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

DATE: December 17, 2018

TO: Patricia K. Nachand, Regional Director
Region 25

FROM: Jayme L. Sophir, Associate General Counsel
Division of Advice

SUBJECT: Duke Energy Indiana
Case 25-CA-214176

530-6050-0120
530-6050-0900
530-6050-7000

This case was submitted for advice as to whether the Employer violated Sections 8(a)(5) and (1) of the Act by unilaterally implementing and/or enforcing a non-solicitation/no-hire provision with third-party subcontractors without first bargaining with the Union. We conclude that the charge should be dismissed, absent withdrawal, because the Union does not have authority to negotiate the terms of third-party agreements to which it is not a party, notwithstanding the effect that the non-solicitation provision has on the unit employees' terms and conditions of employment.

FACTS

Duke Energy Indiana (the "Employer") is a regulated utility that generates, distributes, and transmits electricity for approximately 810,000 customers in Indiana. It is the largest utility in the state of Indiana and operates thirty-two distribution operations centers located throughout 23,000 square miles in the state. The Employer's operations are divided into three departments: generation, transmission, and distribution. Linemen—the focus of the charge—work in the distribution department constructing and maintaining the Employer's power lines and other equipment related to the distribution of electricity.

International Brotherhood of Electrical Workers, Local 1393 (the "Union") represents about 1,200 of the Employer's workforce and, of those employees, approximately 340 are bargaining-unit linemen. The Employer and the Union have an extensive collective-bargaining history going back roughly seventy-five years and the current collective-bargaining agreement ("CBA") is in effect from May 1, 2015 to May 1, 2020. Article 25 of the parties' CBA allows the Employer to subcontract unit

work provided it does not result in the lay-off of bargaining unit employees.[1] The CBA does not contain any non-compete language restricting employees' future employment opportunities.

In addition to the Employer's linemen, the Union also represents linemen who work for subcontractors in the state of Indiana. The Union also operates a hiring hall for the purpose of referring members to open jobs, including jobs with subcontractors working for the Employer. The Union estimates that as many as 61% of referrals for linemen from the Union's hiring hall are to subcontractors performing work on the Employer's property. Many of the Employer's linemen have found that working for the subcontractors through the Union's hiring hall offers better wages and benefits than the Employer. As a result, a high number of employees have terminated their relationship with the Employer to begin working through the hiring hall. The Employer wanted to discourage this trend because it expends considerable resources recruiting and training employees through its lineman apprenticeship program, which takes four years to complete, only to have them leave its employ and return to its property as subcontractors. The Employer reports that there has been a recent surge in the number of linemen who resigned from the Employer after completing the apprenticeship program only to return to work on the Employer's projects as employees of subcontractors.

On or around August 15, 2017,[2] the Employer held meetings at its thirty-two distribution operations centers throughout Indiana, and informed its unit linemen that, from that point forward, they could not work for a subcontractor on the Employer's property for six months after leaving employment with the Employer. The Employer's supervisors explained that due to the recent surge in employees leaving and immediately going to work for subcontractors, the Employer wanted linemen to be aware of the six-month limitation on subcontractor assignments in case they were considering resigning their employment with the Employer. During at least one of these meetings, the linemen suggested that improvements in retirement and insurance benefits, the creation of an incentive program, or improved wages would help retain linemen.

About two weeks later, on September 1, the Employer sent letters to all subcontractors serving the Employer's distribution operations. The letters stated:

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[1] Various factors such as storm damage, changes in demand, regulatory requirements, and approval of capital improvement projects significantly impact the Employer's need for linemen, and because of these fluctuations, for years the Employer has used a number of subcontractors to supply additional linemen.

[2] All remaining dates are in 2017 unless otherwise indicated.

> Dear Supplier,
>
> The purpose of this communication is to remind your company about a non-solicitation/assignment provision in its Master Agreement ("Agreement") with Duke Energy. This provision is necessary to protect the significant investment made by Duke Energy in developing and training its workforce, and to ensure that its contractors are fulfilling their purpose of supplementing the Duke Energy workforce, rather than seeking to diminish it.
>
> Duke Energy intends to enforce the non-solicitation requirement in the parties' Agreement, and expects that your company will not solicit Duke Energy employees during their employment with Duke Energy and for six months after their employment with Duke Energy ends. *Duke Energy also will not permit the assignment of former Duke Energy employees to work on Duke Energy property or projects for six months after their employment with Duke Energy ends*.
>
> To be clear, Duke Energy does not interpret the non-solicitation provision to mean that your company is prohibited from employing former Duke Energy employees immediately after their separation from Duke Energy. *In other words, your company is not restricted in any way from employing former Duke Energy employees and assigning them to perform non-Duke Energy work for the six-month period.* In reviewing the non-solicitation provision in the Agreement again, we concluded that the language could be improved to more clearly reflect our intent regarding this subject, and intend for this letter to provide that clarification.
>
> Duke Energy values the services provided by your company, and appreciates your cooperation on this important issue. Please sign below to acknowledge receipt and please return a copy of this letter for our records. Please contact us if you have any questions.[3]

As the Employer's letter noted, its contracts with its subcontractors included non-solicitation language that the Employer had not previously enforced. The Employer's contracts with its subcontractors contained one of the following, nearly identical provisions:

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[3] Emphasis added.

> Non-Solicitation. Contractor shall not, without Duke Energy's prior written consent, which shall be at Duke Energy's sole discretion, solicit for employment or employ any person who is or was an employee of Duke Energy until six months after such employee is no longer employed by Duke Energy; provided however, Duke Energy waives this six month waiting period for any former employee who has been laid off by Duke Energy as part of a workforce reduction program. The Parties acknowledge that a breach of the obligations set forth in this Article would cause irreparable harm and leave Duke Energy without an adequate remedy at law. Duke Energy thus shall be entitled to injunctive relief to enforce the terms of this Agreement.

Or:

> Non-Solicitation. Contractor shall not knowingly, without Duke Energy's prior written consent, which shall be at Duke Energy's sole discretion, directly solicit for employment or employ any person who is or was an employee of Duke Energy, in the same or substantially similar capacity as the employee was engaged in for Duke Energy, until six months after such employee is no longer employed by Duke Energy; provided however, Duke Energy waives this six month waiting period for any former employee who has been laid off by Duke Energy as part of a workforce reduction program. The Parties acknowledge that a breach of the obligations set forth in this Article would cause irreparable harm and leave Duke Energy without an adequate remedy at law. Duke Energy thus shall be entitled to injunctive relief to enforce the terms of this Agreement.[4]

In response to the Employer's statements about enforcing the non-solicitation provisions, subcontractors banned several linemen (who had left the Employer for the hiring hall shortly before the Employer's announcement) from continuing to work for them on the Employer's property, and the linemen had to pursue job opportunities that provided less compensation and required longer commutes. In addition, unit employees who planned to leave the Employer in pursuit of the superior wages and benefits of the subcontractors decided to remain with the Employer once the subcontracting opportunities were constrained by the Employer's enforcement of its non-solicitation agreements.

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[4] Emphasis added by underlining portions of the second clause to point out the differences in the two clauses.

ANALYSIS

We conclude that the charge should be dismissed, absent withdrawal, because the Employer did not have an obligation to bargain over the terms of its agreements with subcontractors, regardless of the impact those terms have on the unit linemen.

The Board has consistently found that non-compete agreements between an employer and its bargaining unit employees, which by their terms constrain employees' future employment options, are a mandatory subject of bargaining because the resulting lost economic opportunities have a clear and direct impact on the employees.[5] Thus, the Employer could not lawfully impose these kinds of restrictions directly on the unit linemen without bargaining with the Union. The inquiry cannot end there, however, because the provisions at issue in the instant case were contained in the Employer's agreements with third parties rather than in its agreement with the Union or with the employees themselves.

Although the Supreme Court reiterated, in *Pittsburgh Plate Glass*, that an issue shown to "vitally affect the terms and conditions of employment of the bargaining-unit employees" may constitute a mandatory subject of bargaining even if it involves matters outside the strict confines of the employment relationship,[6] the Board and courts have never directly addressed the question presented in this case: whether an employer must bargain over the terms of a contract that it enters into with another business entity where the terms of that contract would vitally affect unit employees. We conclude that there can be no such obligation.

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[5] *See Minteq Int'l Inc.*, 364 NLRB No. 63, slip op. at 3 (July 29, 2016) (concluding that a non-compete agreement clearly affected an aspect of the employment relationship about which the employer is required to bargain), *enforced* 855 F.3d 329 (D.C. Cir. 2017); *Gov't Emp. (IBPO)*, 327 NLRB 676, 684 n.8 (1999) (specifying that, in addition to the unlawful direct dealing, the non-compete agreement within the violative individual employee contracts was in and of itself a mandatory subject of a bargaining), *enforced* 205 F.3d 1324 (2d Cir. 1999); *Bolton-Emerson, Inc.*, 293 NLRB 1124, 1129-30 (1989) (indicating that employer's unilateral implementation of non-compete agreements affected employees' terms and conditions of employment), *enforced* 899 F.2d 109 (1st Cir. 1990).

[6] *Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass*, 404 U.S. 157, 179 (1971) (discussing how *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203 (1964) and *Teamsters Local 24 v. Oliver*, 358 U.S. 283 (1959) long ago established that matters outside the employer-employee relationship are not wholly excluded from constituting mandatory subjects of bargaining).

As explained by the Supreme Court in *First National Maintenance Corp.*,[7] "Congress had no expectation that the elected union representative would become an equal partner in the running of the business enterprise in which the union's members are employed."[8] An employer "must be free from the constraints of the bargaining process to the extent essential for the running of a profitable business."[9] Thus, the Board has recognized that managerial decisions that may impact employees but concern issues that "lie at the core of entrepreneurial control" are not mandatory subjects of bargaining and fall solely within the employer's prerogative.[10] Moreover, the Board has recognized that "the autonomy of employers in their selection of independent contractors with whom to do business" is one of the legislative policies underlying the Act.[11] Many of the terms that employers negotiate in contracts with customers, suppliers, and subcontractors have significant impact on the employer's employees; that does not make them mandatory subjects of bargaining with the union.

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[7] 452 U.S. 666, 677 (1981).

[8] *Id.* at 676.

[9] *Id.* at 678-79 (elaborating that "bargaining over management decisions . . . should be required only if the benefit, for labor-management relations and the collective-bargaining process, outweighs the burden placed on the conduct of the business"); s*ee* *Fibreboard*, 379 U.S. at 223 (clarifying that there is not a "duty to bargain collectively regarding . . . managerial decisions, which lie at the core of entrepreneurial control; "[d]ecisions concerning the commitment of investment capital and the basic scope of the enterprise are not in themselves primarily about conditions of employment").

[10] *Minteq*, 364 NLRB No. 63, slip op. at 4; *see Star Tribune*, 295 NLRB 543, 560 (1989) (differentiating between mandatory subjects that are germane to the working environment, and permissive subjects that are within the realm of managerial or entrepreneurial prerogatives).

[11] *Computer Associates International*, 324 NLRB 285, 286 (1997) (citing *Local No. 447, Plumbers (Malbaff Landscape Construction)*, 172 NLRB 128, 129 (1968); reiterating the principle that an employer does not unlawfully encourage union membership, in violation of Section 8(a)(3), by substituting a contractor with unionized employees for a nonunion contractor, nor does it unlawfully discourage union membership by the reverse action, regardless of whether the union status of the subcontractors' employees motivates the contracting decisions), *enforcement denied on other grounds* 282 F.3d 849 (D.C. Cir. 2002).

In the instant case, it is clear that the Employer's unilateral implementation of the non-solicitation provision with the third-party subcontractors had an impact on unit employees' future economic opportunities as well as their ability to negotiate for improved terms and conditions of employment. Notwithstanding that impact, however, the Employer's decision to include limitations on its third-party contractors' ability to use former unit employees on its projects is the type of managerial decision over which an employer does not have to bargain. The Employer and the Union have engaged in bargaining over the Employer's ability to subcontract unit work, as evidenced by the subcontracting terms set forth in the parties' collective-bargaining agreement, and the Union is free to seek different subcontracting terms in negotiations for any successor agreement. What the Union cannot do is force bargaining over the terms of the Employer's contracts with its subcontractors. Therefore, the Employer's unilateral decision to implement, or to begin enforcing, non-solicitation provisions in its contracts with subcontractors did not violate Section 8(a)(5). Accordingly, the charge should be dismissed, absent withdrawal.

/s/
J.L.S.

ADV.25-CA-214176.Response.DukeEnergyIndiana (b) (6), (b) (7)