

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

# Advice Memorandum

DATE: February 9, 2004

TO : Celeste Mattina, Regional Director  
Region 2

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

SUBJECT: Manufacturers Woodworking Association  
2-CE-189  
2-CA-35702

536-2509-9300  
560-2575-6713

This case was submitted for advice on two issues: The first issue is whether a woodwork manufacturers association violated Section 8(e) when it attempted to enforce an association-Union bargaining agreement provision ("restrictive clause") that required the Union to ensure that its members, while working for non-association installer contractor-employers, installed certain woodwork products that were either manufactured by a signatory to the association contract or manufactured under union standards. We conclude that the restrictive clause does not violate Section 8(e) because it does not constitute an agreement that an association employer, or any other employer, cease doing business with any person. Rather, the clause requires that the Union engage in coercive conduct directed at other, nonsignatory employers.

The second issue is whether the Association violated 8(a)(1) when it initiated an arbitration proceeding to enforce the Restrictive Clause because under Bill Johnson's Restaurants v. NLRB,<sup>1</sup> enforcement of the clause would require the Union to induce a work stoppage in violation of Section 8(b)(4)(B). We conclude that the Association's enforcement of the clause violated Section 8(a)(1) because (1) it seeks an illegal objective, i.e., an 8(b)(4)(B) work stoppage; and (2) it restrains the Section 7 rights of employees of installer contractors because it requires the Union to force employee-members' to participate in the 8(b)(4)(B) strike, restraining or coercing employee-members' exercise of Section 7 rights.

### FACTS

The United Brotherhood of Carpenters and Joiners of

---

<sup>1</sup> 461 U.S. 731, 737 n.5 (1983).

America, the New York City District Council of Carpenters ("the Union"), represents employees who work for two separate types of employers. The Union represents employees working for woodwork manufacturers who typically are members of the Manufacturers Woodworking Association ("MWA"). The Union also represents employees working for woodwork installer contractors, who are not MWA members, but rather typically are members of contractor associations.

The MWA and the Union are parties to a collective-bargaining agreement in effect through June 30, 2007. The parties amended that contract on July 8, 2002 to include a restrictive clause, which reads in relevant part:

The Union shall not allow the installation by any of its members of any woodwork, which is identified as not being furnished and/or manufactured by a signatory to this agreement or in the alternative which is not furnished and/or manufactured by a shop that is paying equal to or better than wages and fringe benefits provided for in this agreement subject to applicable law.

Art. I, Sec. 7.

The restrictive clause does not concern the manufacture of woodwork by unit employees. Instead, the clause concerns the installation of woodwork by nonunit employees working for installer contractors. It is undisputed that, under the clause, the Union must ensure that its members who work for installer contractors only install woodwork products sanctioned by the clause, i.e., products manufactured by an MWA signatory or by a manufacturer that pays its employees at least the union standard rates. The Charging Parties are manufacturers of wood products that would not be sanctioned by the restrictive clause. They are not MWA members, and they do not compensate employees at MWA rates. This case arose when the MWA sought to enforce the restrictive clause against the Union.

On December 9, 2002, MWA notified the Union that MWA members had lost work on 21 projects "to shops outside the jurisdiction" of the Union, and reminded the Union of its contractual responsibility to monitor all work within its jurisdiction and prohibit installation of woodwork that does not meet the contract's requirements. The MWA stated that the Union would be in breach of the contract if it did not meet these obligations. On April 25, MWA filed for arbitration to compel the Union to enforce the Restrictive Clause.

ACTION

1. Section 8(e)

Under Section 8(e), Congress intended to "prohibit all contracts by which employers essentially agree not to do business or otherwise deal with companies who are not unionized or have not otherwise complied with union standards."<sup>2</sup> The provision was enacted to regulate voluntary agreements restricting employer conduct.<sup>3</sup> We conclude that the restrictive clause between the Union and the MWA does not violate Section 8(e) because the clause is not a "cease doing business" agreement.

The clause does not oblige the MWA to cease doing business or otherwise not to deal with any companies. Rather, the focus of the clause is installer contractors who employ Union members. MWA and the Union have agreed that the Union "shall not allow the installation" of certain woodwork. Thus, if an installer contractor employing employees represented by the Union attempts to use woodwork products prohibited by the clause, the clause requires the Union to cause its members to engage in a work stoppage.

We recognize that such a work stoppage would itself cause the targeted installer contractor to cease doing business. However, the targeted contractor has not "agreed" to cease doing business, but rather would be coerced by the restrictive clause's required work stoppage. Since the clause does not embody a cease doing business agreement by the MWA, or by any other employer, the clause does not violate Section 8(e).<sup>4</sup>

II. Section 8(a)(1)

We conclude that by seeking to enforce the clause, the Employer has violated Section 8(a)(1). As discussed below,

---

<sup>2</sup> NLRB v. Central Pa. Regional Council of Carpenters, 352 F.3d 831, 834 (3d Cir. 2003), enf'g Carpenters (Novinger's, Inc.), 337 NLRB 1030 (2002).

<sup>3</sup> See Dan McKinney Co., 137 NLRB 649, 654 (1962).

<sup>4</sup> Because the clause does not fall within the ambit of Section 8(e), we do not need reach the question whether MWA's steps to enforce the clause constituted an "entering into" of a per se Section 8(e) agreement within the Section 10(b) period. See generally Teamsters Local 277 (J & J Farms Creamery Co.), 335 NLRB 1031, 1031 (2001).

if the Employer were to prevail before an arbitrator and if a district court were to enforce the arbitrator's award, the Union's compliance with that award necessarily would have a tendency to restrain or coerce employee rights under Section 7. The Union would be required to compel employees to choose between participating in an unprotected Section 8(b)(4)(B) strike, or being subject to union discipline.

a. Footnote 5 of Bill Johnson's

In Bill Johnson's Restaurants,<sup>5</sup> the Court held that, generally, in order for the Board to halt the prosecution of an ongoing lawsuit, it had to find that the suit lacked a reasonable basis in fact or law and had been brought for a retaliatory motive.<sup>6</sup> The Board has extended Bill Johnson's principles to grievance prosecution.<sup>7</sup> In footnote 5 of Bill Johnson's,<sup>8</sup> the Court further held that, without regard to this two-part test, the Board may enjoin lawsuits, or arbitrations, filed with an objective illegal under the Act.

In footnote 5, the Bill Johnson's Court explained that the Board is empowered to enjoin a lawsuit that has "an objective that is illegal under federal law."<sup>9</sup> If a party files for an arbitration that seeks an illegal object, i.e., that the outcome of the suit sought by the plaintiff would itself violate the Act, then such a grievance/arbitration may be enjoined as an unfair labor practice. The Board thus has enjoined union attempts to restrict employees' exercise of statutory rights,<sup>10</sup> or

---

<sup>5</sup> 461 U.S. 731 (1983).

<sup>6</sup> Id. at 731, 742-743.

<sup>7</sup> See Longshoremen ILWU Local 7 (Georgia-Pacific), 291 NLRB 89 (1988), enf'd, 892 F.2d 130 (D.C. Cir. 1989) (Bill Johnson's analysis appropriate where access to grievance-arbitration procedure is key to access to courts in Section 301 actions, and federal policy favors private resolution of labor disputes); Long Elevator 289 NLRB 1095 (1988), enf'd, 902 F.2d 1297 (8th Cir. 1990).

<sup>8</sup> Bill Johnson's, 461 U.S. at 737 n.5.

<sup>9</sup> 461 U.S. at 737 n.5.

<sup>10</sup> See, for example, Laundry Workers Local 3 (Virginia Cleaners), 275 NLRB 697 (1985) (suit to collect fines imposed on former members for post resignation conduct). In footnote 5 of Bill Johnson's, the Court's examples of lawsuits filed with an unlawful objective involved unions

efforts that have an objective that is contrary to established precedent.<sup>11</sup>

In Long Elevator,<sup>12</sup> the Board applied a footnote 5 analysis and found a Section 8(b)(4)(A) violation. It explained that where a union's grievance sought a construction of the contract that would violate Section 8(e), it had an illegal objective. In that case, the union filed a grievance on behalf of an employee disciplined by the employer for refusing to work behind a lawfully erected reserve gate.<sup>13</sup> That grievance, if the union had been successful, would have converted the lawful clause into a de facto "hot cargo" clause in violation of Section 8(e). Given that unlawful objective, the Board held it "may properly find the pursuit of the grievance coercive" notwithstanding Bill Johnson's.<sup>14</sup> Since the coercive grievance sought an 8(e) interpretation of the clause, the grievance violated 8(b)(4)(ii)(A).<sup>15</sup>

---

that sought judicial enforcement of fines against nonmembers. Booster Lodge No. 405, IAM (The Boeing Co.), 185 NLRB 380 (1970), enf'd in relevant part, 459 F.2d 1143 (D.C. Cir. 1972), aff'd, 412 U.S. 84 (1973); Granite State Joint Board (International Paper Box Machine Co.), 187 NLRB 636 (1970), enf. den. 446 F.2d 369 (1st Cir. 1971), rev'd, 409 U.S. 213 (1972).

<sup>11</sup> See Chicago Truck Drivers Union (Signal Delivery Service), 279 NLRB 904 (1986) (union unlawfully sought judicial enforcement of an arbitral award that would have merged historically separate bargaining units); Teamsters Local 705 (Emery Air Freight), 278 NLRB 1303 (1986), remanded in rel. part 820 F.2d 448 (D.C. Cir. 1987) (union's grievance claimed a violation of a subcontracting clause where work was not fairly claimable as unit work). See also Local 32B-32J, Service Employees (Nevins Realty Corp.), 313 NLRB 392, 392 (1993) (union's resort to arbitration over subcontracting to new company that did not hire employees or maintain wages of predecessor violated Section 8(b)(4)).

<sup>12</sup> 289 NLRB 1095 (1988), enf'd, 902 F.2d 1297 (8th Cir. 1990).

<sup>13</sup> Id. at 1097.

<sup>14</sup> Id. at 1095.

<sup>15</sup> Id. at 1095 n.2.

We first conclude that, by seeking to enforce the restrictive clause, the MWA arbitration has an illegal objective, i.e., a violation of Section 8(b)(4)(B).<sup>16</sup> The clause requires the Union to take all steps necessary to prevent its members, who are employees of installer contractors, from installing any unsanctioned manufactured woodwork. Such a work stoppage would not arise from any primary dispute between the Union and the installer contractor. The Union has no dispute with the installer contractor except to the extent that the contractor handles unsanctioned woodwork products. Rather the work stoppage would arise only, if the MWA succeeds in its arbitration, because of the Union's dispute with the unsanctioned woodwork manufacturer and the Union's decision not to handle that manufacturer's products. The installer contractor remains a neutral or secondary to the primary dispute, and any pressure on that contractor would be secondary.<sup>17</sup> We agree with the Region that the Union's refusal to handle materials manufactured by any unsanctioned woodwork manufacturer would be secondary and unlawful under Section 8(b)(4)(B).<sup>18</sup>

---

<sup>16</sup> See NLRB v. Denver Bldg. & Const. Trades Council, 341 U.S. 675, 692 (1951) (Section 8(b)(4)(B) implements the "dual Congressional objectives of preserving the right of labor organizations to bring pressure to bear on offending employers in primary disputes and of shielding unoffending employers and others from pressures in controversies not their own").

<sup>17</sup> See Longshoremen ILWU Local 13 (Egg City), 295 NLRB 704, 705 (1989) (finding that parties did not enter into an unlawful Section 8(e) agreement, but also finding Section 8(b)(4)(B) violation in unions' efforts to require employers to refuse to handle certain products); Sheet Metal Workers Local 223, 196 NLRB 55, 56 (1972) (finding that union imposition of monetary penalties on employers for using nonunion label products had secondary boycott object and violated Section 8(b)(4)(B)).

<sup>18</sup> The MWA argues that its arbitration demand is primary and lawful because it seeks to enforce an MWA/Union agreement with a work preservation object, i.e., it seeks to preserve the unit manufacturing work of MWA unit employees. However, any Union work stoppage resulting from MWA's arbitration demand would be a secondary "hot cargo" strike directed at neutral installer contractors, in violation of 8(b)(4)(B). See, e.g., Sheet Metal Workers Local 223, 196 NLRB at 56 (Board found union violated Section 8(b)(4)(B) and found no primary work preservation object in union fines imposed to cause product boycott).

The MWA arbitration here requires the Union to cause an unlawful secondary strike. Therefore, that arbitration seeks an unlawful objective, the 8(b)(4)(B) work stoppage. Accordingly, if the MWA arbitration causes the Union to interfere with employee Section 7 rights, it is actionable under Section 8(a)(1).

b. Interference with Employee Section 7 rights

We conclude that the arbitration interferes with the Section 7 rights of the employees of the installer contractors. MWA's enforcement of the clause through arbitration necessarily causes Union interference with employee Section 7 rights. The work stoppage envisioned by the Employer's enforcement action would, as discussed above, violate Section 8(b)(4)(B), and the Union would violate Section 8(b)(1)(A) by requiring member employees to engage in a Section 8(b)(4)(B) strike. Hence, MWA's pursuit of arbitration results in an unlawful interference with employee Section 7 rights and violates Section 8(a)(1).

Any union discipline imposed on members is subject to the proviso to Section 8(b)(1)(A). Under that proviso, a union may regulate its internal affairs by enforcing properly adopted rules which reflect legitimate union interests, so long as those rules impair no policy which Congress has imbedded in the labor laws, and are reasonably enforced against members who are free to leave the union and escape the rule.<sup>19</sup> The proviso does not protect union fines, or threats of fines, for refusing to engage in unprotected picketing. Such discipline would violate 8(b)(1)(A) as contrary to the policy against applying secondary pressure on neutral employers under Section 8(b)(4).<sup>20</sup> Thus, a union that imposes discipline on member

---

<sup>19</sup> Scotfield v. NLRB, 394 U.S. 423, 430 (1969); NLRB v. Allis Chalmers Mfg. Co., 388 U.S. 175, 193-195 (1967).

<sup>20</sup> See, for example, Operating Engineers Local 150 (Harsco Corp.), 313 NLRB 659, 659 n.2 (1994) (union violated Section 8(b)(1)(A) when it issued threats to fine member employees of neutral employee for crossing primary picket line established by union; fines contravened the policy forbidding enmeshing neutral employees in primary disputes); Operating Engineers Local 101 (St. Louis Bridge), 297 NLRB 485 (1989) (union violated 8(b)(1)(A) when it fined employees for failing to observe a picket line in an unprotected strike; discipline would impair labor law policy).

employees to compel compliance with an unprotected strike violates the Act.

Under the above principles, MWA's success in arbitration would cause the Union to impose discipline to coerce employee compliance with an unprotected Section 8(b)(4)(B) strike against installer contractor employers; the Union would thereby restrain or interfere with the installer contractor employees' exercise of Section 7 rights. Because that interference with Section 7 rights would be a result of MWA's enforcement of the restrictive clause, MWA's action clearly has a tendency to interfere with the installer contractor employees' Section 7 rights.<sup>21</sup> Therefore, the MWA pursuit of arbitration violates Section 8(a)(1). Accordingly, the Board may enjoin the MWA arbitration by issuing a Section 8(a)(1) complaint against the Employer.

In sum, the Region should issue a Section 8(a)(1) complaint, absent settlement, and dismiss, absent withdrawal, that part of the charge alleging an 8(e) violation.

B.J.K.

---

<sup>21</sup> See, e.g., Dews Construction, 231 NLRB 182 (1977) (employer violated Section 8(a)(3) and was jointly and severally liable for backpay when it caused second employer to unlawfully discharge its employee), enf'd mem. 578 F.2d 1374 (3d Cir. 1977); Tracer Protective Services, 328 NLRB 734 (1999) (same).