some manner, to cause a union-signatory employer not to form, or do business as, or be involved with a non-union entity. As the Board noted in Painters and Allied Trades District Council No. 51 (Manganaro Corp.), 321 NLRB 158, at fn 5, involving such clauses:

> "… [a]n anti-dual shop clause is a clause that seeks to protect the employees in a bargaining unit from the effects of "double-breasting", a phenomenon that is common in the construction industry." "Double-breasting" generally refers to a union employer's acquisition, formation, or maintenance of a separate nonunion company to perform the same type of work in the same geographic area as covered by its union agreement. See *Carpenters District Council of Northeast Ohio (Alessio Construction)*, 310 NLRB 1023 (1993)."

The lawfulness of a union's proposal for, insistence on, agreement to, or economic action to exact, an anti-dual shop clause from an employer can demand an analysis under various Sections of the Act, but the principal Act provision involved in the analysis of legality of such a clause is Section 8(e) of the Act, 158 U.S.C. Section 158(e), the so-called "hot cargo" provision of the NLRA.

II

THE LEGISLATIVE ADOPTION OF SECTION 8(e)

Section 8(e) was adopted by Congress in 1959, as part of the Landrum-Griffin Amendments to the Act. At the time Section 8(e) was adopted, Congress also considered and adopted other restrictions against union conduct, specifically Section 8(b)(7) --- and its subsections A, B, and C --- prohibiting union picketing in some circumstances, and what is now known as Section 8(b)(4)(A)[1], curtailing certain other coercive union conduct. It appears that Section 8(e) was intended by Congress to plug certain loopholes in pre-existing Section 8(b) (4) found by the Supreme Court in its *Sand Door* [2] decision "…under which it was unlawful for a union to coerce an employer to agree to or enforce a hot cargo agreement but not unlawful for a union and an employer voluntarily to execute such hot cargo agreement."[3] By enacting Section 8(e), Congress thus outlawed agreements between unions and employers by which the employer agreed, *inter alia*, not to do business with, or to cease doing business with, certain entities with which the union had a dispute.[4] The text of the main body of Section 8(e) reads as follows:

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[1] Section 8(b)(4)(A) added in 1959 proscribes, inter alia, restraint and coercion (such as strikes or picketing or other economic action) against a person to force or require that person to "enter into" an agreement prohibited by Section 8(e).

[2] *Local 1976, United Brotherhood of Carpenters and Joiners of America, etc, et al v. NLRB (Sand Door & Plywood* Then Section 8(b)(4)(A) became what is known today as Section 8(b)(4)(B) which generally forbids union coercive conduct such as picketing or threats thereto designed to induce the secondary boycott. The new Section 8(b)(*Company)*, 357 U.S. 93, 106-107 (1958)

[3] *Carpenters, Local 944, etc, et al (Woelke & Romero Framing)*, 239 NLRB 241, 249 (1978)

[4] The "cease doing business" objective is not limited to a total cessation of a business relationship, but extends to even a partial cessation or to an interference with the business relationship, which enmeshes the neutral employer in the union's primary dispute with another person. *NLRB v. Local 825 Operating Engrs (Burns & Roe)*, 400 U.S. 297, 304-305 (1971); see also, *Sheet Metal Workers Local Union No. 91 (The Schebler Co.)*, 305 NLRB 1000, at 1059 ("…the ownership relationship is a business relationship within the meaning of Section 8(e) because it is capable of being disrupted…")

"(e) 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 to 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…."[5]

III

THE "SECONDARY" AIM OF SECTION 8(e)

The Supreme Court, in *National Woodwork Mfrs. Ass'n v. NLRB*[6], has given Section 8(e) its breadth. There, the Supreme Court concluded that Section 8(e) was not violated by a union and employer having agreed to include in a collective-bargaining agreement a provision providing that employees would not handle pre-fitted doors, since the purpose of the provision was to preserve work performed by the union's members under the agreement. After reviewing the legislative history, the Court believed that

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[5] Section 8(e) also contains a "proviso", making some agreements in the construction industry exempt from its proscription. See, *Woelke & Romero Framing Inc. v. NLRB*, 456 U.S. 645 (1982). This "construction industry proviso" as it has become known, reads: "….*Provided*, nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work….."

[6] 386 U.S. 612 (1967)

Congress only meant to prohibit "secondary" objective agreements, not agreements which have "primary" objectives concerning the union's members working for the employer. The Court stated:

> "The determination of whether [the challenged contract provision] violated Section 8(e) ….cannot be made without an inquiry into whether ….the Union's objective was preservation of work [for the contracting employer's] employees, or whether the agreements…were tactically calculated to satisfy union objectives elsewhere…There need not be an actual dispute with the boycotted employer …for the activity to fall within this category, so long as the tactical object of the agreement and its maintenance is that employer, or benefits to other than the boycotting employees or other employees of the primary employer, thus making the agreement or boycott secondary in its aim. The touchstone is whether the agreement or its maintenance is addressed to the labor relations of the contracting employer *vis-à-vis* his own employees."

This "primary vs secondary" standard thus has determined the breadth of the Section 8(e) prohibition: "primary" provisions designed to preserve the work or wages and benefits of bargaining unit members are not within the intent of the proscription of Section 8(e), but provisions designed to satisfy non-

bargaining unit objectives such as the labor relations policies of another employer are "secondary" and within the intent of the proscription.[7]

Accordingly, the main body of Section 8(e) makes it clear that it prohibits only those contracts or agreements which are aimed at conducting "secondary" actions --- i.e., those agreements to refrain from using or handling the products of another employer, or agreements to refrain from doing, or ceasing to do business with another person or employer. And, insofar as the construction industry is concerned, an agreement which is within that general proscription may not violate Section 8(e) if sheltered by the proviso.

IV

THE NLRB'S SECTION 8(e) CONTRACT INTERPRETATION GUIDELINES

The Board's threshold analysis in evaluating a contract clause alleged to violate Section 8(e) is based upon a set of developed "contract interpretation" principles on how it will go about reviewing such a clause. In essence, it must use one or more of those principles to determine whether the clause is clear, or ambiguous, and how much, if any, extrinsic evidence to consider when reviewing the text of the clause. Only after deciding that question will it go forth to determine whether the clause is "primary" or "secondary" in its aim.

[7] Clauses known as "union-signatory subcontractor clauses" are secondary provisions because they are directed at satisfying union wage or organizational objectives outside the bargaining unit – i.e., they are aimed at the labor relations policies of other employers vis-à-vis the latter's employees. *Local 437 (IBEW) (Dimeo Construction Co.)*, 180 NLRB 420 (1969).

The Board summarized these "contract interpretation" guidelines which are applicable to its Section 8(e) jurisprudence in its decision in *General Teamsters, etc., Local 982, et al (J.K. Barker Trucking Co.)*, 181 NLRB 515, 517 (1970). There, the Board summarized those contract interpretation guidelines:

- …. if the meaning of the clause is clear, the Board will determine forthwith its validity …;
- ….where the clause is not clearly unlawful on its face, the Board will interpret it to require no more than what is allowed by law;
- ….if the clause is ambiguous, the Board will not presume unlawfulness, but will consider extrinsic evidence to determine whether the clause was intended to be administered in a lawful or unlawful manner;
- …. [i]n the absence of such [extrinsic] evidence, the Board will refuse to pass on the validity of the clause.

After listing these principles, the Board, in J.K. Barker, supra, noted: "….we are faced with the threshold question whether or not the language used in each clause [allegedly violative of Section 8(e)], either when read by itself or when interpreted and construed in the context of other clauses in the agreements, is so clear as to preclude ambiguity as to its meaning." *Supra*, at 517.

V

THE "WORK PRESERVATION" AND "RIGHT TO CONTROL" TESTS

Once the Board determines the methodology it will use to review the subject clause per the contract construction and interpretation principles, it moves on to the analysis of the language of the challenged clause and consideration of the "primary" vs. "secondary" aim of the clause at issue. Central to the determination of whether a clause is "secondary" and within the ambit of Section 8(e), or "primary" and

not so within it, is the question of *whether or not the clause has a purpose and reach consistent with the preservation of work or working conditions of the signatory employer's bargaining unit employees.* This question is the most central to the determination of whether the clause is within the ambit of Section 8(e); the clause must be within the ambit of Section 8(e) – i.e., it must be a "secondary" clause – before testing the possible exemption of the clause under the "construction industry proviso."

In *NLRB v. International Longshoremen's Association*, 447 U.S. 490, 504-505 (1980), the Supreme Court considered the "primary vs. secondary" distinction necessary to the Section 8(e) analysis, and pointed out regarding the "work preservation" characterization:

> "…. [A] lawful work preservation agreement must pass two tests: First it must have as its objective the preservation of work traditionally performed by employees represented by the union. Second, the contracting employer must have the power to give the employees the work in question -- the so-called 'right of control' test of *Pipefitters, supra [NLRB v Pipefitters*, 429 US 507, 517 (1977)]. The rationale of the second test is that if the contracting employer has no power to assign the work, it is reasonable to infer that the agreement has a secondary objective, that is, to influence whoever does have such power over the work. Were the latter the case, [the contracting employer] would be a neutral bystander And the agreement…would, within the intent of Congress become secondary."

VI

THE BOARD'S JURISPRUDENCE REGARDING "ANTI-DUAL SHOP" CLAUSES

With the foregoing Section 8(e) background, the Section 8(e) contract interpretation guidelines assist in understanding the current state of the Board's Section 8(e) jurisprudence concerning "anti-dual shop" clauses. However, there is no particular "bright line" on the legality (or illegality) of the "anti-dual shop"

clause. The text of each clause must be reviewed, and analyzed in the context of the circumstances in which it is proposed or is agreed to.

In *Sheet Metal Workers Local Union No. 91 (The Schebler Co)*, 294 NLRB 766 (1989), the Board adopted an Administrative Law Judge's rationale that the union's Integrity Clause[8], which the Union executed with one employer and which the union pressured a second employer to agree to, was a "secondary" clause, since (1) both the text of the clause on its face and the extrinsic evidence surrounding its proposal [9], established that the clause did not have a "work preservation" purpose and (2) would be applicable to cause an interference in the business relationship between a signatory employer and its related entities based upon the "*ownership*" by the signatory, or by the "ownership" of a related entity of the signatory, or of interests in the related firms, without regard to the existence of the signatory's control, or right to control the operations of the related firms.[10] See, upon appeal, the D.C. Circuit agreed with the Board that the Integrity Clause had a secondary objective, but remanded the case to the Board for an analysis of whether the clause itself could be saved by severing it from the penalty provisions also contained in the Integrity Clause. *Sheet Metal Workers Local Union No. 91 v. NLRB*, 905 F.2d 417 (D.C. Cir 1990). On the remand, the Board reaffirmed its prior decision – including that portion

[8] See Appendix A for the full text of the Integrity Clause. In part, the text states "…A 'bad faith employer'…is an Employer that itself or through a person or persons subject to an owner's control, has ownership interests … in any business entity that engages in work [covered by the CBA] …using employees whose wage package, hours and working conditions are inferior to those [in the CBA]….."

In later parts of the Clause, the signatory employer obligates itself not to be and not to become a "bad faith employer", under penalty of monetary damages or contract rescission.

[9] Thus, the Board utilized, without directly discussing them, two of the Section 8(e) contract interpretation guidelines noted *infra* – viewing the clause as unlawful on its face, and even if considered "ambiguous", looked at extrinsic evidence of its intention.

[10] *Supra*, 305 NLRB 1055, 1058. The ALJ had concluded: "… the object of the clause is not the preservation of …unit work but the attainment of objectives elsewhere---with other employers or persons and in other work units…"

of it which had adopted the ALJ's decision concerning the secondary nature of the clause – concluding that the Integrity Clause as a whole was unlawful under Section 8(e)[11], and could not be saved from illegality simply by severing the "penalty" provisions or the "rescission" provisions of it.[12]

In a similar vein, in *Carpenters District Council of Northeast Ohio (Ernest Alessio Construction)*, 310 NLRB 1023, the Board concluded that the union had violated Section 8(b)(3) of the Act by insisting to impasse on the inclusion of an "anti-dual shop" provision in the collective-bargaining agreement it wanted with one it is union-signatory employers. The Board noted that the text of the proposed clause[13] was clear, and that it purported to extend the terms of the CBA to any firm the signatory employer formed or participated in the formation of, did not contain any expression of a "work preservation or protection purpose" regarding the signatory employer's employees, and would be applicable to extend the CBA to the second entity, notwithstanding the lack of the signatory employer's "right to control" that separate business entity or the relationship of it with its employees.[14] The provision as interpreted

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[11] In *Schebler*, there was no contention by the union that the Integrity Clause was exempt from illegality by the construction industry proviso. The Board in *Schebler* did not pass upon that issue.

[12] In *Sheet Metal Workers Union, Local Union No. 20 (George Koch & Sons, Inc.)*, 306 NLRB 834 (1992), the Board found that the union had violated Section 8(b)(3) by insisting to bargaining impasse on the employer's agreement to the identical Integrity Clause as had been involved in Schebler.

[13] The clause reads: "…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 this 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 provisions herein and covered by all the terms of this contract."

[14] The Board utilized its "clear on its face" Section 8(e) contract interpretation guideline: " In sum, *considering the plain language* of the proposed clause, we find that *it clearly would apply* on the basis of common ownership alone, and is not limited to cases in which common control or diversion of work is demonstrated. Thus the proposed clause would apply even in circumstances where the signatory employer did not have the power to assign the disputed work to unit employees. Indeed, the proposed clause does not seek and would not require the assignment to unit employees of any work performed by the non-union 'breast'. Rather, the anti-dual shop clause is aimed at ensuring that the other "breast's" employees are covered by the agreement."

by the Board, was meant to satisfy union objectives in other bargaining units, or with other employers by interfering with the ability to hire or employ workers without regard to the union agreement. Hence, the Board considered the clause "secondary" not "primary" for Section 8(e) purposes, and unlawful. It is noteworthy that the clause at issue dealt with the signatory employer "forming" or "participating in the formation of" a related entity, and not with management or control of that entity. In the Board's view, the clause would operate on the basis of "common ownership" alone, and that such showed a "secondary" purpose, especially in light of the extrinsic evidence that the union was unable to show any previous history of the employer having diverted work away from the principal bargaining unit. Finally, against the contention that the "anti-dual shop" clause was saved by the construction industry proviso, the Board noted that such clauses were not clearly of the type which Congress intended to preserve in 1959 by the proviso, *see* *Woelke & Romero Framing Inc. v. NLRB*, 456 U.S. 645 (1982), and held the proviso inapplicable. Id., at 1029. The Board concluded, therefore, that the clause was unlawful under Section 8(e). Since the insistence to impasse on a unlawful provision in negotiations is inimical to good faith bargaining, the Board had no trouble in finding the union's conduct in so insisting to be violative of Section 8(b)(3) of the Act.

Similarly, using the *ILA* decision's two-part test, the Board, in *Painters District Council 51 (Manganaro Corp.)*, 321 NLRB 158 (1996), reviewed the following "anti-dual shop" clause:

> "Section 1. To protect and preserve, for the employees covered by this Agreement, all work they have performed and all work covered by this Agreement, and to prevent any device or subterfuge to avoid the protection and preservation of such work, it is agreed as follows: If the Contractor performs on-site construction work of the type covered by this Agreement, under its own name or the name of another, as a corporation, company,

> partnership, or other business entity, including a joint venture, wherein the Contractor, through its officers, directors, partners, owners or stockholders exercises directly or indirectly (including but not limited to management, control, or majority ownership through family members), management, control or majority ownership, the terms and conditions of this Agreement shall be applicable to such work."

The evidence in the case clearly showed that the two entities involved – union-signatory entity Manganaro Corporation, and non-union entity Sweeney Company – had been established and were operated consistent with the standards established in *Peter Kiewit Sons' Co*., 231 NLRB 76 (1977) for a lawful "double-breasted" operation.[15]

But, the Board found (1) the clause was not unlawful on its face, i.e., was not clearly "secondary" since it was worded so as to be operative only where the contractor exercised significant "management, control, or majority ownership" of the double-breasted entity, and (2) the clause's words stated, and the extrinsic evidence showed, that the clause was proposed to preserve and protect the union signatory employers' type of work in the geographic area of the agreement, including the work of Manganaro's employees and the employees of the multi-employer bargaining unit in the area. *See*, *Painters District Council No. 51 (Manganaro Corp.)*, *supra*, at 165. Accordingly, the Board concluded that the clause, which had been insisted on by the union in collective bargaining negotiations, was not illegal under Section 8(e). Thus, the Board concluded that there was no Section 8(b)(3) bargaining violation in the

[15] *Painters District Council No. 51 (Manganaro Corp)*, *supra*, at 159-160 [Board discussion of the separateness of the two entities and the guidelines each used for the establishment of operational and labor relations policies, and the lack of evidence showing any intent to divert work from the union-signatory entity]

union's failure to refer employee-members to Manganaro until and unless it agreed to the clause, and that there was no Section 8(b)(4)(ii)(A) violation for refusing to refer employee-members to Manganaro in order to force Manganaro to agree to the clause.[16]

The Board was careful to note that its decision in Manganaro --- that the clause was lawful on its face and interpreted with the extrinsic evidence of work preservation it considered [17]--- was not meant to foreclose further 8(e) consideration of that clause in the future if a union sought to apply it in an unlawful manner. *See,* Painters District Council No. 51 (Manganaro Corp.), *supra*, at n. 39. This statement, suggests that even a clause "lawful on its face" might be sought to be applied in such a way that agreement to it in accordance with that intended application would be illegal.

The Board's Manganaro decision, however, was a 2-1 three-member panel decision, with Board Members Browning and Gould in the majority, and Board Member Charles Cohen, in dissent. The dissent by Member Cohen, made the case that the precise language of the "anti-dual shop" clause --- in particular, the words "*management, control or majority ownership*" --- since written in the disjunctive, when fairly read would permit the operation of the clause solely when the signatory firm was the majority owner, and thus, negate the necessity of that firm having "effective control" of the operations of the double-breasted firm. In Member Cohen's view, that circumstance effectively contradicted the

[16] The Board noted that its *Manganaro* analysis and result was consistent with the decision of the Sixth Circuit in Becker Electric Co. v. Electrical Workers, Local 212, 927 F.2d 895 (6th Cir 1991), which had upheld against a Section 8(e) attack a clause virtually identical to the one considered in Manganaro. The Sixth Circuit had concluded that the clause had a "work preservation" objective because of the growth of the non-union threat to unionized jobs and work in the geographic area involved.

[17]Here, the Board employed two of its Section 8(e) contract interpretation guidelines in its *Manganaro* analysis.

Board's analysis in *Alessio Construction* and made it clear that the clause was not "primary" but was "secondary", and intended to interfere with a lawful separate entity's business.

The majority of the *Manganaro* Board distinguished, but did not overrule, the Board's decision in *Alessio Construction*. There, the Board had considered a differently worded "anti-dual shop" clause, and had concluded that the clause was secondary and within the ambit of the Section 8(e) prohibition because it was not limited to situations where the signatory firm possessed or exercised "control" over the operations of the non-union firm or its employees. The *Manganaro* Board, stated: "… [The *Alessio*] clause is not limited to situations in which common control is demonstrated. In the present case, [*Manganaro*] by contrast, the clause requires both that the contractor perform the work and exercise management, control or majority ownership over the entity involved. Because of this distinction, the present case does not, as our dissenting colleague maintains, overrule *Alessio*. "s*upra,* at n. 20 As so viewed by the Board, the *Manganaro* decision did not change the Board's previous rationales, nor signal a different approach in its jurisprudence.

Rather, the Board continued its *Manganaro* and *pre-Manganaro* jurisprudence in *District Council of Carpenters (Mfg Woodworkers Ass'n of Greater NY)*, 326 NLRB 321 (1998). There, the Board dismissed a Section 8(e) complaint finding that the "anti-dual shop" clause was limited in scope to the work the Employer performed and was operative where the signatory employer had "….any significant degree…" of "ownership management or control" of the related entity. Given these words, and given the fact that the clause was challenged only on the basis of its "facial invalidity", [18] the Board found the clause to be

[18] Note again the Board's use of its J.K.Barker Trucking guidelines for Section 8(e) clause interpretation.

governed by the analysis in *Manganaro*, and "primary" as a valid "work preservation provision."[19] The Board gave a clear guide to its thinking as to the determination of whether an "anti-dual shop" clause is "primary" and lawful, or "secondary and unlawful" : "…we find that the crucial focus is whether .work of the type covered by the collective-bargaining agreement is being performed by a business entity over which the signatory employer exercises control…" *Id.*, at 325.

In *Int'l Ass'n of Ironworkers (Southwestern Materials & Supply, Inc.)*, 328 NLRB 934 (1999), the Board did not hesitate to find that an "anti-dual shop" clause violated the Act, however, where the requisite "control" over the related entity by the signatory was not present. There, the Board found that the union had committed a violation of Section 8(e) of the Act by attempting to enforce (both through arbitration and a lawsuit for damages[20]) an "anti-dual shop clause". The Board viewed the clause "on its face", finding by its clear and express terms:

> "Section 2 by its terms provides that the contract will apply to any work coming under the jurisdiction of the union that is performed either by Smith or by an entity "owned or financially controlled by" Smith. We find first that section 2 fails the "right of control" test in that it is not limited to work that Smith has the power to assign. Under the clause, any

[19] The Clause, called an Other Operations Clause, stated: "OTHER OPERATIONS Section 1. Work Preservation Clause. (a) In order to protect and preserve, for the employees covered by this Agreement, all work heretofore performed by them, and in order to prevent any device or subterfuge to avoid the protection and preservation of such work, it is hereby agreed that if and when the Employer shall perform any work of the type covered by this Agreement, under its own name or under the name of another, as a corporation, company, partnership, or any other business entity, including a joint venture, wherein the Employer exercises either directly or indirectly any significant degree of ownership management or control, the terms and conditions of this Agreement including Fringe Benefits shall be applicable to all such work."

[20] The Board found, consistent with its long-established views that seeking to enforce an allegedly violative clause during the Section 10(b) period was a "reaffirmation" of the clause and an "entering into" of the clause.

> company that is simply owned by Smith is bound to the contract. However, as the Board has previously noted, the fact that the signatory employer owns another business entity would not, without more, establish that the signatory employer had control over the assignment of the work performed by the other entity. *Carpenters (Mfg. Woodworkers*), 326 NLRB No. 31, slip op. at 5 (1998). We note further that section 2 does not have (and does not by its terms purport to have) the objective of preserving bargaining unit work for employees of the signatory employees. As noted above, the clause requires that the contract be extended to affiliated entities whose assignment of work the signatory employer does not control. Thus, the clause is not limited to addressing the labor relations of the contracting employer vis-à-vis its own employees, but instead seeks to regulate the labor policies of other, neutral employers—an objective that is clearly secondary."[21]

Hence, the Board, not wanting to depart from its jurisprudence that a clause which does not rest on the "control" or the "right to control" the second entity, found that the clause was secondary and within the ambit of Section 8(e). Going further, the Board, applying its previous rationale in *Alessio*, that the "construction industry proviso" did not shelter "anti-dual shop" clauses, the Board

[21] *Id*., at 936

concluded that the clause violated Section 8(e).[22] Remedially, the Board ordered, inter alia, that the Ironworkers "cease and desist" from pressing its lawsuit against the Employer. Id., at 937.[23]

Although it professed not to be doing so, the Board seemed to retreat from its stringent "right to control" analysis in its decision in Road Sprinkler Fitters Local 669 (Cosco Fire Protection, Inc.), 357 NLRB 2140 (2011). There, the Board found an alleged "anti-dual shop" clause to be primary, even though its language seemed to imply that the signatory employer's "control" of the working conditions and work of the related entity was not really key to the analysis; rather, the Board majority suggested that the key to a proper analysis was its own view of the definition of the words "establish" and "maintain" in the subject clause. The Board viewed those two words as implying the existence of control, even though the clause on its face, or as construed in accordance with the extrinsic evidence in the case, did not clearly show that those words were intended by the union to operate in the fashion implied by the Board. The Board used its Section 8(e) contract interpretation guidelines, however, and believed that the clause was not unlawful on its face. Further, the Board noted that because extrinsic evidence as to how the clause was intended to be applied was limited or missing, it could not interpret the clause to allow more than what the law would require; i.e., it would be construed as lawful. *Id*., at 2143

The Board's decision in that case, however, did not end the matter between the parties. Subsequent NLRA Charges were filed contending that the union violated Section 8(b)(4(ii)(A) of the Act by filing a

[22] The *Southwestern Materials* Clause reads: "…2. This agreement shall be effective in all places where work is performed or is to be performed by the Employer – or any person, firm or corporation owned or financially controlled by the Employer, and covers all work coming under the jurisdiction of the [Union]."

[23] In its *Southwestern Materials* decision, *id*., at 935, the Board concluded that the lawsuit was filed and processed in furtherance of an illegal objective, i.e., the enforcement of "anti-dual shop" clause under Section 8(e), and hence, that it could interdict the union's filing and pursuit of the lawsuit, notwithstanding the Supreme Court's general admonitions in *NLRB v Bill Johnson's Restaurants,* 461 U.S. 731 (1983), noting the footnote 5 exception in the case.

grievance and lawsuit against the related entities. It was argued that seeking to compel them to agree to the union's intended application of the clause to entities which are not commonly controlled violated the Act.[24] *Road Sprinkler Fitters Local 669 (Cosco Fire and Firetrol), 365 NLRB No. 83 (2017).*

There, the Union contended in the grievance/arbitration and lawsuit proceedings that the language of the very same "anti-dual shop" clause considered in the previous case applied to the signatory employer [Cosco Fire] and to each three related entities even though none of the four could be considered "joint employers", or a "single employer" with the others. On the facts, the ALJ found that each of the four entities were separate persons, and did not constitute a single employer. The ALJ concluded that the union was seeking to compel the four entities to be bound to the union contract simply because of the fact of interrelated "ownership" of the entities. This "intended application" of the clause was viewed by the ALJ as "secondary" and would be violative of Section 8(e). The ALJ went on to conclude that the filing of the grievance and arbitration proceedings and related court litigation constituted 8(b)(4)(ii) conduct, citing the Board's decision in *Elevator Constructors (Long Elevator)*, 289 NLRB 1095 (1988), to force the entities to enter into the 'secondary' and unlawful interpretation of the "anti-dual shop" clause. The Board adopted the ALJ rationale and decision, and ordered the union, remedially, not to enforce the clause in the manner noted, and ordered the union to dismiss or withdraw the grievance, arbitration and lawsuit proceedings, and, significantly, to reimburse the four entities for their legal expenses in defending such proceedings.

[24] The Board has been careful to continue to say that simply because it finds a clause facially valid does not mean that it might not re-visit the question of its validity where an unlawful application of the clause was sought. See, *e.g.*, *Painters District Council No. 51 (Manganaro Corp), supra*, at n. 39, discussed *infra*.

VII

APPLICATION OF THE "ANTI-DUAL SHOP ANALYSIS" TO JOINT VENTURES

In *Blasterers, Drillrunners & Miners Local 29 (RWKS Comstock)*, 344 NLRB 751 (2005), the Board applied its "anti-dual shop" clause analysis to the clause in issue in that case.[25] Utilizing the criteria in its *Alessio* decision, which looked at the concepts of "management and control" versus "financial interest or participation" , and relying specifically on that decision, Board found that the clause on its face had a "secondary" not "primary" object --- that is, it had the clear objective of the extension of the agreement to the workers and work of another entity (the joint venture) based only on a the employer's "financial interest" or "participation" in the venture, and not upon its actual or potential to control the venture and the work of the employees. The Board further found that the clause was not saved by the construction industry proviso, since like the situation in *Alessio*, it found that Congress had not intended to shelter this sort of clause when the proviso was enacted in 1959. The Board concluded that the union had violated Section 8(e) of the Act by filing grievances, requests for arbitration, and a lawsuit to enforce the unlawful clause.

The RWKS Comstock decision was consistent with the pre-existing Board decision in *Operating Engineers, Local Union 520 (Massman Construction)*, 327 NLRB 1257 (1999). In *Massman*, the Board considered and applied the *Alessio* rationale and found that the "joint venture" clause[26] had a

[25] The *RWKS Comstock* clause reads: "…To assure the maintenance of work opportunities, the Employer stipulates that any firm engaging in Heavy Construction Work under Article VIII, Section 1 and 2 of the Agreement, in which it has or acquires a financial interest or is participating in a venture with other contractors or operators, shall be responsible for compliance with all the terms and conditions of the Agreement …" .

[26] The clause proposed to Massman reads: "…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

"secondary" purpose, since it clearly was intended to extend the union contract to "non-signatory" employers, including the individual participants to the joint venture, suggesting that it was nothing more than a "union signatory" clause which did not have a work preservation purpose. The Board further found that it was not protected by the construction industry proviso.

VIII

THE SECTION 8(e) ILLEGALITY DEFENSE IN COURT LITIGATION

An Employer confronted with a union's damage claim or assertion, or that of a union trust fund, that the Employer has violated an "anti-dual shop" clause, not only can assert the illegality of the clause offensively in an appropriate unfair labor practice case before the NLRB, but also can defensively interpose an illegality defense in a Section 301 lawsuit filed to enforce that clause.

In *Kaiser Steel Corp. v. Mullins, et al*., 455 U.S. 72 (1982) the U.S. Supreme Court concluded that courts can, indeed may be obliged to, determine the illegality of a clause of a collective-bargaining agreement alleged to violate Section 8(e).

In the words of Justice White, writing for the Court's majority:

> "…Section 8(e) provides not only that it shall be an unfair labor practice to enter into an agreement containing a hot-cargo clause, but also that any

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undertaking or arrangement accept and agree to be bound by this Agreement. The Employer shall be responsible for compliance with the requirement of this provision."

The Union proposed to, and eventually entered into, with certain other employers a similar clause: "… The Employer shall require as a condition for entering into any joint venture or joint work undertaking or arrangement 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 requirement of this provision."

> contract or agreement entered into heretofore or hereafter containing [a hot-cargo clause] shall be to such extent unenforceable {sic} and void…..''
>
> ….Therefore, where a Section 8(e) defense is raised by a party which Section 8(e) was designed to protect, and where the defense is not directed to a collateral matter but to the portion of the contract for which enforcement is sought, a court must entertain the defense."

The *Kaiser v Mullins* Court rejected the notion that the determination of the legality of a hot-cargo clause was exclusively the province of the NLRB, noting that it had previously held in *Connell Construction Company v. Plumbers & Steamfitters Local 100,* 421 U.S. 616 (1975) that courts had jurisdiction to determine the labor law questions concerning the legality of provisions under Section 8(e) that arise collaterally in litigation under other federal statutes. [27]

IX

CONCLUSION

One can summarize the foregoing discussion into several distinct points:

- The NLRB is not the only forum in which to litigate the legality under Section 8(e) of an "anti-dual shop" or "anti-joint venture" clause. Federal courts have jurisdiction to decide such issues.

[27] See also, *Painters District Council 16 v. B & B Glass, Inc*., 510 F.3d 851 (9th Cir. 2007); *Limbach v. Sheet Metal Workers*, 949 F.2d 1241 (3d Cir. 1991);

- Section 8(e) proscribes "an entering into" of an agreement with a "secondary" purpose, designed to cause the signatory employer to interfere with, disrupt, or cease a business relationship;

- The 'construction industry proviso' to Section 8(e) does not shelter "anti-dual shop" or "anti-joint venture" clauses since they are not what Congress intended to shelter by the proviso;

- The test to determine if a challenged "anti-dual shop" or "anti-joint venture" clause is "primary" and lawful is a two-part one: the clause must be for the purpose of preserving or protecting the work of the bargaining unit employees, and the clause must be operative only where the signatory entity has or exercises "control" over the related entities operations and employees and their conditions.

- The "anti-dual shop" or "anti-joint venture" clause is "secondary" and within the proscription of Section 8(e) if it is not objectively for preserving bargaining unit work, or if it seeks to bind the related entity or joint venture only on the basis of "financial" or "ownership" interests, or only on the basis of participation in the formation of the related entity, but where there is no showing of "control" of the related entity by the signatory employer.

- A union violates 8(b)(3) by insisting to impasse on the inclusion of an unlawful "anti-dual shop" clause in its collective-bargaining agreement.

- A union's picketing to secure an unlawful "anti-dual shop" clause can violate Section 8(b)(4)(ii)(A) of the Act.

- A union violates Section 8(e) of the Act if it "enters into" an unlawful "anti-dual shop" agreement with the employer within the Section 10(b) limitations period.

- A union's filing of grievances, pursuing arbitration, or filing a suit for damages, or to compel the arbitration of an unlawful "anti-dual shop" clause can constitute a "reaffirmation" of the clause, and an "entering into" of the clause for NLRB Section 10(b) limitation purposes.

- A union's filing of grievances or lawsuit to enforce an unlawful "anti-dual shop" clause can constitute a violation of Section 8(b)(4)(ii)(A), and the Board can order the withdrawal of the suit and award the employer its legal fees and costs as part of the remedy for such a violation.

- The Board utilizes certain Section 8(e) contract interpretation guidelines in deciding how to evaluate a challenged clause, and which should be used by the practitioner in reviewing a clause for validity:

    1. …. if the meaning of the clause is clear, the Board will determine forthwith its validity …;
    2. ….where the clause is not clearly unlawful on its face, the Board will interpret it to require no more than what is allowed by law;
    3. ….if the clause is ambiguous, the Board will not presume unlawfulness, but will consider extrinsic evidence to determine whether the clause was intended to be administered in a lawful or unlawful manner;
    4. …. [i]n the absence of such [extrinsic] evidence, the Board will refuse to pass on the validity of the clause

- Both the ***Manganaro*** and the ***Alessio Construction*** decisions and rationales still co-exist under current Board Section 8(e) jurisprudence.

Although it is possible with some difficulty to square all the decisions the Board has issued in the last 30 years dealing with the union's contract clause weaponry against "dual shops", it is clear from

a review of what the Board has done that there is insufficient clarity of decision, insufficient consistency, and sometimes outright inconsistency (as noted by some dissenting Board Members in some cases.)

With the seating of three new Board members, including a new Chairman, and with a new General Counsel who can now review and spearhead what issues and complaints to put to the Board, as well as what legal theories to articulate, it appears time for both the General Counsel and the Board to take another look at the issues raised by the "anti-dual shop" clauses.

A new look could try to fashion more consistency in the application of Section 8(e) to the "dual shop" and "double-breasting" members of the construction industry, and provide, perhaps, a simpler, easier approach to deciding whether such clauses are lawful, or not.

JOHN W PRAGER, JR.

APPENDIX A

The INTEGRITY CLAUSE involved in the Schebler and George Koch & Sons cases reads as follows:

SECTION ONE: A ‘‘bad faith employer’’ for purposes of this Agreement is *an Employer that* itself or through a person or persons subject to an owner’s control, ***has ownership interests*** (other than a non-controlling interest in a corporation whose stock is publicly traded) *in any business entity* that engages in work within the scope of SFUA Article I hereinabove using employees whose wage package, hours, and working conditions are inferior to those prescribed in this Agreement or, if such business entity is located or operating in another area, inferior to those prescribed in the agreement of the sister local union affiliated with Sheet Metal Workers’ International Association, AFL–CIO in that area.

An *Employer is also a ‘‘bad faith employer’’* ***when it is owned by*** *another business entity* as its direct subsidiary or as a subsidiary of any other subsidiary within the corporate structure thereof through a parent-subsidiary and/or holding-company relationship, and any other business entity within such corporate structure is engaging in work within the scope of SFUA Article I hereinabove using employees whose wage package, hours, and working conditions are inferior to those prescribed in this Agreement or, if such other business entity is located or operating in another area, inferior to those prescribed in the agreement of the sister local union affiliated with Sheet Metal Workers’ International Association, AFL–CIO in that area.

SECTION TWO: Any Employer that signs this Agreement or is covered thereby by virtue of being a member of a multi-employer bargaining unit expressly represents to the Union that it is not a ‘‘bad faith employer’’ as such term is defined in Section 1 hereinabove and, further, agrees to advise the union promptly if at any time during the life of this Agreement said Employer changes its mode of operation and becomes a ‘‘bad faith employer.’’ Failure to give timely notice of being or becoming a ‘‘bad faith employer’’ shall be viewed as fraudulent conduct on the part of such Employer. In the event any Employer signatory to or bound by this Agreement shall be guilty of fraudulent conduct as defined above, such Employer shall be liable to the Union for liquidated damages at the rate of $500 per calendar day from the date of failure to notify the Union until the date on which the Employer gives notice to the Union. The claim for liquidated damages shall be processed as a grievance in accordance with, and within the time limits prescribed by, the provisions of SFUA Article X.

SECTION THREE: Whenever the Union becomes aware that an Employer has been or is a ‘‘bad faith employer,’’ it shall be entitled, notwithstanding any other provision of this Agreement, to demand that the Agreement between it and such ‘‘bad faith employer’’ be rescinded. A claim for rescission shall be processed by the Union as a contract grievance in accordance with, and within the time limits prescribed under, the provisions of SFUA Article X of this Agreement.

[ITALICS AND BOLD ADDED]

APPENDIX B

The Anti-Dual Shop Clause in <u>Alessio Construction</u> reads as follows:

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 this 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 provisions herein and covered by all the terms of this contract."

[ITALICS AND BOLD ADDED]

APPENDIX C

The Anti-Dual Shop Clause in the Manganaro decision reads as follows:

Section 1. To protect and preserve, for the employees covered by this Agreement, all work they have performed and all work covered by this Agreement, and to prevent any device or subterfuge to avoid the protection and preservation of such work, it is agreed as follows: If the *Contractor performs on-site construction work of the type covered by this Agreement*, under its own name or the name of another, as a corporation, company, partnership, or other business entity, including a joint venture, *wherein the Contractor, through its officers, directors, partners, owners or stockholders exercises directly or indirectly* (including but not limited to management, control, or majority ownership through family members), ***management, control or majority ownership***, the terms and conditions of this Agreement shall be applicable to such work.

[ITALICS AND BOLD ADDED]

APPENDIX D

The Anti-Dual Shop Clause in the Carpenters (Mfg Woodworkers) decision reads as follows:

OTHER OPERATIONS Section 1. Work Preservation Clause. (a) In order to protect and preserve, for the employees covered by this Agreement, all work heretofore performed by them, and in order to prevent any device or subterfuge to avoid the protection and preservation of such work, it is hereby agreed that if and ***when the Employer shall perform any work*** *of the type covered by this Agreement*, under its own name or ***under the name of another***, as a corporation, company, partnership, or any other business entity, including a joint venture, ***wherein the Employer exercises*** either directly or indirectly ***any significant degree of ownership management or control***, the terms and conditions of this Agreement including Fringe Benefits shall be applicable to all such work.

[ITALICS AND BOLD ADDED]

APPENDIX E

The "Anti-Dual Shop" clause in <u>Southwestern Materials</u> reads as follows:

…. 2. This agreement shall be effective in all places where *work is performed* or is to be performed *by the Employer – or any person, firm or corporation* ***owned or financially controlled by the Employer,*** and covers all work coming under the jurisdiction of the [Union].

[ITALICS and BOLD ADDED]

APPENDIX F

The Anti-Dual Shop Clause in <u>Sprinkler Fitters Local 669 (Cosco Fire Protection)</u> reads as follows:

PRESERVATION OF BARGAINING UNIT WORK In order to protect and preserve for the employees covered by this Agreement all work historically and traditionally performed by them, and in order to prevent any device or subterfuge to avoid protection or preservation of such work, it is hereby agreed as follows: *If* and when the ***Employer shall perform any work*** *of the type covered by this Agreement* as a *single or joint Employer* (which shall be interpreted pursuant to applicable NLRB and judicial principles) within the trade and territorial jurisdiction of Local 669, under its own name *or* ***under*** *the name of another,* as a corporation, sole proprietorship, partnership, *or* ***any other business entity including a joint venture,*** wherein the Employer (including its officers, directors, owners, partners or stockholders) *exercises either directly or indirectly* (such as through family members) controlling **or majority ownership, management or control over such other entity**, the wage and fringe benefit terms and conditions of this Agreement shall be applicable to all such work performed on or after the effective date of this Agreement shall be applicable to all such work performed on or after the effective date of this Agreement. The question of single Employer status shall be determined under applicable NLRB and judicial principles, i.e., whether there exists between the two companies an arm's length relationship as found among unintegrated companies and/or whether overall control over critical matters exists at the policy level. The parties hereby incorporate the standard adopted by the Court in Operating Engineers Local 627 v. NLRB, 518 F.2d 1040 (D.C. Cir. 1975) and affirmed by the Supreme Court, 425 U.S. 800 (1976), as controlling. A joint employer, under NLRB judicial principles, is two independent legal entities that share, codetermine, or meaningfully affect labor relations matters.

* * * * * * * * * * * * * * * * *

In the event that the Union files, or in the past has filed, a grievance under article 3 of this or a prior national agreement, and the grievance was not sustained, the Union may proceed under the following procedures with respect to the contractor(s) involved in the grievance:

Should the *Employer* ***establish or maintain operations*** *that are not signatory to this Agreement, under its own name or another or through another related business entity to perform work of the type covered by this Agreement within the Union's territorial jurisdiction, the terms and conditions of this Agreement shall become applicable* to and binding upon such operations at such time as a majority of employees of the entity (as determined on a state-by state, regional or facility-by-facility basis consistent with NLRB unit determination standards) designates the Union as their exclusive bargaining representative on the basis of their uncoerced execution of authorization cards, pursuant to applicable NLRB standards, or in the event of a good faith dispute over the validity of the authorization cards, pursuant to a secret ballot election under the supervision of a private independent third party to be designated by the Union and the NFSA within thirty (30) days of ratification of this Agreement. The Employer and the Union agree not to coerce employees or to otherwise interfere with employees in their decision whether or not to sign an authorization card and/or to vote in a third party election.

[ITALICS AND BOLD ADDED]

APPENDIX G

The Anti-Dual Shop clause in Op Engrs (Massman Construction) reads as follows:

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

[ITALICS AND BOLD ADDED]

APPENDIX H

The anti-joint venture clause in the <u>RWKS Comstock</u> decision provides:

To assure the maintenance of work opportunities, *the Employer stipulates that any firm* engaging in Heavy Construction Work under Article VIII, Section 1 and 2 of the Agreement, in *which it has or acquires* ***a financial interest or is participating in a venture*** *with other contractors or operators*, shall be responsible for compliance with all the terms and conditions of the Agreement.

[ITALICS AND BOLD ADDED]