

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

Advice Memorandum

DATE: June 14, 1994

TO: Richard L. Ahearn, Regional Director
Region 3

FROM: Robert E. Allen, Associate General Counsel
Division of Advice

SUBJECT: Glens Falls Building & Construction 584-0100
Trades Council 584-1250-5000
(Indeck Energy Services) 584-1275-6700
Case 3-CE-55 584-3740
584-5028
584-5042
712-5014-0120
712-5020-0140

This Section 8(e) case was submitted for advice on the issue of whether the Union reaffirmed an agreement not privileged by the construction industry proviso by suing to enforce it.

FACTS

In 1989, Indeck contracted to build and operate a cogeneration plant to supply a paper company with steam and an electric company with electricity. On June 8, 1992, after receiving bids submitted by various "turnkey" contractors,¹ Indeck contracted with Serrine to be the project manager for the construction. The Indeck-Serrine contract conferred on Serrine the authority to man the job, to hire employees, and to make and enforce safety and productivity rules. Serrine had the power to select and direct subcontractors; Indeck retained the right reasonably to reject subcontracts over \$50,000. In return for the assistance of the Unions in securing the environmental clearances for the plant, Indeck informed the Glens Falls Building and Construction Trades Council, hereinafter the Unions, by letter dated February 20, 1992, that

Indeck has committed to construct our project...
utilizing members of the [Unions]. To further
insure our commitment... Indeck will instruct it's

¹ "Turnkey" contractors are entities responsible for all phases of construction, including design, procurement, testing, start-up and actual construction.

[sic] contractor to execute the National Construction Stabilization Agreement as the Project Agreement.... [I]t is understood by all parties that it is the Contractor's and [Union's] responsibility, to mutually agree on any modifications of this agreement prior to its execution.

On various dates between January 31 and September 28, 1992, SIRRINE, the BCTC, and six constituent locals executed the project labor agreement. That document consists of three agreements, including the National Construction Stabilization Agreement, and modifications thereto, totaling about 35 pages. The agreements contain at least two onsite union signatory subcontracting clauses. One of the agreements recites that it was negotiated by SIRRINE and the Unions, and that "SIRRINE will not be a signatory to The Project Agreement itself." In fact, SIRRINE utilized only union signatories.

On some subsequent date, INDECK terminated SIRRINE as its project manager, and in July 1993, made CNF its project manager. CNF enjoyed the same authority as did SIRRINE. However, unlike SIRRINE, CNF declined to enter into a site agreement. Most of the CNF subcontractors appear to be union signatories. However, on November 9, 1993, the Unions sued INDECK seeking \$12,000,000 in damages because, inter alia, INDECK had failed to cause CNF to honor the onsite union signatory subcontracting clauses, thereby breaching the agreement in the February 20, 1992 letter.

The suit is further premised on the theories, in the second cause of action at paragraph 22, that the February 20, 1992 letter from INDECK to the Unions and the fact that SIRRINE was the agent of INDECK for the purpose of executing the project agreement also bind INDECK to the project agreements between SIRRINE and the Unions. INDECK has apparently successfully attempted to remove the suit from the state court, where it was filed, to the United States District Court, where a pretrial conference was scheduled for June 3, 1994.

The Region has concluded that INDECK has no relation with SIRRINE other than that created by the INDECK-SIRRINE agreement; it is a separate employer rather than an alter ego or single or joint employer with SIRRINE. In addition, INDECK does not perform the functions of a general contractor at the site. INDECK does have certain employees, namely a "project manager" who does production control and

tests against specifications, a mechanical engineer, a plant manager who will run the cogeneration plant once built, a construction manager who acts as liaison to SIRRINE or CNF, and an accountant, all of whom visit the site at various times. Indeck employs no craft employees at the site and does not direct SIRRINE, CNF, or the subcontractors. The Unions claim that Indeck executed a number of contracts with contractors, but the evidence shows that while the original contract with SIRRINE was for \$71,000,000, the contracts awarded by Indeck were quite limited. Thus, Indeck awarded (a) a contract to surveyors for \$2200, (b) a contract during the interval between the departure of SIRRINE and the advent of CNF for \$80,000, which CNF assumed upon its appearance at the site, and (c) a contract to collect and analyze soil samples and dispose of hazardous materials, for \$30,000.² In addition, while the Unions claim that SIRRINE actively participated in the negotiations between SIRRINE and the Unions, the evidence presented by the Unions shows merely that Indeck and SIRRINE representatives were both present at two meetings with the Unions in June and July 1992; that they presented a draft project agreement modeled after another project agreement Indeck and SIRRINE were said to have negotiated; and that Indeck agreed that a pipeline distribution network be included within the scope of the project agreement.³ Finally, the Unions asked Indeck to include a particular grievance procedure in the project agreement, but Indeck and the Unions "agreed that the grievance concern would be settled later."

² We assume, arguendo, that contract (c) is for "construction" work. While construction industry contractors award contracts for delivery of materials and removal of trash, the transportation of materials to and from the site has never been found to be work falling under the construction industry proviso. See, e.g., Int'l Brotherhood of Teamsters, Local 294 (Island Dock Lumber), 145 NLRB 484, 491 (1963). Hence the awarding of this work does not show that the land owner was setting the terms and conditions of employment of onsite employees covered by the 8(e) proviso.

³ Indeck later contracted the pipeline distribution network to a project manager which had the same authority that SIRRINE and CNF enjoyed.

It appears that the United States District Court has ceased processing the Unions' lawsuit pending disposition of the charge before this Agency.

ACTION

We conclude that complaint should issue, absent settlement, alleging that, by maintaining the lawsuit against Indeck within the 10(b) period, the Unions reaffirmed the February 20, 1992 letter agreement which is violative of Section 8(e). [FOIA Exemption 5

.] The February 20 agreement between Indeck and the Unions is not privileged by the construction industry proviso because Indeck is not in the construction industry and because the agreement was not negotiated in the context of a collective-bargaining relationship. Assuming arguendo that Surrine is found to be the agent of Indeck for the purpose of executing the facially valid onsite union signatory subcontracting clauses, the clauses remain unlawful; it is irrelevant whether Surrine's agreement with the Unions was privileged by the construction industry proviso because any privilege that Surrine may have enjoyed does not run to Indeck. [FOIA Exemption 5

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I. Section 8(e) Principles

A. The Section 8(e) Violation: The definition of an employer in the building and construction industry.

The key to analyzing the legality of a contractual clause in a Section 8(e) context is whether the clause, on its face or as applied, addresses the labor relations of the contracting employer regarding its own employees or is, on the contrary, "tactically calculated to satisfy union objectives elsewhere."⁴ The construction industry proviso is a narrow exception to the general rule of Section 8(e).⁵ The Board has never extended the proviso to privilege agreements between unions and the owners of facilities being built by someone in the construction industry unless the owners were substantially engaged in the construction industry as general contractors.⁶ [FOIA Exemption 5

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B. The Section 8(e) Violation: The validity of a defense that an onsite union signatory subcontracting clause may be valid even absent a collective-bargaining relationship where it serves to prevent union and nonunion employees from working side-by-side.

In Carpenters Local 944 (Woelke & Romero Framing), 239 NLRB 241, 250 (1978), affd. 456 U.S. 645, 110 LRRM 2377

⁴ National Woodwork Manufacturers Association v. NLRB, 386 U.S. 612, 644-645 (1967). 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 objective is regulation of the labor policies of other employers).

⁵ Connell Construction Co. v. Plumbers & Steamfitters Local 100, 421 U.S. 616, 89 LRRM 2401, 2407-08 (1975).

⁶ See, e.g., Columbus Bldg. and Construction Trades Council (The Kroger Co.), 149 NLRB 1224 (1964); Carpenters Local 743 (Longs Drugs), 278 NLRB 440 (1986). Cf. Church's Fried Chicken, 183 NLRB 1032 (1970).

(1982), the Board said that under the Supreme Court's Connell decision,

the construction industry proviso permits subcontracting clauses... in the context of a collective-bargaining relationship and possibly even without such a relationship if the clauses are aimed at avoiding the Denver Building Trades problem.

Similarly, in Colorado Building & Construction Trades (Utilities Services), 239 NLRB 253, 256 (1978), the Board found that the clause had been negotiated outside the context of a collective-bargaining relationship, but "possibly" could have been within the proviso's protection if

addressed to problems posed by the common situs relationships on a particular jobsite or to the reduction of friction between union and nonunion employees at a jobsite.

Although this possible defense has been mentioned in several subsequent cases,⁷ the defense has never been successful because the clauses were never found to address the possibility of friction. The Board has not made clear whether and when a union signatory subcontracting clause covering all construction employees at a single jobsite may be justified even if negotiated outside the context of a collective-bargaining relationship.

C. The Section 8(e) Violation: The Doctrine of Reaffirmation.

Section 8(e) makes it unlawful for a union and employer "to enter into" an agreement whereby the employer agrees not to do business with another person. Recently, the Board has held that a clause that is lawful and primary on its face

⁷ Construction and General Laborers Union, Local 185 (West-Cal Construction), 255 NLRB 53, 61 (1981) (no exceptions filed); Iron Workers Pacific Northwest Council (Hoffman Construction), 292 NLRB 562, 580 (1989), enfd. 913 F.2d 1470, 135 LRRM 2371 (9th Cir. 1990). See also Carpenters District Council of Detroit (DiCosmo Siding), 243 NLRB 678, 680 (1979) (no violation because clause found to be in context of collective bargaining relationship).

may assume the mantle of unlawfulness if a party seeks to have it applied in an unlawful manner.⁸ By filing a lawsuit seeking an unlawful interpretation unions satisfy the "enter into" requirement of Section 8(e) even though the clause itself is facially lawful. Thus, one party to an agreement can "enter into" a clause in violation of Section 8(e) by filing a lawsuit seeking an unlawful interpretation. Simply put, this issue of whether a clause is facially lawful, or is unlawful on its face, is irrelevant to the issue of whether the clause has been entered or reentered into. Thus, the Board opined in Gunnar I. Johnson:

Although Respondents claim that they have consistently limited their interpretation of their respective clauses to primary activity which is outside the proscriptive parameters of Section 8(e), that position goes to the merits of the alleged violation and not to the question of whether they have reaffirmed the clauses. Indeed, that position contains its own admission that Respondents continue to reaffirm the effectiveness of the clauses - albeit only against primary activity.⁹

Further, in SC Pacific, supra, 312 NLRB at 904, fn. 5, the Board found that the "enter into" requirement was satisfied by the union's filing and prosecuting a grievance under a clause lawful on its face. The Board explained that "...a union or employer cannot evade the strictures of Sec. 8(e) by the subterfuge of agreeing to a provision lawful on its face and then construing and enforcing that provision so as to accomplish objectives forbidden by Section 8(e)." As the ALJ explained:

⁸ Elevator Constructors (Long Elevator), 289 NLRB 1095 (1988), enfd. 902 F.2d 1297 (8th Cir. 1990) (pursuit of grievance on behalf of a member who was disciplined for refusing to enter a neutral reserve gate, held an illegal attempt to enforce a lawful contractual picketing clause; thus, by seeking an unlawful 8(e) interpretation of a facially lawful clause, union violated Section 8(b)(4)(A)). See also Carpenters Local 745 (SC Pacific), 312 NLRB 903 (1993).

⁹ Bricklayers, Local No. 2 (Gunnar I. Johnson & Sons, Inc.), 224 NLRB 1021, 1025 (1976), enfd. 562 F.2d 775 (D.C. Cir. 1977).

Section 8(e)'s 'enter into' requirement reaches both the initial agreement and any subsequent bilateral affirmation or interpretation which may be deemed unlawful. Elevator Constructors (Long Elevator), 289 NLRB 1095 (1988); Bricklayers, Local No. 2 (Gunnar I. Johnson & Son, Inc.), 224 NLRB 1021, 1024-1025 (1976), enfd. 562 F.2d 775 (D.C. Cir. 1977). Thus, the Union's 22 C 1(a) grievance against S & M and its subsequent effort to enforce the favorable SJB awards -- all occurring within the 10(b) period -- satisfy the 'enter into' requirement.¹⁰

It is obvious that the word "bilateral," in the above quote, is a misprint or inadvertent in that the cases cited by the ALJ both involve unilateral actions. Moreover, the ALJ found that the unilateral actions of the union in filing and prosecuting the grievance in issue satisfied the "enter into" requirement.¹¹

However, before the Gunnar I. Johnson decision in 1976, the Board had held that unilateral action within the 10(b) period by a charged party with respect to an 8(e) clause constituted an entering into only if the clause were clearly unlawful.

Preliminarily, an arbitral award construing in an unlawful manner a clause which was not clearly unlawful constituted a bilateral reaffirmation. Thus, it has been settled law since International Union, United Mine Workers of America (Westmoreland Coal), 117 NLRB 1072, 1075 (1957), modified on other grounds 258 F.2d 146 (D.C. Cir. 1958), that an arbitral award construing a collective-bargaining agreement "bec[omes] as much a part of the contract... as if it had been written in nunc pro tunc." Hence, where, as in Gunnar I. Johnson and SC Pacific, there has been an arbitral award which construes or interprets a clause to mean something that is clearly unlawful, there is bilateral "entering into" an 8(e) contract. Where the original execution of the contract was pre-10(b), the date of the

¹⁰ 312 NLRB at 911.

¹¹ See also, Long Elevator, 289 NLRB 1095, where the union's grievance converted a lawful clause into a de facto hot cargo provision violative of Section 8(e).

award constitutes a new "entering into" the contract. Moreover, every unilateral action of the charged party after the award, e.g., filing suit to confirm the award, constitutes a new reaffirmation:

[A] respondent, whether an employer or a union, "enters into" an agreement unlawful under [Section 8(e)] by insisting on its enforcement within the Section 10(b) period.... [S]uch enforcement, whether or not it was sought, assented to, or acquiesced in by the other party to the contract is within the scope of the prohibition of Section 8(e) against entering into such contracts.¹²

Where a clause is clearly unlawful, a unilateral reaffirmation by the charged party constitutes an entering into.¹³ However, where the clause is not clearly unlawful, an attempt by a charged party to enforce the clause in an unlawful manner does not constitute a reaffirmation. Thus, in American Federation of Television and Radio Artists (Westinghouse Broadcasting), 160 NLRB 241, 244, 247-48 (1966), the union filed a grievance and was engaged in an arbitration seeking the enforcement of a lawful clause, but no arbitral award resulted. The Board dismissed the 8(e) allegation because the employer had refused to implement the clause as demanded by the union and hence there was no entering into. Similarly, in Local 1332, Int'l Longshoremens Assn., AFL-CIO (John C. Peet), 151 NLRB 1447, 1451 (1965), the Board said that the union's naked demand

¹² Milk Drivers & Dairy Employees, Local Union 537 (Sealtest Foods), 147 NLRB 230, 231 fn. 3 (1964).

¹³ Id. at 231, fn. 3. Accord: Teamsters Local 610 (Kutis Funeral Home, Inc.), 309 NLRB 1204 (1992), which involved a union signatory "trading" provision. The clause as written was clearly unlawful, and the Board so found at p. 1205. Hence, respondent union, by "obtaining the award," p. 1204 fn. 2, reaffirmed it within the 10(b) period. Dan McKinney Co., 137 NLRB 649, 657 (1962), is another case involving a picket line clause, which the Board had found to be invalid. Hence unilateral efforts to enforce the clause reaffirmed it. That was also the case in IBT, Local 467 (Mike Sullivan), 265 NLRB 1679, 1680-1681 (1982), in which, once again, the picket line clause was found to be clearly unlawful.

that the employer accede to the union's construction of a lawful clause amounted

at most, to an attempt to force PMTA to enter into a new and different version of such clause... [but was not] a reaffirmation of an existing clause violative of 8(e).

The two lines of cases at times produce different results. Under the Westinghouse line of cases, where there is a contract containing a provision that is not clearly violative of Section 8(e), and an arbitrator construes the contract in such a way as to be violative of 8(e), only such unilateral action as occurs after the award constitutes a reaffirmation of the unlawful clause. Where the clause is not clearly violative of Section 8(e), unilateral conduct before the bilateral reaffirmation does not violate Section 8(e). On the other hand, such later cases as Gunnar I. Johnson and SC Pacific hold that conduct, i.e., grievance filing by a respondent before the award which interpreted a lawful clause in an unlawful way, is also an unlawful reaffirmation. In Gunnar I. Johnson, three of the picket line clauses, those covering the Operating Engineers, Bricklayers and Laborers, were clearly unlawful, but the fourth, covering the Plumbers, was not. The General Counsel alleged, 224 NLRB 1024, and the Board agreed, that the position taken in the arbitration by the four unions, including the Plumbers, was an entering into an 8(e) agreement. In SC Pacific, the clause, which barred the signatory from "illegally using an alter-ego operation to escape the obligations of this [collective-bargaining agreement]" was not unlawful. The union there obtained an award which constituted an unlawful construction of the clause. After the award, the union sued in federal court to confirm the award. As noted, the Board found that the prosecution of the grievance, action which occurred before the award, as well as the award and the union's subsequent conduct, was a reaffirmation.

There is also a substantial difference in the method of analysis under the Westinghouse and SC Pacific lines of cases. Under Westinghouse and cases cited in fn. 13 above, one first looks to determine whether the clause is clearly unlawful. That decision determines whether bilateral or unilateral reaffirmation is necessary within the 10(b) period to constitute an entering into. Under the SC Pacific line of cases, one determines first whether there has been a reaffirmation within the 10(b) period, without looking to the validity of the clause.

It may be that Gunnar I. Johnson and SC Pacific merely indicate that where a party secures a judicial or arbitral decision construing a lawful or ambiguous clause as secondary, the Board will "sweep in" prior conduct in furtherance of that unlawful construction to support a conclusion that the clause was reaffirmed within the meaning of Section 8(e). It is true that the Board in Long Elevator, supra, found a violation by the union's filing of a grievance alone which, if successful, would convert a lawful clause into an illegal 8(e) clause. However, the only violation there alleged and found was Section 8(b)(4)(ii)(A) coercion to force the employer to enter into an 8(e) agreement; "reaffirmation" was not an issue. [FOIA Exemption 5

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II. Application of 8(e) Principles

A. The February 20, 1992 agreement between Indeck and the Unions is on its face an unlawful agreement under Section 8(e), and neither it nor the project agreement is privileged by the construction industry proviso.

By its terms, the February 20 agreement committed Indeck to cause the project to be all-union and to cease or refrain from doing business with project managers who did not agree to contract with, and who did not in fact contract with, subcontractors who were union signatories. Such an agreement falls within the literal ban of Section 8(e) and is void. Ironmakers Pacific Northwest Council (Hoffman Electric), 292 NLRB 562, 568, 569, 578-581 (1989), enfd. 913 F.2d 1470, 135 LRRM 2371 (9th Cir. 1990).¹⁴

¹⁴ In NLRB v. Local 825, Operating Engineers, 400 U.S. 297, 76 LRRM 2129 (1971), the court approved a Board determination that pressure on a neutral, there a general contractor, to "bind all the subcontractors on the project to a particular form of job assignments" or else terminate them was secondary and unlawful. By a parity of reasoning, an agreement with Indeck under which it must require that subcontractors be union signatories as a condition of being

The agreement between Indeck and the Unions is not privileged by the construction industry proviso because Indeck is not in the construction industry and because the agreement was not negotiated in the context of a collective-bargaining relationship. In the instant case, Indeck employs no craft employees at the jobsite and cannot fairly be characterized as a general contractor. Thus, the contracts it awarded (other than those to the project managers Sirrine and CNF) were an insubstantial portion of the entire cost of construction and Indeck has not been shown to have directly performed the kind of functions normally performed by general contractors, such as integrating the work of the subcontractors. In addition, the substantive rule is that the proviso privileges only such onsite union signatory subcontracting clauses as Congress in 1959 thought to have existed in the construction industry,¹⁵ and there is no showing that Congress in 1959 had been informed that non-construction companies, for whom construction companies were performing work, were entering into such clauses.¹⁶

Applying relevant Board principles in this regard, Indeck closely resembles the drug store chain in Carpenters Local 743 (Longs Drugs), 278 NLRB 440 (1986), which was found not to be an employer in the construction business, although it directly employed some finish carpenters, in the building of new facilities, because it ceded control over the project to a general contractor. Conversely, the owner in Church's Fried Chicken, 183 NLRB 1032 (1970), was found to be in the construction business because he acted as his own general contractor.

On the other hand, Indeck was more involved in the construction than an owner who limits his involvement to performing a final inspection of the construction to see whether the construction has met specifications, or who causes an architect to make that determination. Indeck

utilized on the jobsite falls within the ban of Section 8(e).

¹⁵ Woelke & Romero Framing v. NLRB, 456 U.S. 645, 110 LRRM 2377, 2381-2382 (1982).

¹⁶ See Lunden, Subcontracting Clauses in Major Contracts, 84 Monthly Labor Review 579, 715-716 (1961), cited in Woelke and Romero Framing, supra.

selected some of the contractors who performed work at the project. Indeck was subject to environmental regulations imposed on Indeck during the construction phase of the project. Indeck did not limit its control over the project to a final inspection, but had its agents at the premises at various times during the course of the construction. In the event that SIRRINE, CNF, or one of their subcontractors were failing to conform with Indeck's own requirements, or with regulation imposed by government on Indeck, Indeck agents could not have lacked the power to intervene in the construction. [FOIA Exemption 5

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Nor can it be said that Indeck negotiated the onsite union signatory clause in the project agreement or the February 20 agreement in the context of a collective-bargaining relationship. This requirement for the invocation of the construction industry exception to the strictures of Section 8(e) was announced by the Supreme Court in Connell.¹⁷ Whatever minimal amount of relationship may ultimately be found to be necessary to meet the requirement, that threshold has not been met here. Thus, Indeck had no rank and file employees on the jobsite who would be covered by a collective-bargaining agreement and its role was not that of a general contractor. Further Indeck's participation in the project agreement negotiations between SIRRINE and the Unions was de minimis. While the February 20, 1992 letter to the Unions stated that Indeck would instruct its contractor to execute the National Construction Stabilization Agreement as the Project Agreement, this did not establish a collective-bargaining relationship regarding any employees of Indeck.

The Unions contend that a single-site union signatory subcontracting clause, which Indeck allegedly executed and which purports to cover all construction employees on the site, reduces the friction created by the presence of union and nonunion construction employees on the site and thereby constitutes a successful 8(e) defense. [FOIA Exemption 5

¹⁷ Connell Construction Co. v. Plumbers & Steamfitters Local 100, supra, 89 LRRM at 2407.

.] In the instant case, there is only a bare allegation that the clause was necessary to reduce jobsite friction, and the apparent absence of friction when CNF, as project manager, utilized both union and nonunion employees, renders the claim nonmeritorious.

B. The Lawsuit cannot legally bind Indeck to the project agreement.

As noted, the Unions' complaint alleges in the second cause of action at paragraph 22 that SIRRINE was the agent of Indeck for the purpose of executing the project agreement, and that SIRRINE thereby bound Indeck. Hence we may anticipate a Union argument that since SIRRINE was privileged to enter into an onsite union signatory subcontracting clause and SIRRINE was the agent of Indeck, Indeck was also privileged. In the following discussion, we assume, arguendo, that SIRRINE is the agent of Indeck for the purpose of executing the onsite union signatory subcontracting clauses, and that SIRRINE could lawfully have entered into onsite union signatory subcontracting clauses. Nonetheless, the clauses are unlawful as to Indeck.

As to the legality of the SIRRINE-Indeck agreement as applied to Indeck, the construction industry proviso is, as noted, a narrow exception to Section 8(e). If an employer eligible to enter into onsite union signatory subcontracting clauses, such as the general contractor or even one of the subcontractors, could lawfully bind an employer not privileged to enter into the clause, the group of employers eligible to enter into lawful onsite union signatory subcontracting clauses would be expanded. Such an expansion would defeat the Congressional intent which was, as noted, to limit the class of eligible employers to what existed in 1959.

Section 180 of the Restatement, 2d, of Agency, provides no solace for the Unions. That section, entitled "Defenses of Principal -- In General" states that in a transaction with a third person, the principal is entitled to all the defenses of the agent, except for those that are personal to

the agent. The Union may claim that in a hypothetical 8(e) proceeding against Indeck, Indeck would be entitled to assert the defense of its agent Sirriner, namely that Sirriner was privileged to enter into the onsite union signatory subcontracting clauses. Hence, more generally, Indeck enjoys the immunity of Sirriner. However, Indeck could not have authorized Sirriner or, for that matter, CNF to enter into the union signatory subcontracting clauses on Indeck's behalf because Indeck, for the reasons stated above, had no lawful authority to enter into them, and the Unions could not reasonably have believed to the contrary. A different result would be at odds with the Supreme Court holding that entities on a construction site retain their independent status when evaluating secondary activities.¹⁸ The relevant principles of agency are those in Restatement Section 161A, entitled "Unauthorized Acts of Special Agents," which states that with certain exceptions not relevant here, "A special agent . . . has no power to bind his principal by contracts . . . which he is not authorized or apparently authorized to make"

Sirriner enjoyed no actual authority to enter into the agreements and bind Indeck because Indeck could not authorize conduct that was beyond its legal powers. Indeck's original willingness to cause the entire construction project to be union did not clothe Sirriner with apparent authority to bind Indeck. This is true even though Indeck was legally privileged to cause the job to be all-union, and to announce that fact to the Unions and to the world.¹⁹ What Section 8(e) proscribes is an enforceable agreement to do so.²⁰ Thus Indeck's publicized intent to make the job

¹⁸ NLRB v. Denver Bldg. and Constr. Trades Council, 341 U.S. 675, 689-690 (1951).

¹⁹ Associated Builders v. Massachusetts Water Resources Authority, 935 F.2d 345, 137 LRRM 2249, 2260 (1st Cir. 1991) (Breyer, C.J., dissenting) (all parties conceded that a private property owner could require that all the construction work on his property be performed by union members), revd. sub nom. Trades Council v. Associated Builders, ___ U.S. ___, 142 LRRM 2649 (1993).

²⁰ See Local 1976, Carpenters v. NLRB (Sand Door & Plywood), 357 U.S. 94, 105 (1958) (secondary boycott provisions of the Act envisage that the neutral will be free to decide whether or not to do business with primaries at the time the question arises).

all-union could no more clothe Sirrine with authority to bind Indeck than it could directly bind Indeck.

C. The February 20, 1992 agreement and possibly the project agreement, have been "entered into" within the meaning of Section 8(e) by the maintenance of the Unions' lawsuit.

Under any construction of the Board's reaffirmation principles, the Unions' filing and maintaining a lawsuit to enforce the February 20 agreement, which is clearly unlawful, constitutes "entering into" an 8(e) agreement. However, only under the Gunnar I. Johnson/Long Elevator/SC Pacific doctrine of reaffirmation can the Board find that the Unions unlawfully entered into the facially valid project agreement with Indeck during the Section 10(b) period by filing and maintaining the lawsuit against Indeck. Under the earlier case of Westinghouse such a finding would not lie. However, as noted above, the current Board law supports the principle that a suit to enforce in an unlawful manner a lawful clause constitutes entering into an 8(e) agreement.

III. Summary of Bill Johnson's analysis

[FOIA Exemption 5

], we must determine whether complaint can issue in light of Bill Johnson's.²¹ In Bill Johnson's Restaurants v. NLRB,²² the General Counsel alleged that the employer violated Section 8(a)(4) by filing a state court lawsuit against an employee alleging libel and business interference in retaliation for her having filed an unfair labor practice charge in a previous case. The Board concluded that the evidence failed to support the employer's factual allegations. Accordingly, the Board held that by filing an unmeritorious lawsuit in retaliation for previous Board activity, the employer violated Section 8(a)(4). The Supreme Court, however, held that the NLRB cannot halt the prosecution of a lawsuit unless two conditions are met: (1) the lawsuit lacks a reasonable basis in fact or law, and (2)

²¹ While the Board in the 8(e) case of SC Pacific, 312 NLRB 903, makes no mention of Bill Johnson's, we believe that our analysis of the latter would apply to Section 8(e) grievances/suits.

²² 461 U.S. 731 (1983).

the plaintiff filed the suit with a retaliatory motive. The Court explained in footnote 5, however, that the Board may enjoin suits that have, "an objective that is illegal under federal law," or which are pre-empted by the Board's jurisdiction.²³

In concluding that the lawsuit is not reasonably based, we are not limited to accepting the Unions' depiction of the facts as claimed on the face of the pleadings. The Court in Bill Johnson's rejected the employer's argument that the Board's inquiry may not go beyond the "four corners" of the complaint.²⁴ Rather, the Court struck a balance:

Although the Board's reasonable-basis inquiry need not be limited to the bare pleadings, if there is a genuine issue of material fact that turns on credibility of witnesses or on the proper inference to be drawn from undisputed facts, it cannot, in our view be concluded that the suit should be enjoined.²⁵

Thus the Court acknowledged that the Board need not stay its hand, "if the plaintiff's position is plainly foreclosed as a matter of law or is otherwise frivolous"²⁶

A review of the Board's post-Bill Johnson's decisions fails to establish clear precedent for the application of the principles enunciated by the Supreme Court. Nevertheless, we have been able to glean sufficient guidance to articulate the following analysis.

A. Reasonably based lawsuit/grievance

Under Bill Johnson's, the Board cannot enjoin a lawsuit or grievance which has a reasonable basis in law or fact.²⁷

²³ Bill Johnson's, 461 U.S. at 737-38 n.5. Hereafter, the Court's two-part reasonable basis/retaliatory motive test will be referred to as a Bill Johnson's analysis, while the unlawful objective test will be referred to as a footnote 5 analysis.

²⁴ Bill Johnson's, 461 U.S. at 744.

²⁵ Id., 461 U.S. at 744-45.

²⁶ Id., 461 U.S. at 747.

B. Lawsuit not reasonably based

The Board has proceeded against lawsuits and grievances which have no reasonable basis in fact or law using both a Bill Johnson's analysis and without regard to Bill Johnson's. In the former case, the Board must be satisfied that the lawsuit both has no reasonable basis in law or fact and that it evinces a retaliatory motive. In the latter case, if the lawsuit has no reasonable basis the General Counsel must simply prove up the elements of the particular violation being alleged (e.g., in a Section 8(b)(4)(B) case, that the lawsuit was filed with the object of coercing an employer into ceasing doing business with another employer).²⁸ Furthermore, the General Counsel may also proceed against a lawsuit which has no reasonable basis using both a Bill Johnson's and a footnote 5 analysis as the ALJ did in Nevins Realty,²⁹ a finding and analysis which the Board specifically adopted.³⁰

C. Footnote 5 illegal objective violation

If reasonably based, the Board can still proceed with a case under Bill Johnson's footnote 5 where the suit seeks an illegal objective, e.g., the unlawful imposition of union

²⁷ See, e.g., Electrical Workers IBEW Local 113 (Collier Electric Co.), 296 NLRB 1095, 1100 (1989).

²⁸ See, e.g., Plasterers Local 337 (Marina Concrete Co.), 312 NLRB 1103 (1993).

²⁹ SEIU Local 32B-32J (Nevins Realty Corp.), 313 NLRB No. 48 (November 24, 1993).

³⁰ Id., slip op. at 1. Since the Board in its discussion specifically noted only that part of the ALJ's analysis finding that the lawsuit had no reasonable basis, Nevins can also be cited as an application of the theory that a lawsuit without a reasonable basis may be enjoined without regard to Bill Johnson's.

discipline³¹ or a result inconsistent with a prior Board ruling.³²

D. Long Elevator violation

If the lawsuit or grievance would convert a facially lawful contractual clause into a Section 8(e) clause, the Board has applied footnote 5 to find a Section 8(b) (4) violation.³³

IV. Bill Johnson's Analysis

A. Reasonably based lawsuit/grievance

Where the Board concludes that a lawsuit or grievance is reasonably based, it will not find that a proceeding to compel an employer to go to or abide by the results of interest arbitration violates Sections 8(b) (1) (B) or 8(b) (3). In Electrical Workers IBEW Local 113 (Collier Electric Co.),³⁴ the Board concluded that the respondent union did not unlawfully coerce Collier by unilaterally submitting bargaining issues to interest arbitration pursuant to the provisions of a timely-revoked collective bargaining agreement. Thus, the Board dismissed the complaint upon concluding that the union had an "arguably meritorious claim both in fact and law" that the collective-bargaining agreement still bound a single employer who had timely withdrawn from a multi-employer association but had failed to terminate the contract.

In Sheet Metal Workers Local 91 (Neyens Refrigeration Co.),³⁵ the Board concluded that, under the facts of the case, the employer was "arguably bound" by the collective-

³¹ See, e.g., Bill Johnson's, 461 U.S. at 737-38 n.5, and cases cited therein.

³² See, e.g., Teamsters Local 776 (Rite Aid Corp.), 305 NLRB 832 (1991), enfd. 973 F.2d 230, 141 LRRM 2176 (3d Cir. 1992), cert. denied __U.S.__, 142 LRRM 2648 (1993).

³³ See Long Elevator, supra, 289 NLRB 1095.

³⁴ 296 NLRB 1095 (1989).

³⁵ 311 NLRB 1140, 1141 (1993).

bargaining agreement to submit disputes to an interest arbitrator. Thus, following Collier, the Board dismissed the Section 8(b)(3) complaint without citing Bill Johnson's.

The Board also refused to find a violation concerning a lawsuit filed with the objective of forcing an employer to assign work to a particular unit of employees where no Section 10(k) award has issued. Thus, in Longshoremens ILWU Local 7 (Georgia-Pacific Corp.),³⁶ the Board concluded that the filing of time-in-lieu grievances prior to the issuance of a Section 10(k) ruling does not violate the Act, "because the grievances were arguably meritorious."³⁷

B. Lawsuit/grievance not reasonably based

(1). Bill Johnson's violation

The main body of Bill Johnson's cases involve factual scenarios similar to that of Bill Johnson's itself, i.e., lawsuits filed in retaliation against employees' exercise of their Section 7 rights. In these situations, the Board has found that a lawsuit or grievance may be enjoined only if it had no reasonable basis in law or fact and exhibits a retaliatory motive. Thus, the Board routinely applies a Bill Johnson's analysis in cases involving Section 8(a)(1),³⁸ 8(a)(3),³⁹ 8(a)(4),⁴⁰ and 8(b)(1)(A)⁴¹ conduct.

³⁶ 291 NLRB 89 (1988).

³⁷ Id. at 93. The fact that an arbitrator found the grievances to be meritorious strengthened the Board's conclusion in this respect.

³⁸ See, e.g., Johnson and Hardin Co., 305 NLRB 690, 690-92 (1991) (criminal trespass complaint filed against union organizers by employer with no rights to relevant property, held baseless and retaliatory); H.W. Barss, Inc., 296 NLRB 1286, 1287 (1989) (summarily dismissed defamation suit filed against union seeking monetary damages, held baseless and retaliatory); Phoenix Newspapers, Inc., 294 NLRB 47, 48-50 (1989) (summarily dismissed libel suit seeking large punitive damages, held meritless and retaliatory).

³⁹ See, e.g., Vanguard Tours, Inc., 300 NLRB 250, 254-56 (1990), mod. 981 F.2d 62 (2nd Cir. 1992) (post-strike continuation of lawsuit designed to end strike, held meritless and retaliatory).

The Board also has applied a Bill Johnson's analysis to cases brought under Section 8(b)(4)(D). For example, in Georgia-Pacific, the Board concluded that the union violated Section 8(b)(4)(D) by filing grievances after issuance of an adverse Section 10(k) award, "because at that point the grievances lacked a reasonable basis and reflected an improper motivation to undermine the Board's 10(k) award."⁴²

Similarly, in Longshoremen ILWU Local 13 (Sea-Land Service, Inc.),⁴³ the Board rejected a Bill Johnson's defense on the ground that the grievance lacked a reasonable basis in that it was contrary to a Section 10(k) award. The Board, without elaborating, also found, "an unlawful motive."⁴⁴ We assume that this finding rests on the fact that the Section 10(k) award was being undermined. In enforcing the Board order, the D.C. Circuit relied upon footnote 5 to conclude that the lawsuit had an unlawful objective and thus Bill Johnson's was not applicable in circumstances where the lawsuit would force a party, "to choose between a Board section 10(k) award and a squarely contrary contract claim."⁴⁵

⁴⁰ See, e.g., Summitville Tiles, Inc., 300 NLRB 64 (1990) (lawsuit for malicious prosecution against employees because they previously filed unfair labor practice charge, held meritless and retaliatory).

⁴¹ See, e.g., Teamsters Local 520 (Alberici Construction Co.), 309 NLRB 1199 (1992) (union's dismissed lawsuit alleging libel and slander against member who filed charges with Board and EEOC, held meritless and retaliatory); Machinists Lodge 91 (United Technologies Corp.), 298 NLRB 325, 326 (1990), *enfd.* 934 F.2d 1288 (2nd Cir. 1991) (union's dismissed lawsuit against dissident member seeking permanent injunction from entering union hall, held meritless and retaliatory).

⁴² 291 NLRB at 92; 273 NLRB 363, 367.

⁴³ 290 NLRB 616 (1988), *enfd.* 884 F.2d 1407 (D.C. Cir. 1989).

⁴⁴ Id., 290 NLRB at 617.

⁴⁵ Longshoremen v. NLRB (Sea-Land, Inc.), 884 F.2d 1407, 1414 (D.C. Cir. 1989).

(2). Violation without regard to Bill Johnson's

In Plasterers Local 337 (Marina Concrete Co.),⁴⁶ the employer withdrew from a multi-employer association and terminated its collective-bargaining agreement with the respondent union. After an employee failed to pay union dues as set forth under the expired agreement, the union filed a grievance against the employer demanding the employee's discharge for non-compliance with the union security clause as well as reimbursement of lost union dues. The union referred the matter to arbitration which held against the employer. The employer subsequently filed suit in federal district court requesting the arbitral award to be vacated. The union counterclaimed, seeking judicial enforcement.

The Board held that the union violated Sections 8(b) (1) (A) and (2) by filing the grievance and judicial counterclaim. The Board did not cite Bill Johnson's. It held that, under the Retail Associates⁴⁷ framework, the union did not have a "reasonable" belief that the employer was bound to the terms of the collective-bargaining agreement.⁴⁸ Upon so concluding, the Board did not review the union's motivation in filing the grievance, as it would have under a Bill Johnson's analysis. Rather, the Board simply held that the union forced the employer into a bargaining relationship which it had lawfully abandoned, "in derogation of statutory rights."⁴⁹

Similarly, in SC Pacific, supra, the Board, without regard to Bill Johnson's, held that a union violated Section 8(e) when it filed a grievance, prosecuted the grievance before the State Joint Board, and thereafter, sought to confirm the State Joint Board's awards on the grievance in federal district court. The Board reasoned that although the contract clause in question was not unlawful on its face, "Respondent's theory of what would constitute a

⁴⁶ 312 NLRB 1103 (1993).

⁴⁷ 120 NLRB 388 (1958) (written notice of withdrawal from multi-employer association must be timely and unequivocal).

⁴⁸ 312 NLRB at 1105-1106.

⁴⁹ Id., at 1106.

contract violation amounted to enforcing the clause as if it were the equivalent of a clause that would be unlawful on its face." 312 NLRB 903.

(3). Both Bill Johnson's and footnote 5 violation

In SEIU Local 32B-32J (Nevins Realty Corp.),⁵⁰ Nevins canceled a contract with a cleaning subcontractor whose employees the respondent union represented and gave the work to a second, non-SEIU subcontractor. The second contractor refused to hire the predecessor's employees or maintain the SEIU's wages and benefits level. In response, the union filed a grievance against Nevins under a contract covering other Nevins employees alleging a violation of that agreement's subcontracting clause.

The Board found a Section 8(b)(4)(ii)(B) violation against the union for coercing Nevins -- a neutral employer -- in furtherance of the union's dispute with the second cleaning contractor. In so concluding, the Board stated that it, "fully agree[d] with the judge's analysis,"⁵¹ which based the violation alternatively on Bill Johnson's as well as footnote 5. Thus, in apparent affirmation of the ALJ's Bill Johnson's analysis,⁵² the Board ultimately held that, "the Respondent's contractual claim is not reasonably based on the language of the contract," because the subcontracting clause in the Nevins agreement only pertained to the subcontracting of work which the Nevins bargaining unit exclusively performed.⁵³ However, the Board also apparently adopted the judge's alternative conclusion that the union ran afoul of footnote 5 by filing a grievance which had an unlawful secondary objective.⁵⁴ Thus, the Board concluded that the Union's grievance had a secondary object of disrupting Nevins' relationship with the second contractor

⁵⁰ 313 NLRB No. 48 (November 24, 1993).

⁵¹ Ibid.

⁵² For the judge's Bill Johnson's analysis, see id., ALJD slip op. at 18.

⁵³ Id., slip op. at 1.

⁵⁴ Id., ALJD slip op. at 16-17.

because the latter did not employ members of, or have a contract with, the union.⁵⁵

C. Footnote 5 illegal objective violation

The Board has consistently used a footnote 5 analysis to enjoin prosecution of lawsuits filed by unions which unlawfully attempt to impose discipline on non-members or otherwise restrict employees' statutory rights.⁵⁶ In Laundry Workers Local 3 (Virginia Cleaners),⁵⁷ the Board held that footnote 5 "specifically endorses" its conclusion that the respondent union violated Section 8(b)(1)(A) by filing a state-court lawsuit for enforcement of fines against non-members for post-resignation conduct. In American Postal Workers Union (USPS),⁵⁸ the Board held that the respondent union's lawsuit seeking recovery of expenses it paid to process a non-member's grievance evinced an unlawful objective under footnote 5 and violated Section 8(b)(1)(A). In Electrical Workers Local 113 (Pride Electric, Inc.),⁵⁹ the Board held that the respondent union violated Section 8(b)(1)(B) by suing a union member/statutory supervisor for enforcement of fines and membership expulsion because he worked for a nonsignatory employer. And, in Sheet Metal Workers Local 9 (Concord

⁵⁵ Ibid. In concurrence, former Member Raudabaugh concluded that because the union had a "secondary object" the lawsuit could be enjoined pursuant to footnote 5. 313 NLRB No. 48, slip op. at 1 n.4.

⁵⁶ In footnote 5 of Bill Johnson's, the Court provided two examples of lawsuits filed with an unlawful objective; both involved unions which sought judicial enforcement of fines against non-members for post-resignation conduct. Booster Lodge No. 405, IAM (The Boeing Co.), 185 NLRB 380 (1970), enf. in pert. part, 459 F.2d 1143 (D.C. Cir. 1972), affd. 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), revd. 409 U.S. 213 (1972).

⁵⁷ 275 NLRB 697 (1985).

⁵⁸ 277 NLRB 541 (1985).

⁵⁹ 283 NLRB 39 (1987).

Metal Inc.),⁶⁰ the Board affirmed an ALJD which concluded that the respondent union violated Section 8(b)(1)(A) by suing to enforce the imposition of fines against a non-member for working behind a picket line.

The Board also has applied a footnote 5 analysis where the objective of the lawsuit runs counter to a prior case resolving a representational question. Thus, in Teamsters Local 776 (Rite Aid Corp.),⁶¹ the Board held that the respondent union unlawfully maintained a lawsuit which effectively would have altered the scope of a bargaining unit in contradiction to a prior UC determination. The Board held that the lawsuit could be enjoined under footnote 5 because,

In our view, where the Board has previously ruled on a given matter, and where the lawsuit is aimed at achieving a result that is incompatible with the Board's ruling, the lawsuit falls within the "illegal objective" exception to Bill Johnson's. Accordingly, the lawsuit enjoys no special protection. If it is unlawful under traditional NLRA principles, it can be condemned as an unfair labor practice.⁶²

Similarly, in Teamsters Local 952 (Pepsi Cola Bottling Co. of Los Angeles),⁶³ the Board concluded that the respondent union's unlawful arbitration demand which sought to undermine the results of a prior decertification election fell within the parameters of footnote 5.⁶⁴

Another line of footnote 5 cases stems from Section 8(b)(4)(A) and (B) violations. In Teamsters Local 705

⁶⁰ 297 NLRB 86 (1989).

⁶¹ 305 NLRB 832 (1991).

⁶² Id. at 835.

⁶³ 305 NLRB 268 (1991).

⁶⁴ See also Chicago Truck Drivers Union (Signal Delivery Service, Inc.), 279 NLRB 904 (1986) (footnote 5 applied where union unlawfully sought judicial enforcement of an arbitral award which would have merged historically separate bargaining units).

(Emery Air Freight),⁶⁵ Emery subcontracted work to an employer whose employees were represented by the Chicago Truck Drivers Union (CTDU). Emery subsequently canceled the contract and entered into a new agreement with another subcontractor whose employees the CTDU did not represent. Emery's own employees -- who did not engage in bargaining unit work -- were represented by respondent union Teamsters Local 705. The Teamsters threatened Emery with retaliation if the new subcontractor did not have a contract with the Teamsters or the CTDU. The Teamsters then struck and picketed the employer and also filed a grievance against Emery claiming a violation of the Teamsters' contractual subcontracting clause. The arbitral board upheld the grievance in the Teamster's favor. Concluding that under Bill Johnson's the Board is bound to the arbitrator's finding, the ALJ held that the filing of the grievance did not violate Section 8(b)(4)(ii)(B) because it could not be concluded that the grievance lacked a reasonable basis in law and fact.

The Board reversed, refused to apply a Bill Johnson's analysis, and applied footnote 5 because, "the Respondent's grievance against Emery had an unlawful objective."⁶⁶ This holding was based upon the conclusion that the work was not fairly claimable as unit work.

In Teamsters Local 25 (Boston Deliveries, Inc.),⁶⁷ Sears subcontracted work to Boston Deliveries, then canceled the subcontract and decided to do the work in-house. The respondent union representing employees of Boston Deliveries filed a grievance against Boston Deliveries seeking pay-in-lieu of the lost work. The union struck and picketed Boston Deliveries and also sought enforcement of the resulting arbitral award in its favor. The Board affirmed the ALJD which held that the union violated Section 8(b)(4)(ii)(B) by filing the grievance and lawsuit for the purpose of forcing Boston Deliveries -- a neutral employer -- to use its influence on Sears -- the primary employer -- in order to obtain work for unit employees. The Board also affirmed the

⁶⁵ 278 NLRB 1303, 1304-05 (1986), remanded in relevant part, 820 F.2d 448 (D.C. Cir. 1987).

⁶⁶ Emery, 278 NLRB at 1304.

⁶⁷ 282 NLRB 910, 913-914 (1987), enfd. 831 F.2d 1149 (1st Cir. 1987).

ALJ's conclusion that footnote 5 precludes a Bill Johnson's analysis in this case since the union filed the grievance and lawsuit with an unlawful cease doing business object.⁶⁸

D. Long Elevator violation

In Long Elevator,⁶⁹ the respondent union filed a grievance on behalf of an employee who was disciplined for refusing to work behind a lawfully erected reserve gate. The Board concluded that the union's filing of this grievance effectively transformed a facially valid no-strike clause into an unlawful hot cargo provision. The Board reasoned that although, "the provision may be entirely susceptible of a lawful meaning ... given the theory of the Respondent's grievance, the Respondent is seeking to enforce an unlawful provision."⁷⁰ Thus, the theory of the union's grievance sought a construction of the no-strike clause that would require the primary employer to acquiesce in any work stoppage by its employees in support of the union's dispute with a neutral employer, a "de facto" hot cargo provision. Accordingly, the Board applied footnote 5 and held that by filing the grievance the union coerced the employer into entering into a hot cargo clause in violation of Section 8(b)(4)(ii)(A).

V. Bill Johnson's does not bar the instant 8(e) proceedings.

In the instant case, the Unions' suit lacked a reasonable basis in law in that Indeck, which was not in construction industry and whose agreement with the Unions was not reached in the context of a bargaining relationship, was never privileged to enter into the project agreement or an agreement that the construction be all-union. Since the basis for the suit is an unlawful 8(e) agreement, which under that Section is "unenforceable and void," it can have

⁶⁸ Boston Deliveries, 282 NLRB 913-14. The ALJ relied in part on the Board's decision in Emery. The Court of Appeals for the 1st Circuit used a Bill Johnson's, rather than a footnote 5, analysis in enforcing the Board's holding. 831 F.2d at 1154.

⁶⁹ 289 NLRB 1095 (1988), *enfd.* 902 F.2d 1297 (8th Cir. 1990).

⁷⁰ 289 NLRB at 1095 n.2.

no reasonable basis. Thus, under the holdings of Marina Concrete, supra, and SC Pacific, supra, and possibly Nevins Realty, supra, it can be enjoined by the Board without regard to Bill Johnson's.

Even if Bill Johnson's is applicable, its two-prong test has been met. First, the suit has no reasonable basis. Secondly, its retaliatory motive is inferred from the filing of a baseless suit for substantial money damages. Additionally, the suit is for illegal objective of enforcing an unlawful 8(e) agreement and thus falls within the footnote 5 exception of Bill Johnson's. See Emery, Boston Deliveries and Long Elevator, supra.

In sum, the letter agreement, which was re-entered into within the 10(b) period by the filing of the lawsuit, is illegal on its face, the project agreement is unlawfully applied as to Indeck, and Bill Johnson's does not preclude the Board from enjoining the suit because it is inapplicable, because it is not reasonably based and also because of the footnote 5 exception of Bill Johnson's.

VI. Noerr-Pennington: Sham Litigation

In order to establish that the Unions' lawsuit is baseless, the General Counsel need not establish that the Unions engaged in "sham" litigation pursuant to the Noerr-Pennington line of cases. In the antitrust field, the Supreme Court has stated that regardless of a person's anticompetitive motive or lack of success when he petitions the government for an anticompetitive object, a lawsuit before the government does not constitute an antitrust violation unless it is a "sham," i.e., an attempt to keep his competitor from being heard by the government.⁷¹ However, the Supreme Court has also indicated that the "sham" Noerr-Pennington exception need not be construed so narrowly. In California Motor Transport Co. v. Trucking Unlimited,⁷² the Court considered it to be, "well settled

⁷¹ See Eastern Railroad Presidents' Conference v. Noerr Motor Freight, 365 U.S. 127, 135, 139, 144 (1961); United Mine Workers v. Pennington, 381 U.S. 657, 670 (1965); City of Columbia v. Omni Outdoor Advertising, Inc., 111 S.Ct. 1344, 1355, 59 USLW 4259 (April 2, 1991). Accord: Oregon Natural Resources Council v. MOHLA, 944 F.2d 531, 533-535 (9th Cir. 1991).

⁷² 404 U.S. 508, 514 (1972).

that First Amendment rights are not immunized from regulation when they are used as an integral part of conduct which violates a valid statute. (Citation omitted.)" The Court went on to state that a carrier's, "purpose to eliminate an applicant as a competitor by denying him free and meaningful access to the agencies and courts may be implicit" in the exercise of the carrier's right of access to agencies and courts to defeat applications of its competitors, but that, "First Amendment rights may not be used as the means or the pretext for achieving 'substantive evils' (citation omitted) which the legislature has the power to control."⁷³

However, even assuming that the Noerr-Pennington "sham" exception is narrowly construed in the antitrust field, we believe that Bill Johnson's strikes a different accommodation between First Amendment considerations and the NLRA. In Bill Johnson's, the Supreme Court described California Motor Transport v. Trucking Unlimited, *supra*, a Noerr-Pennington "sham" exception case, and stated: "[w]e should be sensitive to these First Amendment values in construing the NLRA in the present context," and that, "we should follow a similar course under the NLRA."⁷⁴ The Court then transferred the antitrust sham rationale into the NLRA as a lawsuit that is baseless and has a retaliatory motive.⁷⁵ Thus, unlike the arguably narrow Noerr-Pennington sham exception, which essentially is limited to lawsuits constituting an abuse of process, lawsuits which lack a "reasonable basis" can be condemned as unfair labor practices because "baseless litigation is not immunized by the First Amendment right to petition."⁷⁶ In Bill Johnson's itself, the Supreme Court stated:

The first amendment interests involved in private litigation - compensation for violated rights and interests, the psychological benefits of vindication, public airing of disputed facts - are not advanced when the litigation is based on

⁷³ Id. at 515.

⁷⁴ 461 U.S. at 741, 744.

⁷⁵ 461 U.S. at 744.

⁷⁶ Id. at 743.

intentional falsehoods or on knowingly frivolous claims. Furthermore, since sham litigation by definition does not involve a bona fide grievance, it does not come within the first amendment right to petition. (Footnote omitted.)⁷⁷

Moreover, as to whether a lawsuit lacks merit, in Bill Johnson's on remand, the Board noted the Supreme Court's admonition that deference should be given to the state court judgment unless the plaintiff can provide a cogent explanation for refusing to do so.⁷⁸ The Board has consistently applied this principle without regard to the nature of the state court judgment adverse to the plaintiff.⁷⁹ Thus, when a lawsuit is no longer pending and the plaintiff did not prevail, the Board does not address whether the lawsuit lacked a reasonable basis in fact and law, but proceeds to determine whether the lawsuit was filed with a retaliatory motive.⁸⁰ Accordingly, although Bill Johnson's principles were based on the same First Amendment considerations underlying the Noerr-Pennington line of cases, Bill Johnson's counterpart to the Noerr-Pennington "sham" exception, i.e. lack of reasonable basis, clearly allows less First Amendment insulation from violating the NLRA, as opposed to violating the antitrust laws, when plaintiffs do not prevail on the merits of their claims.

VII. [*FOIA Exemption 5*]

⁷⁷ Ibid, at n.10, quoting Balmer, Sham Litigation and the Antitrust Laws, 29 Buffalo L. Rev. 39, 60 (1980); Accord: Clipper Express v. Rocky Mountain Motor Tariff Bureau, Inc., 674 F.2d 1252, 1265-1266 (9th Cir. 1982); Fischel, Antitrust Liability for Attempts to Influence Government Action: The Basis and Limits of the Noerr-Pennington Doctrine, 45 U. Chi. L. Rev. 80, 101 (1977).

⁷⁸ Bill Johnson's Restaurants, 290 NLRB 29, 31 (1988), citing 461 U.S. at 749 n.15.

⁷⁹ See Summitville Tiles, supra, 300 NLRB at 65-66, and H.W. Barss, 296 NLRB 1286, 1287 (1989), citing Phoenix Newspapers, supra (summary judgment); Machinists Lodge 91 (United Technologies), 298 NLRB 325, 326 (1990) (dismissal on the merits); Vanguard Tours, supra, 300 NLRB at 254-256 (withdrawal of lawsuit).

⁸⁰ Summitville Tiles, supra, at 66.

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R.E.A.

⁸¹ [FOIA Exemption 5

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