

MMS for yard-to-yard delivery services. The Union claims that prior to May 2008, the yard-to-yard delivery work was exclusively performed by Rieth-Riley bargaining unit employees unless there were no such employees available. In May 2008, the Employer began to utilize MMS to perform the yard-to-yard delivery work even when other bargaining unit employees were available. The Union filed a grievance, which still remains active, contesting this utilization of MMS to provide yard-to-yard delivery services.

In response to two more recent instances where the Employer utilized MMS for yard-to-yard delivery services, on October 21, 2010, and December 2, 2010,¹ the Union filed the grievances that are the subject of the instant charges. Through the October grievance, the Union requested that "[m]ember(s) on the Local 142 Out of Work List . . . be made whole in every way for wages and benefits for all lost hours." The December grievance requested that "[m]ember(s) of Local 142 laid off from Rieth-Riley to be made whole in every way for wages and benefits for all hours MMS worked." Irrespective of the language in its grievances, the Union asserts the only remedy it is seeking is compensation from the Employer for Rieth-Riley bargaining unit employees who lost work as a result of MMS employees performing the yard-to-yard delivery work.

In support of its October grievance, the Union alleged violation of Article 4 and "any other relevant Article and/or Sections" of the labor agreement. In its December grievance, the Union alleged the Employer violated Articles 1, 2, 4 and "any other relevant Article and/or Sections" of the contract. Those articles provide, in relevant part:

Article 1, Recognition and Scope of Agreement

Section 4. Work Covered: Jurisdiction

All work covered by the terms of this Agreement shall be performed exclusively by those classifications of employees specified in the Agreement. This Agreement shall apply to employees in the classifications herein set forth in the performance of work involved in the following operations, but not limited to:

- (a) Highway Construction shall include trucking, towing, pulling, and hauling for construction, modifications, demolition, additions or repairs of roads and streets and construction thereto . . .

¹ All dates are in 2010 unless otherwise noted.

(b) Heavy construction shall include trucking, towing, pulling, and hauling for construction, or modification, demolition, or addition, or repair of railroad construction projects . . .

Section 5.

All work covered by this Agreement is specifically the operation of vehicles, group positions and equipment listed in Article 11 of this Agreement and shall be performed exclusively by those classifications of employees specified in Article 11.²

Article 2, Work Coverage

. . . All work covered by the terms of this Agreement shall be performed exclusively by those classifications of employees specified in the Agreement. The Employer further agrees that no Trucks or other equipment specified in the Agreement shall be used or operated unless a Driver or Operator covered by the terms of this Agreement is [sic] driving same, except for Pickup Trucks used by Foremen or other Supervisory Personnel for transportation purposes only. This shall be strictly enforced by the Company and the Union. No one shall haul material except employees covered by this Agreement. . . .

Article 4, Subcontracting

Section 1.

The Employer agrees that neither it nor any of its subcontractors will subcontract any work covered by this Agreement to be done at the site of construction, alteration, or repair of a building, structure, road or other work, except to a person, firm or corporation, signatory to this Agreement.

² Article 11 includes a list of equipment including "dumps."

Section 2.

Any Employer who sublets to or who hires any other Employer to perform any work or services including the spreading on the construction site or the road bed of any stabilized base material to be used for subsurface which shall include but not [be] limited to fill, Poz-O-Pac, aggregate materials, bituminous aggregate materials, cement aggregate materials, or any other trade name of base or paving materials shall neither sublet nor hire any such Employers unless the employees of such Employers are paid an amount equal to the wages and fringe benefits being paid to employees working under this Contract. . . .

After receiving the Union's October grievance, the Employer's [REDACTED] initiated a discussion with the Union [REDACTED] about the dispute. During the course of that conversation, the Union [REDACTED] referred to MMS as "rats" and stated that the Employer "had to use signatory trucks." Thereafter, the Employer denied the Union's October and December grievances on the ground that the yard-to-yard delivery work was not bargaining unit work under the contract. The Union's grievances remain active and are still pending consideration by an arbitrator.

The Union has offered to provide testimony from a steward and several Rieth-Riley employees affirming that they regularly performed yard-to-yard delivery work prior to 2008.³ The evidence supplied by the Employer is not contrary to the Union's assertion that the bargaining unit employees have historically performed the yard-to-yard delivery services. Thus, the Employer provided data showing that non-union companies delivered approximately 80 - 90% of the total construction materials delivered to its plants in 2006 - 2008. However, the Employer has not provided the Region with information as to what percentage of the yard-to-yard delivery work claimed by the unit employees was subcontracted out prior to 2008.

ACTION

We conclude that there is no merit to the Charging Party's Section 8(b)(4)(ii)(A) and (B) allegations because the bargaining unit employees have a colorable claim to perform the yard-to-yard delivery work in dispute, and the

³ FOIA Exemption 5 [REDACTED]

Union's grievances therefore have a primary work preservation objective. We also conclude that a Section 8(e) complaint is unwarranted because no arbitral award has issued that would constitute an unlawful bilateral "agreement" modifying the otherwise facially lawful union-signatory subcontracting provision.

Section 8(b)(4)(ii)(A) and (B) Allegations

Section 8(b)(4)(ii)(A) prohibits a union from threatening, restraining, or coercing an employer with an object of forcing or requiring it to enter into an agreement prohibited by Section 8(e), where the employer agrees to cease doing business with any other person. Similarly, Section 8(b)(4)(ii)(B) prohibits such conduct to force or require any person to cease doing business with any other person.

The Board has long held that a union's prosecution of a reasonably-based contract claim, by itself, is not coercion within the meaning of Section 8(b)(4)(ii).⁴ The lawfulness of a grievance prosecution is generally determined under the principles of the Supreme Court's decisions in Bill Johnson's Restaurant v. NLRB⁵ and BE & K Construction Co. v. NLRB.⁶ That is, a grievance is unlawfully coercive only if it is both objectively baseless and filed with a retaliatory

⁴ Teamsters Local 483 (Ida Cal Freight Lines, Inc.), 289 NLRB 924, 925 (1988) (no 8(b)(4)(ii)(A) violation where union grieved and sought to compel arbitration over whether owner-operators were "employees" covered by labor agreement, because union's contentions were reasonable, the union did not strike or picket, and there had been no prior adjudication of the owner-operators' status); Teamsters Local 83 (Cahill Trucking), 277 NLRB 1286, 1290 (1985) (grievance to enforce a colorable contract claim is not coercion within meaning of Section 8(b)(4)(ii)(A) or (B)); Heavy, Highway, Building and Construction Teamsters, et al., 227 NLRB 269, 274 (1976) (same).

⁵ 461 U.S. 731, 743-45 (1983).

⁶ 536 U.S. 516, 531-32 (2002). See Longshoremens ILWU Local 7 (Georgia-Pacific Corp.), 291 NLRB 89, 93 (1988) (applying Bill Johnson's to determine that the filing of an arguably meritorious grievance is not 8(b)(4)(ii) coercion), review denied 892 F.2d 130 (D.C. Cir. 1989); Manufacturers Woodworking Assn. of Greater New York, Inc., 345 NLRB 538, 540 (2005) (applying Bill Johnson's to an employer's demand for arbitration under a contractual grievance/arbitration provision).

motive, or if it has an unlawful objective.⁷ Thus, the Board has found that a Union violates Section 8(b)(4)(ii)(A) and (B) if it files a grievance based on a contractual interpretation that would convert a facially lawful clause into an unlawful Section 8(e) agreement.⁸

The principal characteristic distinguishing whether a union's efforts are lawful primary or unlawful secondary activity is whether that activity "is addressed to the labor relations of the contracting employer vis-à-vis his own employees" or instead is "calculated to satisfy union objectives elsewhere."⁹ Accordingly, Section 8(b)(4)(ii)(A) and (B) does not prohibit conduct seeking to preserve or reacquire traditional bargaining unit work for bargaining unit employees - "fairly claimable" work - so long as the contracting employer has the power to assign the disputed work to the unit employees.¹⁰

Fairly claimable work has been described by the Board as work that is "identical or very similar to that already

⁷ Bill Johnson's Restaurant v. NLRB, 461 NLRB at 737 n.5; BE & K Construction Company, 351 NLRB 451, 458 (2007).

⁸ Elevator Constructors (Long Elevator), 289 NLRB 1095, 1095 (1988) (union violated Section 8(b)(4)(ii)(A) by filing grievance over suspension of employee who refused to pass through a neutral reserved gate because the Board concluded the union's interpretation would require primary employer acquiescence in any work stoppage by its employees in support of the union's dispute with a neutral employer), enfd. 902 F.2d 1297 (8th Cir. 1990); Service Employees Local 32B-32J (Nevins Realty), 313 NLRB 392, 392 (1993) (union's arbitration claim over employer's selection of cleaning subcontractor violated 8(b)(4)(ii)(B) because Board found unlawful work acquisition objective where cleaning work had always been contracted out and union had never represented cleaning employees), enfd. in pertinent part 68 F.3d 490 (D.C. Cir. 1995); Sheet Metal Workers Local 27, 321 NLRB 540, 540 (1996) (union violated Section 8(b)(4)(ii)(B) because its grievance sought to have employer cease doing business with another employer); Newspaper and Mail Deliverers (New York Post), 337 NLRB 608, 608-09 (2002) (finding union's attempted enforcement of union signatory subcontracting clause violative of Section 8(b)(4)(ii)(A) and (B) because union sought to prevent subcontracting to nonunion company).

⁹ National Woodwork Mfrs. Assn. v. NLRB, 386 U.S. 612, 645 (1967).

¹⁰ NLRB v. Longshoremens ILA, 447 U.S. 490, 504 (1980).

performed by the bargaining unit and that bargaining unit members have the necessary skill and are otherwise able to perform."¹¹ The Board has found work fairly claimable when traditionally performed for the employer by bargaining unit employees.¹² In contrast, the Board has found work not fairly claimable where it has not historically been performed by unit employees.¹³

Here, the Union has at least a colorable claim to the yard-to-yard delivery work at issue based on its undisputed assertion that this work was regularly performed by Rieth-Riley bargaining unit employees prior to May 2008. Moreover, the Union is not seeking to apply the union-signatory subcontracting clause to offsite delivery work. Instead, through its grievances the Union is only seeking compensation for bargaining unit employees adversely affected by MMS performing the yard-to-yard delivery work.¹⁴ Thus, the Union's grievance has a lawful work preservation and/or reacquisition object and does not violate Section 8(b)(4)(ii)(A) or (B).

Section 8(e) Allegation

We also conclude that the charge alleging that the Union violated Section 8(e) lacks merit. First, there is no contention that the contract is unlawful on its face;

¹¹ Newspaper and Mail Deliverers' Union (Hudson County News Co.), 298 NLRB 564, 566 (1990).

¹² Retail Store Employees, Local 876, 174 NLRB 424, 425 (1969) (finding the in-store shelving and servicing work for certain brand-name items fairly claimable for bargaining unit of employees who historically handled the bulk of the in-store shelving and servicing tasks for the employer); Hudson County News, 298 NLRB at 568 (distribution of newly added publications within specific geographic area was fairly claimable when bargaining unit's traditional work jurisdiction encompassed all employer-distributed publications).

¹³ Nevins Realty, 313 NLRB at 392 (cleaning work historically performed by outside contractors); Sheet Metal Workers Local 27, 321 NLRB 540, 540 (1996) (unit employees had never fabricated the kitchen equipment at issue); Teamsters Local 705 (Emery Air Freight), 278 NLRB 1303, 1304 (drayage work always performed by others and was never covered by union contract).

¹⁴ There is no contention that the Employer does not have the power to assign the yard-to-yard delivery work to the unit employees.

indeed, it contains only a job-site union-signatory subcontracting clause, protected under the 8(e) construction industry proviso, and a lawful work preservation requirement that subcontractors performing non-jobsite work pay comparable wages and benefits.¹⁵ Additionally, as discussed above, the Union is not seeking an unlawful application of either of the facially valid clauses.¹⁶ Furthermore, even assuming arguendo the Union was pursuing an unlawful interpretation of a facially valid contractual clause through its grievances, there has not been an arbitral award that would constitute "entering into" a bilateral "agreement" violative of Section 8(e).¹⁷

Accordingly, the Region should dismiss these charges, absent withdrawal.

B.J.K.

¹⁵ See, e.g., Teamsters Local 386 (Construction Materials Trucking, Inc.), 198 NLRB 1038, 1038-39 (1972) (specifically recognizing the lawfulness of a "union standards" subcontracting clause, which required subcontractors to comply with the economic provisions of the union contract, because of the primary purpose of removing the economic incentive to subcontract unit work).

¹⁶ See, e.g., Hudson County News, 298 NLRB at 566 (no 8(e) violation when union enforced no-subcontracting provision to prevent subcontracting of work which Board found was within unit employees' traditional work jurisdiction). Compare Sheet Metal Workers Local 27, 321 NLRB at 540 (union violated Section 8(e) by filing a grievance and obtaining an award based on its unlawful interpretation of a facially valid union signatory subcontracting clause where the work in dispute was not previously performed by unit employees).

¹⁷ See Sheet Metal Workers Local 27, 321 NLRB at 540 n.3 (1996) (stating that a solely unilateral action by a union to enforce an unlawful interpretation of a facially lawful clause does not violate Section 8(e) because such conduct does not constitute an "agreement"). Compare New York Post, 337 NLRB at 609 (2002) (where a facially valid contract provision is construed by an arbitrator as having a meaning inconsistent with Section 8(e), "[s]uch a construction will provide the necessary 'agreement' for an 8(e) violation.").