

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

DATE: June 13, 2000

TO : Frederick Calatrello, Regional Director  
Region 8

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

SUBJECT: Northeast Ohio District Council  
of Carpenters (Cedar Fair, L.P.) 554-1450-0180  
Cases 8-CB-9017, 8-CE-80 554-1467-6667

This matter was resubmitted for advice to consider the Employer's assertion that the Union violated Section 8(b)(3) by insisting to impasse on those portions of a secondary, on-site construction subcontracting clause which we concluded are protected by the proviso to Section 8(e).

Briefly, in our memorandum dated April 11, 2000, we concluded that the Union violated Section 8(e) by entering into that portion of a union signatory subcontracting clause in its collective-bargaining agreement with the Employer that would have applied to off-site work which had not been performed historically on-site by the Employer's employees. Thus, at least on some building projects, the Employer amusement park operator was engaged in the construction industry; the subcontracting clause had secondary objectives in that it applied to work, even on-site, not historically performed by unit employees; but the clause did not violate Section 8(e), except to the extent indicated above, because it applied to on-site work and was protected by the construction industry proviso to Section 8(e). We also concluded that the Union violated Section 8(b)(3) by insisting to impasse and threatening to strike over the inclusion of the off-site portion of the subcontracting clause, which is unlawful under Section 8(e).

We agree with the Region that the Union did not violate Section 8(b)(3) by insisting on the inclusion of the provisions of the subcontracting clause which we have concluded are lawful under Section 8(e).

The Board's longstanding law is that a union does not violate Section 8(b)(3) by insisting to impasse or striking over the inclusion of a clause protected by the construction industry proviso to Section 8(e).<sup>1</sup> The Employer here contends that since the unit intended to be covered by the collective bargaining agreement, i.e., the Employer's repair and maintenance carpenters, do not perform the construction work covered by the subcontracting clause, then the clause is not a mandatory subject of bargaining because it does not affect unit employees' terms and conditions of employment, and insisting on the nonmandatory clause therefore violates Section 8(b)(3). However, by definition, clauses protected by the proviso to Section 8(e) are secondary in nature, and therefore do not govern unit employees' terms and conditions of employment. In holding that a union may insist to impasse on a proviso-protected clause without violating Section 8(b)(3), the Board was trying to harmonize the provisions of the Act as a whole, without regard to whether such clauses are mandatory or nonmandatory. To the extent that the Employer contends that the Union was unwilling to discuss alternatives to the lawful portion of the subcontracting clause, which would have limited, but not prohibited, the Employer from subcontracting on-site construction work to nonsignatory employers, the Union's stance appears to constitute hard bargaining, and the Employer ultimately withdrew its proposals. Accordingly, the Union here did not violate Section 8(b)(3), except as set forth in our April 11 memorandum.

B.J.K.

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<sup>1</sup> International Hod Carriers, Local 1082 (E.L. Boggs Plastering Co.), 150 NLRB 158, 165 (1964), enfd. 384 F.2d 55 (9<sup>th</sup> Cir. 1967); Southern California District Council of Hod Carriers (Gunitite Contractors), 158 NLRB 303, 305-06 (1966).