

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION**

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WESTERN DISTRICT OF TEXAS
AUSTIN, TEXAS

**CENTRAL TEXAS CHAPTER, NATIONAL
ELECTRICAL CONTRACTORS
ASSOCIATION, INC.,**

Plaintiff,

-vs-

Case No. A-11-CA-339-SS

**INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS LOCAL UNION NO.
520,**

Defendant.

ORDER

BE IT REMEMBERED on this day the Court reviewed the file in the above-styled cause, and specifically Plaintiff Central Texas Chapter, National Electrical Contractors Association, Inc. (the Chapter)'s Motion for Summary Judgment [#10], Defendant International Brotherhood of Electrical Workers Local Union No. 520 (the Union)'s Opposition and Motion for Summary Judgment in response [#32], the Chapter's Reply [#36], and Response [#37], the Union's Reply [#42], and the letter briefs filed by the Chapter and the Union at the Court's request [##45, 48]. Also before the Court are Motions for Leave to file Amicus Briefs by the International Brotherhood of Electrical Workers and the National Electrical Benefit Fund [##29, 31], and the Chapter's Responses in Opposition [##38, 39]. Having reviewed the aforementioned documents, the case file as a whole, the parties' arguments at a hearing held on September 26, 2011, and the relevant law, the Court enters the following opinion and orders.

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Background

This case arises out of a labor dispute between the Central Texas Chapter of the National Electrical Benefit Fund (the Chapter), which is the collective bargaining representative for twenty-five electrical contractors, and Local Union Number 520 of the International Brotherhood of Electrical Workers (the Union), which is the collective bargaining representative for electricians, construction wiremen, construction electricians, and apprentice employees who work for the contractors represented by the Chapter. From June 1, 2008, until May 31, 2010, the contractors and employees were bound by a collective bargaining agreement negotiated by the Chapter and the Union (the 2008 Agreement). In the 2008 agreement, the parties agreed to an interest arbitration clause, which the Union invoked on May 29, 2010, because the parties had failed to agree to terms for renewing the 2008 Agreement. Although the 2008 Agreement expired on May 31, 2010, its terms remained in-force under an “evergreen” clause.

Between October 5, 2010, and December 22, 2010, the parties appeared before Arbitrator Joe D. Woodward. At arbitration, the Union essentially argued for terms consistent with the expired 2008 Agreement. By contrast, the Chapter sought several novel provisions. These included objecting to mandatory contributions to the various employee welfare trusts (contributions which the employers had made for years), a point that also forms the core of the Chapter’s present attack on the arbitration award. The welfare trusts provide for health, retirement, and vacation benefits to the Union members. Collectively, they form a system whereby the employers contribute either specified sums, or set percentages of each employee’s wages, to the various trusts, and the benefits, administered through the trusts, follow employees whenever they change employer. Apparently, changing both employers and geographic location as construction activity ebbs and flows in different

locales is a reality of the labor market for electrical workers. Such trusts serve the dual purpose of giving the employees uninterrupted benefits, and also benefit both employers and employees by providing a more mobile labor pool.

The Chapter also included a so-called “E-Pay” system in its arbitration proposals. E-Pay apparently constituted a major and radical change to how the Chapter’s contractor-members would hire particular grades of electrical workers, both Union and non-union. The arbitrator took pains in his award to specifically reject the E-Pay proposal, labeling it at one point a “Trojan horse.” Compl. [#1], Ex. 2 (Arbitration Award) at 23. The arbitrator found “E-Pay would furthermore change the long-standing pay structure and even the very names which have been recognized in the industry for well over 100 years.” *Id.* at 22. There was testimony before the arbitrator which supported his conclusion, in which the Union president opined that E-Pay would undermine the long-established journeyman and apprentice system prevalent among electrical workers, that it would make it difficult for non-local workers to come into the local labor market in boom times, would furthermore facilitate supplanting Union workers with non-union employees, and might even allow the Chapter to effectively de-unionize its workforce. *See* Def.’s Opp’n to Mot. Summ. J. [#32], Att. 1.

The arbitrator generally ruled in favor of the Union, and his arbitration award created a successor collective bargaining agreement (the new CBA) which was generally a logical extension of the 2008 Agreement. Apparently dissatisfied with the outcome of the arbitration it had agreed to, the Chapter brought this suit, seeking to void the arbitration award, and arguing the arbitrator exceeded his powers. The Union brings a counterclaim, asserting the new CBA established by the award has a retroactive effective date of June 1, 2010, and seeking payment of compensation based

on that effective date, and attorney's fees and costs, as apparently the Chapter has refused to implement any part of the award or its component successor CBA.

Discussion

As a preliminary matter, the National Electrical Benefit Fund (NEBF) and the International Brotherhood of Electrical Workers (IBEW) have moved for leave to file amicus briefs. Because some of the issues in the case have potential consequences beyond the particular parties to the suit, and since the amici offer useful, broader perspectives on these issues, the Court GRANTS their motions, and their amicus briefs are henceforth part of the record in this case.

I. Legal Standards

A. Summary Judgment

Summary judgment shall be rendered when the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine dispute as to any material fact and that the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–25 (1986); *Washburn v. Harvey*, 504 F.3d 505, 508 (5th Cir. 2007). A dispute regarding a material fact is “genuine” if the evidence is such that a reasonable jury could return a verdict in favor of the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). When ruling on a motion for summary judgment, the court is required to view all inferences drawn from the factual record in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 587 (1986); *Washburn*, 504 F.3d at 508. Further, a court “may not make credibility determinations or weigh the evidence” in ruling on a motion for summary judgment. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000); *Anderson*, 477 U.S. at 254–55.

Once the moving party has made an initial showing that there is no evidence to support the nonmoving party's case, the party opposing the motion must come forward with competent summary judgment evidence of the existence of a genuine fact issue. *Matsushita*, 475 U.S. at 586. Mere conclusory allegations are not competent summary judgment evidence, and thus are insufficient to defeat a motion for summary judgment. *Turner v. Baylor Richardson Med. Ctr.*, 476 F.3d 337, 343 (5th Cir. 2007). Unsubstantiated assertions, improbable inferences, and unsupported speculation are not competent summary judgment evidence. *Id.* The party opposing summary judgment is required to identify specific evidence in the record and to articulate the precise manner in which that evidence supports his claim. *Adams v. Travelers Indem. Co. of Conn.*, 465 F.3d 156, 164 (5th Cir. 2006). Rule 56 does not impose a duty on the court to "sift through the record in search of evidence" to support the nonmovant's opposition to the motion for summary judgment. *Id.* "Only disputes over facts that might affect the outcome of the suit under the governing laws will properly preclude the entry of summary judgment." *Anderson*, 477 U.S. at 248. Disputed fact issues that are "irrelevant and unnecessary" will not be considered by a court in ruling on a summary judgment motion. *Id.* If the nonmoving party fails to make a showing sufficient to establish the existence of an element essential to its case and on which it will bear the burden of proof at trial, summary judgment must be granted. *Celotex*, 477 U.S. at 322–23.

B. Arbitration Awards

Judicial review of collective-bargaining arbitrations is tightly circumscribed, reflecting a congressional preference "for private settlement of labor disputes without the intervention of government." *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 37 (1987). "Because the parties have contracted to have disputes settled by an arbitrator chosen by them rather than by

a judge, it is the arbitrator's view of the facts and of the meaning of the contract that they have agreed to accept." *Id.* at 37–38. "The arbitrator may not ignore the plain language of the contract; but the parties having authorized the arbitrator to give meaning to the language of the agreement, a court should not reject an award on the ground that the arbitrator misread the contract." *Id.* at 38. However, the arbitrator's awards must "draw its essence" from the contract, and "cannot simply reflect the arbitrator's own notions of industrial justice." *Id.* Nonetheless, if the arbitrator is "even arguably construing or applying the contract," and acted within the scope of his authority, the court must uphold the arbitration award. *Id.*

The Fifth Circuit applies a three-part test to reviewing arbitration awards in labor disputes. The test requires "(1) an agreement to arbitrate and the parties must be covered by that agreement; (2) an award which draws its 'essence' from the agreement and does not exceed the scope of the issues presented to the arbitrator; and (3) an award which is not 'repugnant' to the NLRA." *Sheet Metal Workers Local Union No. 54 v. E.F. Etie Sheet Metal Co.*, 1 F.3d 1464, 1475 (5th Cir. 1993). Arbitration award provisions which purport to include nonmandatory subjects of bargaining are unenforceable as contrary to national labor policy. *See id.* at 1476. Under the NLRA, mandatory subjects of bargaining are those related to "wages, hours, and other terms and conditions of employment." *Fibreboard Paper Prods. Corp. v. N.L.R.B.*, 379 U.S. 203, 210 (1964) (quotations omitted). Subjects of bargaining which are not illegal, but that are not mandatory, are permissive subjects of bargaining, and "each party is free to bargain or not to bargain" on them. *Id.* A party may properly invoke an interest arbitration clause in a prior agreement only when the parties have reached impasse on mandatory issues—because parties are free to not bargain on permissive issues, interest arbitration cannot be invoked merely because of impasse on those issues. *E.F. Etie*, 1 F.3d

at 1473.

II. Summary Judgment—Application

The Chapter attacks the arbitration award on several grounds. First, the Chapter argues the arbitrator impermissibly imposed a third-party collective bargaining agent on the Chapter by incorporating the NEBF trust, which contains terms, particularly a rate of contribution, that are negotiated by third parties. Second, the Chapter asserts the various benefit fund delinquency procedures were permissive subjects of bargaining, and so beyond the arbitrator's authority. The Chapter also argues the new CBA's subcontracting clause applies outside the geographic scope of the arbitrator's authority, and contains an illegal "cease doing business" provision. The final arrow in the Chapter's quiver is to assert the award is fatally ambiguous as to certain benefit-fund contribution provisions. Finally, as a counterclaim, the Union asserts the effective date of the new CBA should be retroactive from the date of the award.

A. The NEBF Trust Agreement

The Chapter argues the arbitrator exceeded his power by including the NEBF trust instrument in the new CBA, because the trust provides the trustees can set a new contribution rate. The Chapter claims this would constitute collective bargaining by the trustees, which would be contrary to the NLRA, because the Chapter does not select any of the trustees.¹ The Union argues this does not constitute collective bargaining. Amicus NEBF notes the contribution rate has only changed once in the sixty-five years in which the NEBF has been in existence. *See* Brief of Amicus Curiae National Electrical Benefit Fund [#31] at 2, 4.

The Court is persuaded this case falls squarely within the rule in *N.L.R.B. v. Amax Coal Co.*,

¹The *national* NECA does select one of the trustees, but the local chapter, the plaintiff in this suit, does not.

453 U.S. 322 (1981). In *Amax Coal*, the Supreme Court faced essentially the same issue presented here: whether a union demand to require participation in an employees' welfare trust violated § 8(b)(1)(B) of the Labor Management Relations Act (LMRA). *Id.* at 328. Specifically, the Supreme Court in *Amax Coal* considered and rejected the employer's argument that being required to participate in a welfare trust denied the employer's right to collective bargaining through a freely chosen representative. *See id.* *Amax Coal* revolved around facts similar to this case, including a comparable welfare trust, participation in which was a contested subject of bargaining. *See id.* 325–26. The Supreme Court found, based on statutory analysis and consideration of the fiduciary duties imposed on plan trustees, that a plan trustee, appointed by an employer's collective bargaining association, is not a "representative" of the particular employer for purposes of collective bargaining. *Id.* at 329–39. And the Supreme Court recognized this is not a cause for alarm, or repugnant to the Act:

However, the power of a union to strike or bargain to impasse to induce an employer to contribute to a multiemployer trust fund does not pose the danger Congress sought to prevent [in § 8(b)(1)(B)]. Congress treated the issues of multiemployer bargaining units and multiemployer trust funds quite distinctly. It is permissible under the law, and may be in the interest of the public, for an employer to bargain separately with a union, independently of any industrywide employer association, while the union exerts economic pressure to obtain protection for the employees through the medium of a multiemployer benefit fund.

Moreover, union pressure to force an employer to contribute to an established employee trust fund does not amount to dictating to an employer who shall represent him in collective bargaining and the adjustment of grievances, because the trustees of a § 302(c)(5) trust fund simply do not, as such, engage in these activities.

Id. at 335–36.

The Chapter is making substantively the same argument that failed in *Amax Coal*, with only the added wrinkle of emphasizing the possibility the trustees might adjust the contribution rate in

the future. If the arbitration award in question approved an actual, unilateral increase in the contribution rate by the trustees, the Court might find the Chapter's argument more persuasive. *See Prof'l Adm'rs Ltd. v. Kopper-Glo Fuel, Inc.*, 819 F.2d 639, 644 (6th Cir. 1987). However, here, as in *Amax Coal*, no change in the rate has occurred or is even contemplated. *See Amax Coal*, 453 U.S. at 336 n.20 (noting, while upholding the agreement and trust, the trustee's power fix the contribution rate).

The Chapter invites the Court to apply the Sixth Circuit's decision in *Kopper-Glo* to this case.² However, *Kopper-Glo* is not only not binding on this Court, it also decided a different question than the one posed here. There, the trustees of the welfare trust had actually imposed a large contribution-rate increase, and "amended the plan documents to authorize themselves to unilaterally increase the pension and welfare plan contribution rates over those specified in the collective bargaining agreements." *Kopper-Glo*, 819 F.2d at 643. Furthermore, the arbitration award approved the unilateral increase imposed by the trustees. *Id.* at 644. By contrast, the contribution rate to the NEBF has not changed in decades, *see* Brief of Amicus Curiae National Electrical Benefit Fund [#31] at 4, and the arbitration award is not memorializing any increase by the trustees. Rather, it is simply confirming the same rate of contribution which existed before, and has existed since 1976. *See id.* As such, the basis for the Sixth Circuit's decision in *Kopper-Glo* (that a large, unilateral increase to the contribution rate by the trustees amounted to a trespass upon the realm of

²The Chapter also relies on *Mobile Mechanical Contractors Association v. Carlough*, 664 F.2d 481 (5th Cir. Unit B 1981). However, *Carlough* is irrelevant to this issue. It simply held unions commit an unfair labor practice under § 8(b)(4)(A) by attempting to either coerce employers into joining a collective bargaining association, or by forcing them to *act* as if they were part of such an association. *See id.* at 485–86. To the extent the Chapter argues the NEBF provisions are tantamount to being forced to join or act as if it is part of a collective bargaining association, the argument is foreclosed under *Amax Coal*, which held welfare trust trustees do not engage in collective bargaining. *Amax Coal*, 453 U.S. at 335–36.

collective bargaining) is not present here. *See id.* The parties dispute whether the NEBF trust instrument authorizes the national parent bodies of the parties here (IBEW and NECA) to raise rates unilaterally, and whether they would be able to do so effective during the term of the new CBA, or if such an increase would only take effect at the beginning of a subsequent CBA. The parties also dispute the process by which such an increase would take place. The new CBA itself specifies a rate of contribution of 3%, which is the current NEBF rate. Amicus NEBF says the one time the rate was changed in the past, the NEBF did not impose the change mid-stream on existing collective bargaining agreements, but rather encouraged NEBF participants to include the new rate upon renewal of existing agreements. *Id.* All of this is moot at this point, and the Court withholds judgment on whether such an increase would be legal or not, because to rule on it now would simply be advisory—no increase has occurred, nor do the parties allege one is imminent.

Accordingly, the Court holds as a matter of law the new CBA provisions requiring the Chapter to participate in the NEBF do not require the Chapter to submit mandatory bargaining issues to the negotiation of a representative not chosen by the Chapter, and therefore the Court AFFIRMS the arbitration award on this point. As such, the Court DENIES the Chapter's motion for summary judgment, and GRANTS the Union's cross motion, on this issue.

B. Benefit Fund Delinquency Procedures

The Chapter argues the various enforcement and penalty provisions found in the welfare trusts incorporated by reference in the new CBA constitute permissive subjects for bargaining, and therefore are unenforceable for being outside the proper scope of the arbitrator's authority.³ The

³Specifically, the Chapter challenges various provisions in the NEBF trust document, including audit costs, liquidated damages, interest, actuarial expenses and attorney's fees, and certain bond or other surety requirements. The Chapter also objects to bond and surety, and interest provisions, in the health and benefit fund. Finally, the Chapter

Union disputes this, and also argues if such provisions are merely permissive subjects, employers could render welfare trusts meaningless by simply refusing to bargain over the enforcement provisions of them.

It is well-established that contributions to health, welfare, and pension funds constitute mandatory subjects of collective bargaining. *N.L.R.B. v. Haberman Const. Co.*, 618 F.2d 288, 295 (5th Cir. 1980). The Chapter points to no authority supporting its apparently novel position that an employer can carve out the enforcement provisions of such trusts and, by characterizing them as permissive subjects, refuse to bargain or be bound on them. As such, the Court finds the enforcement provisions within the trust instruments, adopted by reference in the new CBA, and the provisions relating to the trust fund within the CBA itself, were mandatory subjects of bargaining, and therefore within the arbitrator's power. This is in accord with a recent NLRB order, which held liquidated damages and interest provisions related to welfare trust funds were a mandatory subject of bargaining. *Triple A Fire Prot., Inc.*, 357 N.L.R.B. No. 68, 2011 WL 3804022, at *6 (2011).

Furthermore, the practical effect of adopting the rule proposed by the Chapter would be to eviscerate interest arbitration clauses in many industries. Welfare trusts are specifically endorsed and authorized by Congress. *See* 29 U.S.C. § 186(c)(5); *Amax Coal*, 453 U.S. at 329. In order for them to function, they must have organic enforcement provisions, and their terms generally must be homogenous as to all participating employers. If, as the Chapter argues, it was impermissible for an arbitrator to award the full terms of a welfare trust, i.e., if the enforcement provisions are merely

objects that it would be required "to follow the rules as set forth by the Vacation Plan Trustee," which appears to encompass similar enforcement provisions to ensure the Chapter's members make timely and correct contributions to that trust as well. Pl.'s Mot. Summ. J. [#10] at 9. All of these provisions enable the trustees of the various trusts in question to enforce the contribution requirements of their respective trusts, and apply in the event employers contributions. The Chapter was bound by similar or identical terms as to all the trusts under the 2008 Agreement.

permissive subjects, then interest arbitration would cease to be a practical avenue for avoiding labor conflicts, because it would no longer be possible to meaningfully bind parties to welfare trusts via arbitration. This would be a radical and imprudent turn, because interest arbitrations have a long-recognized and important role in labor law. *See E.F. Etie*, 1 F.3d at 1471. Moreover, such a result is clearly contrary to the intent of Congress, which has both authorized use of such trusts, *see Amax Coal*, 453 U.S. at 329, and has made it a national policy to encourage the use of arbitration to peacefully resolve labor disputes, *see Republic Steel Corp. v. Maddox*, 379 U.S. 650, 652 (1965).

Finally, the cases relied on by the Chapter are not on point. First, in *N.L.R.B. v. American Compress Warehouse*, 350 F.2d 365 (5th Cir. 1965), the principal issue was whether a performance bond was a mandatory subject; the issue of enforcement provisions for welfare trusts was not before that court. *See id.* at 369–70. Nor does the holding in *American Compress* apply here by analogy. A performance bond is a “security device,” which gives security to either the employer or the union, and does not benefit the employees themselves. *See N.L.R.B. v. Davison*, 318 F.2d 550, 556 (4th Cir. 1963), *cited with approval in American Compress*, 350 F.2d at 370 n.8. Hence, it is not related to “wages, hours, and other terms of employment,” and so is merely a permissive subject. *Id.* By contrast, the enforcement provisions at issue here do not provide security to the Chapter or the Union, they ensure the welfare trusts, which are a mandatory subject of bargaining, are fully and properly funded—i.e., they provide a benefit or security to the employees, and as such are mandatory. *See id.*

Nor is *N.L.R.B. v. G&T Terminal Packaging Co.*, 246 F.3d 103 (2d Cir. 2001) relevant here. That case remanded an NLRB order applying delinquency interest rates to unpaid welfare fund payments. *See id.* at 127–28. The interest rates were found in the trust documents, but, unlike this

case, the court found the trust documents were not incorporated by reference in the relevant collective bargaining agreements. *Id.* at 128. As such, the NLRB's adoption of interest rates was only supportable under the NLRB's general remedial power, which does not extend to punitive measures. *Id.* The Second Circuit did not hold as a matter of law that the rates were punitive, rather, it remanded for the NLRB to better develop the record, in order to ensure whatever rate was ultimately applied would "bear[] a reasonable relationship to those losses directly attributable to the Company's unlawful withholding." *Id.* As such, *G&T* does not speak to the issues in this case.

C. Subcontracting Clause

Section 2.05 of the new CBA governs subcontracting. As relevant here, it states:

The subletting, assigning, or transfer by an individual Employer of any work in connection with electrical work to any person, firm or corporation not recognizing the IBEW or one of its Local Unions as the collective bargaining representative of his or her employees on any electrical work in the jurisdiction of this or any other Local Union to be performed at the side [sic] of the construction, alteration, painting or repair of a building, structure or other work, will be deemed a material breach of this Agreement.

Compl. [#1], Ex. 2 (Arbitration Award) at 30.

1. Geographic Scope

At oral argument, the Chapter raised a new argument: that the subcontracting clause was permissive, and therefore beyond the scope of the arbitrator's power, because it is extra-territorial, and would apply outside the jurisdiction of the Union. The Court advised the parties to submit letter briefs, citing their two best cases on this point. Unfortunately, neither of the cases cited by the Chapter say anything about what constitutes an extra-territorial clause, and whether such clauses are

permissive or mandatory.⁴ The Union only cited cases relating to the “cease doing business” issue discussed below, but noted the award’s “Parties Clause” explicitly limits the applicability of the award to “Employer’s job sites within the geographic jurisdiction of the Union.” Compl. [#1], Ex. 2 (Arbitration Award) at 25. It is difficult to reconcile this general limitation of the award’s geographic scope with the language in the subcontracting clause, which purports to apply to “the jurisdiction of this or any other Local Union.” *Id.* at 30. However, to the extent the subcontracting clause is therefore an “out-of-area” clause, it is a type of clause apparently well-known within the construction industry. *McKinstry Co. v. Sheet Metal Workers’ Int’l Assoc., Local Union # 16*, 859 F.2d 1382, 1389 (9th Cir. 1988). Such agreements “appear to have been common in the construction industry and contemplated by the drafters of” the NLRA. *Id.* “[G]iving extra-territorial application to the subcontracting clause, fosters the goals of the labor relations laws by promoting comity among locals in the same trade and by reducing fragmentation in construction industry collective bargaining.” *Id.* Although not binding here, the Court is persuaded by the reasoning set forth in *McKinstry* holding such provisions are permitted by the NLRA in the construction industry context. Given the transitory nature of the construction industry, and the apparent prevalence of such clauses in the industry,⁵ the Court further concludes the provision reflects a mandatory subject of bargaining, and therefore was within the scope of the arbitrator’s powers. *See Fibreboard Paper Prods. Corp.*

⁴The Chapter cites two cases purportedly on-point, but they are in fact irrelevant to this issue. The first, *Acco Construction Equipment, Inc. v. N.L.R.B.*, 511 F.2d 848 (9th Cir. 1975), decided whether the construction site exception (discussed in subpart II(C)(1), *infra*) applied to equipment dealer repairmen who happened to be on-site in order to service equipment. *Id.* at 850. The second, *Spectacor Management Group v. N.L.R.B.*, 320 F.3d 385 (3d Cir. 2003), decided whether a trade show floor constituted a construction site within the meaning of the exception. *Id.* at 388.

⁵*See Fibreboard Paper Prods. Corp. v. N.L.R.B.*, 379 U.S. 203, 212 (1964) (“[I]t is appropriate to look to industrial bargaining practices in appraising the propriety of including a particular subject within the scope of mandatory bargaining.”).

v. *N.L.R.B.*, 379 U.S. 203, 211 (1964) (holding that “contracting out” work previously done by union employees to a third party was a mandatory subject of collective bargaining).

2. “Cease Doing Business”

Section 8(e) of the NLRA forbids agreements between an employer and a labor organization by which the employer undertakes to “cease doing business with any other person.” 29 U.S.C. § 158(e). The Chapter claims the subcontracting clause of the new CBA violates § 8(e), because it “allows subcontracting only to IBEW signatory contractors.” Pl.’s Mot. Summ. J. [#10] at 11. The Chapter notes correctly the general rule that § 8(e) forbids “an agreement that bars the employer from subcontracting with any person not party to an agreement with the union even if the prohibition applies only to the subcontracting of bargaining unit work.” *Int’l Bhd. of Teamsters, Local 251*, 356 N.L.R.B. No. 135, 2011 WL 1493542 at *3 (2011). However, § 8(e) has a specific exception for the construction industry: “*Provided*, That nothing in this subsection 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.” 29 U.S.C. § 158(e). The subcontracting clause tracks this language word-for-word—assuming “side” was a typographical error (and the Chapter does not argue otherwise). Therefore, the subcontracting clause complies with § 8(e) because it falls squarely within the construction industry proviso. See *Woelke & Romero Framing, Inc. v. N.L.R.B.*, 456 U.S. 645, 660 (1982). The Court accordingly upholds the subcontracting clause, and DENIES the Chapter’s motion on this point.⁶

⁶The Union also argued the Chapter waived any right to challenge the subcontracting clause by failing to object to the arbitrator on this point, but the Court is unable to determine from the record whether this is accurate.

D. Ambiguity of the Award

Finally, the Chapter posits the award must be vacated because it is “irreconcilably ambiguous.” Pl.’s Mot. Summ. J. [#10] at 11. Specifically, the Chapter argues:

Section 4.03 [of the Award] purports to set forth the rates of wages and contributions to various trust funds on behalf of employees. . . . In that section, the Woodward Award sets forth a contribution to the health and welfare fund of \$4.65. However, Article X—Health and Welfare, specifically states that any increase above \$4.25 shall be split between an employer and the employee equally through a corresponding decrease in the wage. Because the contribution is not set, the contract is ambiguous and must be set aside.

Id. The Chapter cites no authority for its contention that a single, and relatively minor, ambiguity is grounds to set aside an entire award. Rather, the rule is that only in extraordinary circumstances will a court invalidate an entire award. *See E.F. Etie*, 1 F.3d at 1476. Otherwise, severability provisions—which this award contains—will be given effect. *Id.*; Compl. [#1], Ex. 2 (Arbitration Award) at 62. In any event, the award is not ambiguous. The relevant provision in Article X is a contingent one, and represents a compromise whereby any *future* increases in contribution rates over \$4.25 are to be born equally by employer and employee. *See* Compl. [#1], Ex. 2 (Arbitration Award) at 59. It says nothing about the *existing* rates set by other award provisions, such as the \$4.65 rate in question. There being no ambiguity, the Court rules in favor of the Union on this point as well.

E. Effective Date of the new CBA

In its own counterclaim and motion for summary judgment, the Union argues the effective date of the new CBA is June 1, 2010. In other words, the Union argues the new CBA is retroactive, and should extend back in time to take effect upon expiration of the 2008 Agreement on May 31, 2010. In response, the Chapter makes the disingenuous assertion “There is nothing in the Award that specifies the Award is retroactive to June 1, 2010” Pl.’s Resp. to Def.’s Mot. Summ. J. [#37]

at 11. This statement, read literally, is true. But it is also beside the point. The Union's counterclaim seeks to establish the effective date of the new CBA—not the effective date of the *award*. As such, the Chapter's argument is frivolous, and is perilously close to a Rule 11 violation.

There is ample indication in the award that the arbitrator intended precisely the result argued for by the Union—i.e., the arbitrator intended the new CBA be retroactive to June 1, 2010. Specifically, the first page of the new CBA, contained within the award, unambiguously states “Effective June 1, 2010.” In addition, the concluding provisions of the award specify “The [new CBA] is effective June 1, 2010.”

However, the Union's counterclaim nevertheless fails, at least in part. The evergreen clause of the 2008 Agreement provides “The existing provisions of the agreement, including this Article, shall remain in full force and effect until a conclusion is reached in the matter of the proposed changes.” Compl. [#1], Ex. 1 (2008 Agreement) at 2. A conclusion in the matter of proposed changes was not reached until March 23, 2011, when the arbitrator issued the award. As such, the terms of the 2008 Agreement remained in force until that date, and the Chapter was entitled to rely on those terms in the interregnum between expiration of the old agreement, and the date of the award. Furthermore, the 2008 Agreement limited the arbitrator's power on this point, and therefore, to the extent the award purports to make the new CBA retroactive from the date of the award, the arbitrator exceeded his power. Accordingly, the Court DENIES the Union's request to enforce the terms of the award prior to March 23, 2011.

The Union prevails, however, from that date forward. The award constituted a conclusion as to the requested changes, and thereby terminated the evergreen clause (and the 2008 Agreement generally) on March 23, 2011. Beginning on that date, the relationship between the parties was

properly governed by the new CBA established by the award. Therefore, the Court GRANTS the Union's motion for summary judgment regarding effectiveness of the award from March 23, 2011, and holds the Union, its represented employees, and the various benefit trusts, are entitled to enforce the new CBA against the Chapter and its represented contractors prospectively from March 23, 2011. This includes any shortfalls in wages, other compensation, and benefit trust contributions which have occurred since that date, as a result of the refusal of the Chapter and the employers to abide by the arbitration award. Finally, because both parties have prevailed in part, it would be improper to award attorney's fees, and the Union's request for fees and costs is DENIED.

Conclusion

For all the reasons given above, the Court concludes the award (1) sprang from an agreement to arbitrate which covered the Chapter and the Union, (2) the award drew its "essence" from that agreement, and did not exceed the scope of the issues properly presented to the arbitrator, and (3) no part of the award is repugnant to the NLRA. *See E.F. Etie*, 1 F.3d at 1475. Therefore, under Fifth Circuit precedent, the award must be upheld. *See id.* The only exception is the effective date of the new CBA, and the Court voids the award only to the extent it made the new CBA retroactive. The Court therefore DENIES the Chapter's motion for summary judgment, GRANTS the Union's motion for summary judgment in part, upholding the award generally, but DENIES the Union's motion for summary judgment as to making the award retroactive.

Accordingly,

IT IS ORDERED that Chapter's Motion for Summary Judgment [#10] is DENIED;

IT IS FURTHER ORDERED that the Union's Motion for Summary Judgment [#32] is GRANTED in part and DENIED in part, such that the March 23, 2011 arbitration award

is upheld in its entirety, save that the new collective bargaining agreement it creates is effective March 23, 2011, rather than June 1, 2010;

IT IS FINALLY ORDERED that the Union's request for attorney's fees and costs is DENIED, and that the parties are to bear their respective attorney's fees and costs.

SIGNED this the 14th day of November 2011.



SAM SPARKS
UNITED STATES DISTRICT JUDGE