

National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

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Sheet Metal Workers International, Association, Local 162 (Madison Industries, Inc. of Arizona), Case 21-CC-3139

560-2575-6713, 560-2575-6721, 560-2575-6767-7500, 560-7540-8001-1750, 560-7540-8001-6700, 560-7580-0150, 560-7540-4020-2500, 560-7540-4020-7500, 584-5014, 584-5042, 584-5056

This case involving Employers engaged in the construction industry was submitted for advice as to whether the Union violated Section 8(b)(4)(ii)(B) by filing and maintaining a grievance and a lawsuit against the signatory Employer alleging that the disputed assignment of work by an affiliated Employer constituted a breach of the signatory Employer's subcontracting clause and seeking substantial damages, as well as attorney fees and costs, where the Board has issued a Section 10(k) decision finding that the signatory Employer was separate from the Employer that controlled disputed work.

FACTS

Madison Industries, Inc. of Arizona (Madison of Arizona) and Madison Industries, Inc. of California (Madison of California) are both wholly-owned subsidiaries of John S. Frey Enterprises, Inc. (Frey Enterprises). John S. Frey, Sr. is president and CEO of Frey Enterprises. Frey, Sr., is president and Robert Hansen is vice-president of both Madison of California and Arizona. John S. Frey, Jr. is general manager of Madison of California. John Sentell is general manager of Madison of Arizona. Frey Enterprises shares offices with Madison of California, but has its own, separate office staff and accounts. There are no shared accounts, supervisors, equipment, or employees between Frey Enterprises and either of these subsidiaries, or between either subsidiary. The general managers of the subsidiaries do not hold any position with Frey Enterprises or any of its other subsidiaries and independently determine their own labor relations policies. Madison of California only performs work in California and Hawaii, while Madison of Arizona only performs work in Arizona, Washington, Oregon, Nevada, New Mexico, Utah and Colorado

Madison of Arizona

Madison of Arizona recognized Sheet Metal Workers Local 359 as the representative of its field construction employees and has been a party to a "me too" agreement since July 1980, incorporating by reference the terms of the Standard Form Union Agreement (SFUA) and Local Addenda between Local 359 and the Air Conditioning Contractors of Arizona. The current agreement expires on July 31, 1993. Local 359 represents employees in Arizona.

Article II, Section 1, of the SFUA provides in pertinent part that No Employer shall subcontract or assign any of the work described herein which is to be performed at a job site to any contractor, subcontractor or other person or party who fails to agree in writing to comply with the conditions of employment contained herein including, without limitations, those relating to union security . . .

Article III, Section 1, of the agreement provides that signatory employers will notify Local 359 of their assignment of all "work to be performed at a jobsite prior to commencement of work at the site. . . ."

Madison of California

Madison of California recognized Los Angeles Local 108 of the Sheet Metal Workers International Association regarding Madison of California's field construction employees and Madison of California was party to a series of 8(f) agreements with

it.1 The most recent of those agreements expired June 30, 1986. Thereafter, the parties attempted to negotiate a new contract.

Negotiations between Local 108 and Madison of California continued off and on until March 1990, when Local 108 members walked off the Employer's jobs. Shortly thereafter, Frey, Jr., signed a "me too" agreement with the California District Council of Iron Workers (the Iron Workers), effective until June 30, 1992, covering all field construction work.

Sheet Metal Workers Local 162 of Sacramento (Local 162 or the Union) is party to an agreement with the Sheet Metal and Air Conditioning Contractors, Sacramento Valley Chapter, effective through June 30, 1992. However, there is no evidence that any Madison or Frey Enterprises company is a member of that association or party to an agreement incorporating the terms of that agreement or that Local 162 has a collective-bargaining relationship under either Section 9(a) or 8(f) with either Madison of California or Madison of Arizona.

Early in 1990, Frey, Jr., received a phone call from Local 162 Business Representative Don Whipple. Whipple said that he understood that Frey was working on projects in the Sacramento area and asked Frey to assign the work to Local 162's members. Frey replied that he could not discuss the matter inasmuch as he was involved in a dispute with Local 108.

In about April or May 1991, Whipple again called Frey, Jr., and said that he knew Frey had been working at British Petroleum (BP) sites in the Sacramento area, and that the work should be assigned to his members. Frey refused to do so on the basis of his agreement with the Iron Workers. Whipple argued that the work should be assigned to Local 162's members based on Madison of Arizona's agreement with Local 359. Frey responded that Madison of California and Madison of Arizona are separate employers.

Local 162 filed a grievance dated June 5, 1991, with the Sacramento Valley Sheet Metal Joint Adjustment Board (JAB) against Madison of Arizona, alleging violations of Article II, Section 1, and Article III, Section 1, of Local 359's agreement. Shortly thereafter, the JAB sent a letter to Madison of Arizona, to the attention of "John Frey", transmitting a copy of the grievance and setting a hearing for June 17, 1991. Sentell replied, by letter dated June 7, 1991 to the JAB, declining to appear at the hearing and stating that Madison of Arizona did not do business in California and that the grievance should have been directed to Madison of California. Sentell sent the JAB a more detailed letter dated June 12, 1991, again denying that Madison of Arizona and of California were related companies. Sentell stated that Local 162's dispute was properly with Madison of California and not with Madison of Arizona and that he understood that Madison of California was under an order to bargain with Local 108.

On June 17, 1991, the JAB held a hearing concerning the assignment of work at the Sacramento BP sites. Neither Madison of Arizona nor Madison of California was represented at the hearing. The hearing began at 5:26 p.m. and concluded at 5:59 p.m. after issuing a decision. The JAB concluded that Madison of Arizona and Madison of California were one and the same entity and that Madison of Arizona had violated the contract as alleged by failing to employ Local 162 members at the Sacramento British Petroleum projects. The JAB ordered "Madison Industries" to pay \$60,000 (\$15,000 a site for each of four sites) to the Local 162 training fund.

By letter to John Frey, Jr., dated September 5, 1991, Iron Workers President Richard Zampa stated that he understood that the Sheet Metal Workers were claiming the Sacramento field construction work. Zampa stated that Madison of California's agreement with the Iron Workers covered the Sacramento work.

Local 162 sent "Madison Industries" a letter dated September 17, 1991, demanding payment of the \$60,000 penalty. Local 162 stated that if payment was not made within 10 days of receipt of that letter, it would file suit seeking payment of the penalty, plus attorney's fees and costs.

In late September 1991, Frey, Jr., called Iron Workers Business Representative Sven Sorensen and informed him that Madison of California might be forced to reassign some of the work to Local 162 members. Sorensen replied that the Iron Workers would picket the BP sites and that he would consider pulling the employees off Madison of California's jobs. The next day, Zampa called Frey, Jr., and said that he would pull the Iron Workers off Madison of California jobs if any work was assigned to the Sheet Metal Workers. By letter dated October 23, 1991, Iron Workers Attorney Victor Van Bourg informed Madison of California that if Iron Workers were taken off Madison of California jobs, the Iron Workers "would take every appropriate

means, legal and otherwise, against the Company."

On March 16, 1992, Local 162 filed in United States District Court for the Eastern District of California a petition against Madison of Arizona alleging that it had violated its contract with Arizona and seeking to confirm the JAB's award.

Section 10(k) Proceedings

Meanwhile, a Section 10(k) hearing in which both the Iron Workers and Local 162 participated was held on December 5, 1991.² On April 30, 1992, the Board issued a decision (302 NLRB No. 59) finding that Madison of Arizona and Madison of California are separate Employers under the Act and awarding the work to the Iron Workers. The Board held that the work in dispute was Madison of California's work "for British Petroleum and other customers in the State of California" (sl. op. at 5) and that Local 359's agreement was not relevant to resolution of the 10(k) dispute (Id. at 9).

Madison of California has not reassigned any field construction work and there has been no picketing or strike by either Union.

ACTION

We conclude that Local 162 violated Section 8(b)(4)(ii)(B) by filing and maintaining the grievance and lawsuit against Madison of Arizona alleging that the disputed contract for work by Madison of California constituted a breach of Madison of Arizona's subcontracting clause inasmuch as Madison of Arizona is a neutral employer, separate from Madison of California, and has no control over the disputed work. In our view, the Union has also violated Section 8(b)(4)(ii)(D) by its maintenance and enforcement of the grievance and lawsuit since the issuance of the 10(k) award.

1. SECTION 8(b)(4)(D)

Section 8(b)(4)(D) prohibits unions from using threats, coercion, or restraint with an object of forcing or requiring an employer to assign work to employees in one labor organization, trade, craft or class, rather than to employees in another labor organization, trade, craft or class, unless the employer is in violation of a Board order or certification determining the appropriate bargaining representative. Together with Section 10(k), Section 8(b)(4)(D) reflects a Congressional preference for private resolution of such work assignments or jurisdictional disputes. See *Longshoremen ILWU Local 7 (Georgia-Pacific Corp.)*, 291 NLRB 89, 922-93 (1988).³

Carpenters Local 33 (Blount Brothers), 289 NLRB 1482 (1988), was a post-10(k) 8(b)(4)(ii)(D) decision involving a grievance filed against a signatory employer by the losing union in a 10(k) proceeding. Blount was party to an agreement with the Carpenters containing an 8(e) proviso union signatory subcontracting provision. Blount subcontracted certain work that the Carpenters contended fell under that agreement, first to one subcontractor and then to another subcontractor which had an agreement with the Laborers instead of with the Carpenters. The Carpenters filed an in-lieu-of pay grievance against Blount for violation of the subcontracting provision. Meanwhile, 10(k) proceedings were initiated and the Board issued a decision awarding the disputed work to the subcontractor's employees represented by the Laborers. The Board thereafter held that the Carpenters had not engaged in coercion violative of Section 8(b)(4)(ii)(D) by filing and pursuing the arbitration claim. The Board considered that the Carpenters' contract action against Blount would not run afoul of the 10(k) award because the Carpenter's contract claim against Blount could have no effect on the subcontractor's assignment of work. Similarly, because different employers were involved in the contract action and the 10(k) award, the situation was distinguishable from *Carey v. Westinghouse*, 375 U.S. 261 (1963), where the Supreme Court had held that a 10(k) decision had to take precedence over an inconsistent arbitral decision against the same employer because otherwise the employer would face the choice of complying with the Board's decision and risking Section 301 damages or complying with the arbitrator's decision and violating the 10(k) award. Because Blount had had control of the work during its contractual relationship with the Carpenters, the Board reasoned that the Carpenters' pursuit of the breach of contract claim against Blount did not constitute coercion unlawfully enmeshing a neutral in a work dispute. In sum, Blount arose in the construction industry and involved the Carpenters' suit against Blount for violation of Blount's agreement with the Carpenters by its own action in subcontracting work; the Board held that the 10(k) award did not immunize Blount from a contract action by the signatory union in those circumstances.

McKinstry Co. v. Sheet Metal Workers Int'l Ass'n, Local 16, 859 F.2d 1382, 129 LRRM 2781 (9th Cir. 1988), involved an 8(e)

proviso clause in an agreement between the Sheet Metal Workers local with jurisdiction over Western Washington and an employer based in Seattle. The signatory employer subcontracted work to be done in Oregon. Arguing that the subcontract violated the union signatory subcontracting provision in the employer's contract with the Washington local, the Oregon Sheet Metal Workers local filed a grievance against the signatory employer for in-lieu-of damages. The joint adjustment board found that the signatory employer had breached its agreement by entering into the subcontract. The national JAB reduced the damages. The employer sued to vacate the arbitral award. The court held that the sister local was entitled to sue as the third party beneficiary of the signatory local's agreement. The court reasoned that the agreement was protected under the construction industry proviso to Section 8(e). 4 There was no 10(k) proceeding. In sum, McKinstry is consistent with Blount's holding that the general's subcontracting of work in violation of its own agreement may give rise to a damage suit and added that a sister local of the signatory local has standing to sue as a third party beneficiary.

Iron Workers, Local 30 (Spancrete Northeast, Inc.), 298 NLRB No. 114 (1990) is consistent with Blount and McKinstry. That case involved a subcontracting by Mellon-Stuart to Spancrete who assigned the work to its employees represented by the Laborers allegedly in violation of an 8(e) proviso clause in Mellon-Stuart's agreement with the Iron Workers. The Laborers threatened to picket and the Iron Workers filed a grievance claiming the work under its contract with Mellon-Stuart which contained an 8(e) proviso clause. In a 10(k) proceeding, the work was awarded to employees of Spancrete represented by the Laborers. Thus, this case also involved a general contractor operating in the context of the construction industry that had allegedly subcontracted work in violation of its own agreement with the Iron Workers. In those circumstances, the Board held that the Iron Workers' grievance against Mellon-Stuart for alleged breach of its own agreement by its own conduct had arguable merit and could not be violative of 8(b)(4)(ii)(D).

In Blount, McKinstry, and Spancrete, the general contractors involved had allegedly violated clauses in their own contracts by their own subcontracting of disputed work for performance by employees not represented by the signatory union. In contrast, Georgia-Pacific (a non-construction industry case) involved grievances seeking in-lieu-of payments filed against a subcontractor (Bellingham Stevedoring) by the union representing its employees (ILWU) alleging a violation of Bellingham's collective-bargaining agreement stemming from the loss of certain work when Georgia Pacific decided to perform that work with its own employees (represented by AWPPW) which it had previously subcontracted to Bellingham. The AWPPW threatened a work stoppage over the work. The Board issued a Section 10(k) decision awarding the work to Georgia-Pacific employees represented by the Paper Workers, rather than to Bellingham employees represented by the Longshoremen. In an 8(b)(4)(D) proceedings, the Board held that the mere filing of such an arguably meritorious grievances prior to a 10(k) decision does not constitute restraint or coercion violative of 8(b)(4)(D); but that filing after such an award does. Looking to Bill Johnson's⁵ and the preference for private resolution of work assignment disputes, the Board concluded that the mere filing of the grievances by the Longshoremen prior to the 10(k) award was not unlawful coercion under Section 8(b)(4)(ii)(D) in the absence of a showing of prohibited motive and absence of reasonable basis. However, the continued pursuit of grievances seeking work in contravention of the 10(k) award after that award could have no reasonable basis. In reaching this result, the Board stated that under 8(b)(4)(D) it is immaterial that the employer against whom the grievance is filed does not control the assignments of work.

The Georgia-Pacific rationale was applied to a construction industry case in Laborers Local 261 (Skinner, Inc.), 292 NLRB 1035 (1989). There a cable television company was party to an 8(e) proviso clause pursuant to an agreement with the IBEW. It subcontracted out work to Skinner, stipulating that Skinner would use IBEW labor. However, Skinner also had a contract with the Laborers. When Skinner refused to reassign the work, the Laborers filed a grievance over Skinner's assignment of the work to employees represented by the IBEW instead of to employees represented by the Laborers. The IBEW had threatened to picket for the work. A board of adjustment ruled in favor of the Laborers, awarding in-lieu-of damages. The Laborers sued to enforce the arbitral award. Meanwhile, the Board issued a 10(k) determination awarding the work to Skinner's employees represented by the IBEW. The Board held that, by maintaining the suit against Skinner to enforce the arbitral award in their favor after the Board had awarded the work to Skinner's IBEW employees, the Laborers had sought to undermine the 10(k) award and coerce Skinner to reassign the disputed work, in violation of 8(b)(4)(D). The Board further concluded that its 10(k) "decision [had] put the [Laborers], who fully participated in the 10(k) hearing, on notice that there was no longer any reasonable basis for continuing to prosecute the lawsuit." (Id. at 1035).

Unlike Blount, McKinstry and Spancrete, all of which involved grievances against the signatory employers, arising from that employer's breach of its own bargaining agreement by its own conduct of contracting out work, Georgia Pacific and Skinner

were grievances against subcontractors who had either received the work or had it cancelled after receiving it. In the first line of cases, the grievances were held to be proper and, in the latter, they were held to be unlawfully coercive. We now turn to the question which of those lines of cases control the subject situation.

In the instant case, Local 162, as the third party beneficiary of Local 359's contract with Madison of Arizona, is suing Madison of Arizona for the alleged violation of the subcontracting provision in Local 359's agreement.⁶ However, as in *Georgia Pacific and Skinner* the alleged breach arose from the actions not of the signatory employer but those of Madison of California, which was found to be a separate employer in the 10(k) proceeding. Madison of Arizona took no action vis-a-vis its own bargaining agreement; that is, it did not seek, contract work or take any action arguably violative of its contract with its Union. Thus, we conclude that the subject cases is closer to *Georgia Pacific and Skinner* than the *Blount* line of cases. In fact, the case is further from *Blount* than *Georgia-Pacific and Skinner* in the sense that Madison of Arizona has absolutely no connection to the work in question as was the situation in the latter two cases.

Applying the foregoing, we conclude that, prior to the 10(k) determination, there was at least some basis for Local 162 to believe that Madison of Arizona and Madison of California were sufficiently related that Madison of California was obligated to proceed in accordance with Local 359's agreement with Madison of Arizona and that it could pursue the grievance and suit as a third party beneficiary standing in the shoes of Local 359. However, after the 10(k) determination, in which Local 162 fully participated, Local 162 no longer had a reasonable basis for believing that Madison of Arizona and Madison of California were not separate employers. Accordingly, Local 162's continued pursuit of the grievance and suit after the 10(k) determination was violative of Section 8(b)(4)(D) under *Georgia-Pacific and Skinner*.

2. SECTION 8(b)(4)(B)

The Supreme Court has found that Section 8(b)(4)(B) embodies the "dual congressional objectives to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressure in controversies not their own," *NLRB v. Denver Building Trades Council*, 341 U.S. 675 (1951). To resolve questions arising under this section of the Act, the Board requires that the following two questions be answered: (1) is the object of the union's conduct one proscribed by the statute, and (2) does the union's conduct amount to threats, coercion, or restraint within the meaning of the statute? *Painters Local 829 (Theatre Techniques)*, 267 NLRB 858, 860 (1983), enforcement denied and remanded, 762 F.2d 1007, 119 LRRM 2675 (D.C. Cir. 1985), 278 NLRB 319 (1986).

The key to analyzing the legality of a union's objective is whether its conduct addresses the labor relations of the contracting employer regarding his own employees or is, on the contrary, "tactically calculated to satisfy union objectives elsewhere." *National Woodwork*, 386 U.S. at 644-645. ⁷ The Supreme Court's decision in *NLRB v. Enterprise Association of Steam Pipefitters Local 638*, 429 U.S. 507, 529-531 (1977), teaches that union pressure against an employer that does not have the power to control the assignment of work is secondary activity. The Board has found no right to control in circumstances where the employer never had the work to award in the first place, and where it had "no past, present or future authority to award work to the union."⁸

In *Emery Air Freight*,⁹ Emery had subcontracted work to two employers and then canceled those subcontracts and entered into a new subcontract with a third employer. The union representing the employees of Emery (IBT) threatened Emery with retaliation if the new subcontractor did not have a contract with the IBT or with the independent union representing the first two subcontractors. The independent union picketed and the IBT filed a grievance claiming the subcontracting out of the work violated its agreement with Emery. The Board held that this grievance was for an unlawful object in that it sought to cause the neutral (Emery) to cease doing business with the new subcontractor and thus was violative of Section 8(b)(4)(ii)(B). Assuming, without deciding, that *Bill Johnson's* is applicable to the filing of a grievance, the Board held that since the grievance had an unlawful objective, the Supreme Court's holding in *Bill Johnson's* was inapplicable. 278 NLRB at 1304, relying upon footnote 5 of *Bill Johnson's*, 461 U.S. at 737 n. 5.

Similarly, in *Boston Deliveries*,¹⁰ Sears subcontracted work to Boston Deliveries, then canceled the subcontract and decided to do the work in-house. The Boston Deliveries union filed a grievance, seeking pay-in-lieu of the work, against Boston Deliveries for the lost work and sought judicial confirmance of the resulting award in its favor. The Union also struck and picketed Boston Deliveries. The Board, observing that the Union knew that Boston did not control the assignment of the work,

found that the entire course of conduct violated 8(b)(4)(B); that is, it was for the purpose of forcing the neutral employer (Boston) to "use its influence" on the primary employer (Sears) to obtain work for employees represented by the union. The Board found it unnecessary to pass on whether the grievances alone constituted unlawful conduct. In enforcing the Board's order, however, the First Circuit strongly suggested that the grievances alone would be violative since they have no reasonable basis in law or fact.

In *Georgia-Pacific*, supra, the Board distinguished Section 8(b)(4)(D) and 8(b)(4)(B) on the basis that 8(b)(4)(B) has not been interpreted to reflect a Congressional preference for private resolution of disputes as has 8(b)(4)(D). *Id.* at 92, n. 10. Chairman Stephens agreed with the majority there that the subcontractor's (Bellingham's) lack of control over the work did not require a determination that there had been a violation of 8(b)(4)(D) in the union's filing of time-in-lieu grievances. However, he stated that a 8(b)(4)(B) violation "is at least arguably present" based on the filing of the grievances even prior to the 10(k) determination (*Id.* at 93, n. 11, reiterated at p. 93, n. 12) on the theory that the Longshoremen were attempting to penalize Bellingham, which did not itself have the right to control the work, in order to compel it to cease doing business with *Georgia-Pacific*, which did.

Here, Local 162's grievance and lawsuit are against Madison of Arizona. Madison of Arizona has done nothing to violate its contractual union signatory subcontracting provision. Based on the 10(k) determination, in which Local 162 fully participated, there is reasonable cause to believe that the signatory Madison of Arizona is a separate employer from the primary Madison of California. Madison of Arizona has itself no control over the disputed work and Madison of Arizona is otherwise neutral in the dispute with Madison of California. Accordingly, Local 162's pursuit of the grievance and lawsuit against Madison of Arizona has an unlawful secondary object. *ILA v. Allied International, Inc.*, 456 U.S. 212, 110 LRRM 2001 (1982).

Local 162 may attempt to justify its grievance, for 8(b)(4)(B) purpose, on the ground that, standing in place of sister Local 359, it is only enforcing a valid 8(e) proviso agreement. However, the construction industry proviso to Section 8(e) cannot privilege Local 162's conduct here. Thus, the Union's conduct is directed against Madison of Arizona. As demonstrated, Madison of Arizona has itself done nothing to breach the contractual union signatory subcontracting provision and there is reasonable cause to believe that it is separate from the primary, Madison of California, and neutral to the Union's dispute with that Employer. The Union has applied the clause to jobsites where the signatory Madison of Arizona has no connection, based on conduct with which it has had nothing to do, and based on work over which it has no control.

Therefore we conclude, in our first level of inquiry, that the Union's objective was to apply pressure against a neutral employer (Madison of Arizona) to force a change in the labor policies of the primary (Madison of California). That objective was secondary and was not shielded by the proviso.

The second level of inquiry is whether the union's conduct amounts to threats, coercion, or restraint in furtherance of its unlawful objective. Having determined that the subcontracting provision, as applied by the Union, has a secondary object not privileged by the proviso, it follows that the Union's efforts to secure judicial and arbitral enforcement of the provision against an Employer without the power to control allocation of that work violate Section 8(b)(4)(B).

Thus, although it is clearly lawful for a union to pursue a grievance to obtain damages for an employer's failure to award fairly claimable unit work to unit employees, a grievance filed in furtherance of a secondary objective violates Section 8(b)(4)(B). In two cases the Board found the filing of grievances to be violations of Section 8(b)(4)(B) as part of an entire course of conduct which was found to be coercive. In *Emery Air Freight*, the Board found that "the Respondent's filing of the grievance was but a further attempt to force Emery to cease doing business with DPD."¹¹ Then, in *Boston Deliveries*, the Board found that the union's entire course of conduct, which included striking and picketing as well as grievance filing, violated Section 8(b)(4)(i)(B). And the First Circuit strongly indicated that the grievances alone were violative since they were for an unlawful object. We conclude that where a union files a grievance against an employer that has no right of control, i.e., no power to satisfy the union's demands, that conduct constitutes restraint and coercion under Section 8(b)(4)(B).¹²

Here, Local 162 is seeking damages from a signatory employer (Madison of Arizona) for failure to assign work that was not within the employer's right of control and, indeed, which was not claimable by the unit represented by Local 162. The Union is seeking damages under the contract "for not acquiring work over which it had no control was merely an attempt to substitute one form of unlawful secondary economic pressure for another" in violation of Section 8(b)(4)(ii)(B).¹³ Accordingly, we

conclude that the Region should issue a Section 8(b)(4)(ii)(B) complaint, absent settlement, alleging that the Union acted unlawfully in maintaining the grievance and seeking court enforcement even though those actions were not accompanied by any other coercive conduct.

Finally, we conclude that Local 162's grievance and lawsuit to seek enforcement of the JAB award fall within the ambit of footnote 5 of *Bill Johnson's*. The Union's objective was to force Madison of Arizona to pressure a separate employer (Madison of California) to change its manner of doing business. That objective was illegal, as discussed above; and thus a *Bill Johnson's* analysis is not appropriate.

3. SUMMARY

In sum, the Region should resume processing of its complaint alleging that, by filing and maintaining the grievance and lawsuit seeking to enforce the clause, the Union violated Section 8(b)(4)(B) in that it sought to have the neutral, Madison of Arizona, cease doing business with Madison of California. [FOIA EXEMPTIONS 2 & 5]

R.E.A.

1 Madison of California also had a Section 9(a) relationship with Local 108 covering a separate unit of "inside" employees. See *Madison Industries*, 290 NLRB 1226 (1988).

2 Because no 10(k) award had issued, the Region, by letter dated November 13, 1991, dismissed Charge 21-CD-600 alleging that Local 162 had violated Section 8(b)(4)(ii)(D) by pursuing the grievance action. That decision was not appealed. On November 22, 1991, the Region issued an 8(b)(4)(ii)(B) complaint. After proceedings on that complaint were held in abeyance because of a request that the matter be transferred to Region 20 for trial, the Region submitted the instant request for advice.

3 *Affd.* 892 F.2d 130, 133 LRRM 2326 (D.C. Cir. 1989).

4 129 LRRM at 2786), citing *Woelke & Romero Framing v. NLRB*, 456 U.S. 645, 648, 110 LRRM 2377 (1982).

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

6 As noted previously third party beneficiaries have standing to sue under an 8(e) proviso clause. *McKinstry Co.*, *supra*.

7 See also *Retail Clerks Local Union No. 1288 (Nickel's Pay-Less Stores)*, 163 NLRB 817, 818-819 (1967), *enfd.* in pertinent part, 390 F.2d 858, 861-862 (D.C. Cir. 1968)(clauses that restrict the performance of fairly claimable unit work to unit members in the employ of the contracting employer are not violative of Section 8(e), in that they are germane to the economic integrity of the principal work unit; provisions are secondary and unlawful if their principal objective is regulation of the labor policies of other employers).

8 See e.g. *Local 438 United Pipe Fitters (George Koch Sons, Inc.)*, 201 NLRB 59 (1973), *enfd.* 490 F.2d 323 (4th Cir. 1973).

9 *Teamsters Local 705 (Emery Air Freight)*, 278 NLRB 1303, 1304-05 (1986), remanded in relevant part, 820 F.2d 448, 125 LRRM 2705 (D.C. Cir. 1987).

10 *Boston Deliveries, Inc.*, 282 NLRB 910, 913-914 (1987), *enfd.* 831 F.2d 1149, 126 LRRM 2886 (1st Cir. 1987).

11 278 NLRB at 1305. The D.C. Circuit took issue with the Board's finding that the union's objective in filing the grievance was secondary and that accordingly the grievance was unlawful. The court remanded *Emery Air Freight* to the Board for a determination as to the legality of the contract provision which the union was seeking to enforce. 820 F.2d at 452-53. The Board remanded the case to the Regional Director and the case is now closed, apparently after settlement.

12 See also *Associated General Contractors v. NLRB*, 514 F.2d 433, 439 (9th Cir. 1975)(finding 8(b)(4)(B) violation based on grievance filed seeking in-lieu-of payments against employer with no control over work union sought for its members); *Carrier Air Conditioning Co. v. NLRB*, 547 F.2d 1178, 1190-1193 (2d Cir. 1976)(same). Cf. *Local No. 742, United Brotherhood of Carpenters & Joiners (J.L. Simmons Co.)*, 237 NLRB 564, 565 (1978) (union proposal that neutral employer pay wage premium for installation of prefabricated doors coercive under Section 8(b)(4)(B) where employer had no right of control over the work).

13 *Painters Local 829 (Theatre Techniques, Inc.)*, 243 NLRB 27, 29 (1979).