

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

DATE: August 31, 2012

TO: Wayne R. Gold, Regional Director
Region 5

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

542-3333-9200

SUBJECT: Marine Engineers Beneficial Association
(Liberty Maritime)
Case 05-CB-077851

This case was submitted for advice as to whether the Union, which represents Section 2(11) licensed deck and engineering supervisors, violated Section 8(b)(1)(B) of the Act by filing a lawsuit against the Employer for the purpose of asserting its alleged contractual right to require the Employer to replace its current supervisory personnel with the Union's members.

We conclude that the charge should be dismissed, absent withdrawal. The Union and the Employer had a collective-bargaining agreement covering the Union's members, who were previously employed by the Employer, and the lawsuit, which alleges that the Employer had breached its contractual obligations by entering into a contract with another union to represent those employees, has a reasonable basis. Further, while the result of the lawsuit may be the substitution of one group of Section 2(11) representatives with another, such a result does not constitute an "unlawful object" under *Bill Johnson's Restaurants*¹ because a successful lawsuit would simply hold the Employer accountable to its contractual obligations.

FACTS

Liberty Maritime Corporation, which operates bulk carrier vessels, and District 1, Pacific Coast District, Marine Engineers' Beneficial Association, AFL-CIO (MEBA) had a series of collective-bargaining agreements beginning in 1986. MEBA represented the licensed deck and engineering officers on cargo vessels operated by Liberty. The parties' most recent agreement stipulated that the officers were

¹ *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731, 737 note 5 (1983).

supervisors under Section 2(11) of the Act. That contract expired in 2010, and was extended to September 30, 2011² by a Memorandum of Understanding (MOU). The MOU states the following:

In the event either the Company or the Union serves notice to amend the Agreement, the terms of the Agreement in effect at that time of the notice to amend shall continue in effect until mutual agreement on the proposed amendments or an impasse has been reached.

The parties met three times to negotiate a new contract between July and September 2011. Liberty insisted on approximately 20 operational changes that it stated were necessary in order to cut costs. The most important issue concerned the Company's insistence that the defined benefit pension plan be converted to a defined contribution pension plan.

There was no agreement or movement on any of the Company's proposed changes. On September 27, the Union again rejected the Company's pension proposal. However, on September 28, the Union's president called the Company's president, and told him that the Union was reversing itself, and that it would now accept the defined contribution plan. The Company asked the Union to put it in writing and repeated its request in an email to the Union after their phone call. After those communications, top Company officials met and decided that they were not going to sign a successor agreement with the Union. Rather, it would sign an agreement with the American Maritime Officers Union (AMO), a rival union. Pursuant to the Company's request, the Union sent an email confirming that it was accepting the Company's proposal to convert the defined benefit pension plan to a defined contribution pension plan. The Union also requested more bargaining on the other issues.

The next day, the Company emailed the Union, stating that it was too late; that the Company did not believe that the Union was really changing its mind; and that the contract would expire on September 30. On October 1, the Company entered into a collective-bargaining agreement with AMO, which now represents the licensed officers on the ship. The effect of the Company's decision to recognize a different union is that the previous Meba-represented officers are no longer employed by the Company.

On September 30, the Union filed a grievance alleging that the Company had breached the parties' contract by failing to recognize MEBA as the officers' collective-

² All dates hereinafter are in 2011.

bargaining representative, failing to allow MEBA representatives access to the vessels, and failing to assign unit work to unit personnel. The Union amended this grievance on October 7 to claim that the Company had breached the duration clause, locked out the MEBA officers, and breached the good faith and fair dealing provision of the contract. The Company denied the grievance, contending that the contract had expired according to its terms, that the parties reached impasse on September 27, and that the Union never agreed to all the Company's terms. On October 11, the Union filed a lawsuit in United States District Court for the District of Columbia requesting a declaration that the collective-bargaining agreement is in effect according to its own terms as outlined above, and that the Company be compelled to arbitrate this dispute pursuant to the collective-bargaining agreement.

ACTION

We conclude that the lawsuit alleging that the Employer had breached its contractual obligations by entering in a contract with another union to represent those Section 2(11) employees has a reasonable basis. Further, a judgment substituting one group of Section 2(11) representatives with another would not constitute an "unlawful object" under *Bill Johnson's Restaurants*³ because it would simply hold the Employer accountable to its lawful contractual obligations. Accordingly, the charge should be dismissed, absent withdrawal.

A union violates Section 8(b)(1)(B) if its conduct restrains or coerces an employer in selecting its representatives for collective bargaining or grievance adjusting.⁴ The concern of Congress, in enacting this provision, was that one party to the bargaining process should not be coerced in its selection of those who will carry out its function in the bargaining and grievance-handling process.⁵ However, there is no statutory prohibition against an employer voluntarily agreeing to limit or circumscribe either the selection of representatives or the manner of the exercise of a representative's functions.⁶ Thus, there is nothing that prohibits an employer and a labor

³ *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731, 737 note 5.

⁴ See generally *NLRB v. Electrical Workers (IBEW) Local 340 (Royal Electric)*, 481 U.S. 573, 580 (1987); *Teamsters Local 507 (Klein News Co.)*, 306 NLRB 118, 120 (1992).

⁵ *Houston Mailers Union No. 36*, 199 NLRB 804, 804 (1972).

⁶ *Ibid.*

organization from voluntarily resolving, in their collective-bargaining agreement, how this legislative policy should function in their particular circumstances.⁷

The Board has applied Section 8(b)(1)(B) to hold that where the parties' collective-bargaining agreement at least arguably bound the employer to an arbitration provision -- and despite the fact that the employer had timely withdrawn from the multi-employer association -- a union could lawfully seek enforcement of its contractual rights by submitting the unresolved bargaining issues to interest arbitration and by pursuing a Section 301 suit in court.⁸ The Board explained that even though interest arbitration is a nonmandatory subject of bargaining that can be repudiated by either party, "collective bargaining should be fostered and that when parties have bargained for and reached an agreement, fairness requires that they be allowed to enforce it."⁹ In construing Section 8(b)(1)(B), the Board has also held that where parties' 8(f) contract is arguably still binding on the employer because the interest arbitration clause contemplates renewal of the contract, a union could lawfully seek to enforce the contractual interest arbitration clause through arbitration or court enforcement.¹⁰ Similarly, where no contractual bargaining obligation exists, a union violates Section 8(b)(1)(B) by filing a lawsuit to compel an employer to hire one group of Section 2(11) representatives over another.¹¹

⁷ *Ibid.*

⁸ *Electrical Workers IBEW Local 113 (Collier Electric)*, 296 NLRB 1095, 1098 (1989).

⁹ *Ibid.*

¹⁰ *Sheet Metal Workers Local 20 (Baylor Heating)*, 301 NLRB 258, 260-261 (1991) (employer's right to repudiate Section 8(f) at its expiration did not prevent parties from voluntarily incorporating interest arbitration clause or preclude automatic renewal of 8(f) agreement pursuant to such a clause). Compare *District Council of Plasterers and Cement Masons Local 337*, 312 NLRB 1103 (1993) (union violated 8(b)(1)(B) by seeking court enforcement of award that would have forced the employer into a bargaining relationship that it had lawfully abandoned, where there was no reasonable basis for the claim that employer was bound by multi-employer agreement).

¹¹ See *IOMMP (Cove Tankers)*, 224 NLRB 1626, fn. 2, 1633-1634 (1976) (union violated 8(b)(1)(B) by filing a lawsuit to compel purchasers of vessel to impose its own contract on purchasers and replace their 2(11) employees with those supplied by the union); *IOMP (Westchester Marine Shipping Co.)*, 219 NLRB 26, 27 (1975) (union's picketing to force the employers to replace their licensed deck officers with officers from the union and to force the employers to sign a contract with the union

In determining whether a union violates Section 8(b)(1)(B) when it attempts, through an arbitration award or lawsuit, to bind an employer to a collective-bargaining agreement, the Board applies the Supreme Court's standard in *Bill Johnson's Restaurants*.¹² Thus, a lawsuit that is reasonably based in fact or law may not be enjoined by the Board, but must be allowed to proceed in court unless it has an "objective that is illegal under federal law."¹³ A lawsuit has an unlawful object if it seeks a result incompatible with Board law.¹⁴ The Board has held that such a lawsuit does not have an unlawful object under *Bill Johnson's*, and thus does not violate Section 8(b)(1)(B), where it seeks to resolve a bona fide contractual issue.¹⁵

In the instant matter, the bargaining unit is composed of Section 2(11) supervisors, and thus the contract is enforceable only by a lawsuit. Although such a lawsuit would violate Section 8(b)(1)(B) in the absence of a continuing bargaining

"interfered with the [e]mployers' freedom to select and control their 8(b)(1)(B) representatives.")

¹² *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731.

¹³ 461. U.S. at 737 n. 5. See also *Collier Electric*, above, 296 NLRB at 1100 (applying *Bill Johnson's*, inasmuch as union had an arguably meritorious claim in both fact and law that the employer is bound to the interest arbitration provision, we will not interfere with the employer's right to pursue its claim). Cf. *Sheet Metal Workers Local 9 (Concord Metal)*, 301 NLRB 140, 144 (1991) (8(f) union violated Section 8(b)(1)(B) by seeking court enforcement of interest arbitration award where there was no reasonable basis for the claim that the parties were bound to an interest arbitration clause).

¹⁴ *Bill Johnson's Restaurants v. NLRB*, 461 U.S. at 737 fn. 5.

¹⁵ See *Brink Construction Co.*, 291 NLRB 437, 438-439 (1988) (union did not violate Section 8(b)(1)(B) when it filed lawsuit under Section 301 to resolve a bona fide dispute as to whether a contract continued to exist between the union and the employer, compelling the employer to abide by its provisions: the union's actions were consistent with the goal of obtaining an adjudication through arbitration or court action of the status of the owner-operators), citing *Teamsters Local 483 (Ida Cal Freight)*, 289 NLRB 924 (1988). Compare *Elevator Constructors (Long Elevator)*, 289 NLRB 1095 (1988), (interpreting *Bill Johnson's* footnote 5 to find an unlawful object where union's construction of the parties' contract in arbitration would necessarily result in a Section 8(e) violation); *Elevator Constructors (Long Elevator)*, 289 NLRB at 1095; *Teamsters Local 705 (Emery Air Freight)*, 278 NLRB 1301, 1304 (1986), enf. denied and remanded in part, 820 F.2d 448 (D.C. Cir. 1987) (grievance filed for unlawful secondary objective absent any evidence primary employer had right to control separate entity).

obligation,¹⁶ the Union's lawsuit asserts that such a continuing bargaining obligation exists and the evidence demonstrates that the lawsuit has a reasonable basis. Thus, the parties in their Memorandum of Understanding agreed to extend their agreement until they reached a new agreement or until "an impasse was reached." Much as in *Baylor Heating, above*, the parties here contemplated renewal of the contract (and thereby the continued employment of the Union's members). Further, the fact that the Union accepted the Company's pension plan proposal prior to the Company's declaration of impasse provides strong support for the Union's legal claim that no impasse existed and consequently that the contract remained in effect. Moreover, even assuming an impasse existed on September 27 when the Union last rejected the Company's pension proposal, the evidence demonstrates that it was broken the next day when the Union reversed itself and accepted the pension proposal before the Company declared impasse.¹⁷

Further, the Union's demand for arbitration and the filing of a federal lawsuit does not have an unlawful object because it does not seek a result incompatible with Board law. Rather, it seeks to resolve a bona fide contractual issue by simply holding the Company accountable to its contractual obligations. Accordingly, we conclude that the Union's otherwise reasonable lawsuit for the purpose of holding the Company to its bargain does not seek an unlawful object, and the charge should be dismissed, absent withdrawal.

/s/
B.J.K.

¹⁶ See *IOMP (Westchester Marine Shipping Co.)*, 219 NLRB at 27; *IOMP (Cove Tankers)*, 224 NLRB at 1626 fn. 2.

¹⁷ See, *Circuit-Wise, Inc.*, 309 NLRB 906, 921 (1992), and the cases cited therein ("Anything that creates a new possibility of fruitful discussions (even if it does not create a likelihood of agreement) breaks an impasse." (citations omitted)).