

Sheet Metal Workers' International Association, Local 27, AFL-CIO and E.P. Donnelly, Inc. and United Brotherhood of Carpenters and Joiners of America, Local Union No. 623. Case 04-CD-001188

December 8, 2011

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS BECKER
AND HAYES

On August 18, 2008, Administrative Law Judge Joel P. Biblowitz issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed exceptions and a supporting brief, and a brief in answer to the Respondent's exceptions.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.¹

Facts

E.P. Donnelly, Inc. (Donnelly), a New Jersey contractor, installs prefabricated roofs. It had a collective-bargaining agreement with the United Brotherhood of Carpenters and Joiners of America, Local Union No. 623 (Local 623).

Sambe Construction Company, Inc. (Sambe) was the general contractor for the Egg Harbor Township Community Center in New Jersey, a public works project covered by a Project Labor Agreement (PLA) authorized by New Jersey State law. Sambe and the Sheet Metal Workers' International Association, Local 27, AFL-CIO (Respondent or Local 27) were signatories to the PLA.² In March 2007, Sambe subcontracted roofing installation work on the Egg Harbor Township Community Center project to Donnelly, and Donnelly signed a Letter of Assent agreeing to be bound by the PLA.

In April 2007, Local 27 claimed the roofing work under the PLA, but Donnelly assigned the work to its Carpenters-represented employees. Local 27 invoked the

¹ In accordance with our decision in *Kentucky River Medical Center*, 356 NLRB 6 (2010), we modify the judge's remedy by requiring that backpay and other monetary awards shall be paid with interest compounded on a daily basis. We shall modify the judge's recommended Order to conform to the violations found and to provide for the posting of the notice in accord with *J. Picini Flooring*, 356 NLRB 11 (2010). For the reasons stated in his dissenting opinion in *J. Picini Flooring*, Member Hayes would not require electronic distribution of the notice.

² The PLA included a "supremacy" provision stating that it "supersedes any . . . other collective bargaining agreement of any type which would otherwise apply to this Project."

PLA's procedure for resolving jurisdictional disputes. Arbitrator Stanley Aiges found that Sambe and Donnelly violated the PLA "by assigning the disputed work to members of the Carpenters Union, Local 623" and directed that the work be reassigned to employees represented by Local 27. (Aiges Award).³

10(k) Proceedings and Determination

In late April 2007, Local 623 threatened to picket if the roofing work on the Egg Harbor Township Community Center project was reassigned, and Donnelly filed 8(b)(4)(ii)(D) charges. In the subsequent 10(k) proceeding, Local 27 contended that the Board could not award the disputed work because the PLA was authorized by New Jersey statute, which is not subject to preemption under the Supreme Court's decision in *Building & Construction Trades Council v. Associated Builders & Contractors of Mass./R.I., Inc.*, 507 U.S. 218 (1993) (*Boston Harbor*) (holding that the Act does not preempt a state authority acting as owner of a construction project from requiring that contractors abide by a PLA).

On December 31, 2007, the Board issued its 10(k) determination, 351 NLRB 1417, awarding the work to employees represented by Local 623 based on employer preference, current assignment and past practice, and economy and efficiency of operations. The Board disagreed that an award of the work to Local 623 "would effectively and impermissibly preempt New Jersey law":

An award of the disputed work to Local 623 would not prevent Egg Harbor Township from exercising its authority under state law to negotiate and execute project labor agreements, nor would it invalidate the PLA. *The Employer would continue to be bound under the terms of the PLA, and the parties to the PLA would retain any rights they may have under state law to bring a suit for damages against the Employer for any breach of the PLA.* Id. at 1419. [Emphasis added.]

Local 27's Complaints in Federal Court and Donnelly's Unfair Labor Practice Charges

In June 2007, Local 27 filed a complaint, and in August filed a first amended complaint, against Donnelly, Sambe, and Local 623 in Federal district court under Section 301 of the Act. The first amended complaint sought enforcement of the Aiges Award and the LJOB

³ Local 27 also filed a grievance under its collective-bargaining agreement against Sambe and Donnelly with the Local Joint Adjustment Board (LJOB) over the work assignment. The LJOB found that Sambe and Donnelly had violated the agreement and the PLA, failed to comply with the Aiges Award, and were liable for lost wages and benefits.

award, reassignment of the work to Local 27-represented employees, and damages for breach of contract.

Donnelly filed new 8(b)(4)(ii)(D) charges with the Board in January 2008, claiming that Local 27's "refusal to comply with the Board's 10(k) award by continued maintenance of its district court action" violated Section 8(b)(4)(ii)(D). The Region issued its complaint on April 16, 2008.

In June 2008, the Respondent filed a second amended complaint against Sambe and Donnelly. In it, the Respondent no longer sought reassignment of the Egg Harbor work. Count one of the second amended complaint requested a declaratory judgment that the Aiges Award is valid and binding on Sambe and Donnelly ". . . to the extent that Arbitrator Aiges held that Donnelly and Sambe violated said PLA." Count two requested damages for breach of the PLA, and count three requested damages for violation of the New Jersey statutes.

The Judge's Decision

The administrative law judge found that by maintaining its Section 301 lawsuit against Donnelly and Sambe after the Board had issued its 10(k) determination, the Respondent violated Section 8(b)(4)(ii)(D) of the Act.

For the reasons discussed below, we agree with the judge that the Respondent unlawfully maintained its lawsuit against Donnelly. Contrary to the judge, however, we do not find that the Respondent unlawfully maintained its lawsuit against Sambe.

Discussion

The Respondent and the General Counsel except to the judge's finding that the Respondent unlawfully maintained the lawsuit against Sambe. They argue that the Respondent was denied due process because the complaint did not allege that the lawsuit against Sambe violated the Act. They further contend that, under Board precedent, because Sambe did not assign the disputed work directly to employees, an award against Sambe would not be inconsistent with the Board's 10(k) award. See, e.g., *Carpenters Local 33 (AGC of Massachusetts)*, 289 NLRB 1482, 1484 (1988) (finding grievance seeking damages from general contractor for breaching subcontracting clause did not undermine 10(k) award of work to subcontractor's employees). We agree with these arguments, and reverse the judge's finding that the Respondent violated Section 8(b)(4)(D) by maintaining its suit against Sambe following the Board's 10(k) determination.

However, we affirm the judge's conclusion, based on longstanding Board and court precedent, that Local 27 violated Section 8(b)(4)(ii)(D) by maintaining its lawsuit against Donnelly after the Board's 10(k) award issued in

December 2007. In doing so, we reject the Respondent's contention that the judge erred by failing to consider that it had a reasonable basis for filing and maintaining its lawsuit under *Bill Johnson's Restaurant v. NLRB*, 461 U.S. 731 (1983).

As a general rule under *Bill Johnson's*, an ongoing lawsuit can be enjoined as an unfair labor practice only if it is filed with a retaliatory motive and if it lacks a reasonable basis in fact or law. But the Court noted an exception to the general rule in *Bill Johnson's*, finding the rule inapplicable to a lawsuit "that has an objective that is illegal under federal law." *Bill Johnson's*, 461 U.S. at 747 fn. 5. Thus, 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*." *Teamsters Local 776 (Rite Aid)*, 305 NLRB 832, 835 (1991), enf. 973 F.2d 230 (3d Cir. 1992), cert. denied 507 U.S. 959 (1993).⁴

It is well established that a union's lawsuit to obtain work awarded by the Board under Section 10(k) to a different group of employees, or monetary damages in lieu of the work, has an illegal objective for purposes of *Bill Johnson's* footnote 5 and violates Section 8(b)(4)(ii)(D).⁵ Accordingly, we affirm the judge's finding that, following the Board's 10(k) award, Local 27's maintenance of its 301 lawsuit was incompatible with the Board's award and, therefore, had an objective that was illegal under Federal law.

The Respondent attempts to distinguish the clear case precedent by asserting that the second amended complaint's count two seeks damages only for breach of the PLA, not pay-in-lieu of assignment of the work. But this

⁴ In *BE&K Construction Co. v. NLRB*, 536 U.S. 516 (2002), the Supreme Court held that the Board may not find that maintenance of a completed, unsuccessful lawsuit constituted an unfair labor practice where the suit was objectively reasonable and filed with the purpose of receiving the relief requested. On remand from the Supreme Court, the Board in *BE&K Construction Co.*, 351 NLRB 451, 456 (2007), held that "the filing and maintenance of a reasonably based lawsuit does not violate the Act, regardless of whether the lawsuit is ongoing or is completed, and regardless of the motive for initiating the lawsuit."

The Board had held that the Supreme Court's ruling in *BE&K* did not affect the footnote 5 exceptions in *Bill Johnson's*, supra, for lawsuits with an illegal objective. *Allied Trades Council (Duane Reade, Inc.)*, 342 NLRB 1010, 1013 fn. 4 (2004). See also *Small v. Plasterers Local 200*, 611 F.3d 483 (9th Cir. 2010).

⁵ *Small v. Plasterers Local 200*, supra at 493; *United Slate, Tile & Composition Roofers Local 30 v. NLRB*, 1 F.3d 1419, 1426 (3d Cir. 1993) ("[T]he pursuit of a . . . breach of contract suit [for pay-in-lieu] that directly conflicts with a section 10(k) determination has an illegal objective and is enjoined as an unfair labor practice under section 8(b)(4)(ii)(D)."), enf. *Roofers Local 30 (Gundle Construction)*, 307 NLRB 1429 (1992). See also cases cited in *Roofers Local 30*, supra at 1430.

is a distinction without a difference. The basis of the damages in count two is that the arbitrator “clearly and unequivocally determined that . . . Donnelly violated the PLA” and, as a result of that violation, Local 27 and its members were “damaged. . . as they lost wages and benefits otherwise due.” The arbitrator’s rationale for finding the violation was Donnelly’s having assigned the work to employees represented by the Carpenters in accordance with the Board’s 10(k) award. The judge correctly concluded that the effect of count two’s request for damages for breach of the PLA is the same as the first amended complaint’s request that Donnelly pay damages for assigning the work to employees represented by Local 623.

Similarly, count three, though couched in terms of a State-law violation, is founded on Donnelly’s assignment of the disputed work in accordance with the Board’s 10(k) award. The Respondent’s claim that Donnelly violated State law and owed damages to the Respondent directly conflicts with the Board’s 10(k) award, and is therefore unlawful.⁶

The judge saw “nothing improper” in the request in count one of the second amended complaint for declaratory relief validating the Aiges Award’s finding that Donnelly violated the PLA. We disagree. If granted, a declaration validating the finding that Donnelly breached the PLA by assigning the work to the Carpenters-represented employees would also directly conflict with the 10(k) award. Accordingly, we will modify the remedy to require that the Respondent withdraw its lawsuit against Donnelly in its entirety.

The Respondent’s other principal argument is that, despite longstanding 8(b)(4)(ii)(D) precedent, the Board’s 10(k) award expressly permitted Local 27 to continue its lawsuit seeking damages from Donnelly for breach of the PLA. The Respondent’s argument focuses on a single sentence from the 10(k) award stating that Donnelly “would continue to be bound under the terms of the PLA, and the parties to the PLA would retain any rights they may have under state law to bring a suit for damages against the Employer for any breach of the PLA.” 351 NLRB at 1420. The Respondent asserts that its interpretation was confirmed by the district court’s decision denying the Region’s request for an injunction pendente

⁶ We note that the district court denied the Respondent summary judgment on this cause of action, finding that the New Jersey statute authorizing PLAs did not create a private right of action. *Sheet Metal Workers’ Local 27 v. E.P. Donnelly, Inc. & Sambe Construction Co.*, 673 F.Supp.2d 313, 331 (D.N.J. 2009).

lite. *Moore-Duncan v. Sheet Metal Workers Local 27*, 624 F.Supp.2d 367 (D.N.J. 2008).⁷

The court concluded that the Respondent’s second amended complaint did not conflict with the Board’s 10(k) determination because it sought only damages for breach of the PLA.⁸ It rejected as implausible the idea that the Board was addressing only future, unrelated suits that might arise under the PLA, and not Local 27’s existing lawsuit, given the Board’s “sweeping assurance that parties would retain ‘any rights’ under the PLA to sue for ‘any breach.’” If the Board intended to exclude the ongoing litigation from its broadly worded assurance, it would have done so clearly.” 624 F.Supp.2d at 374. “In short, the Board’s 10(k) decision specifically held the [the Respondent’s] Action to be compatible with it.” *Id.* at 374–75.⁹ With all due respect to the court, we believe that it misconstrued (as did the Respondent) the meaning of the Board’s language in the 10(k) determination.

Initially, if the Board had intended to overrule decades of well-established precedent in its 10(k) decision and permit a union to pursue a contractual claim conflicting with the Board’s award, it would have done so explicitly. *Cf. Longshoremen ILWU Local 7 (Georgia-Pacific)*, 291 NLRB 89, 92–93 (1988), review denied 892 F.2d 130 (D.C. Cir. 1989) (explicitly reversing earlier precedent

⁷ See also *Sheet Metal Workers Local 27 v. E.P. Donnelly, Inc. and Sambe Construction Co.*, 673 F.Supp.2d at 331 (reaffirming the findings in 624 F.Supp.2d and granting Local 27 summary judgment on breach of contract claim).

⁸ Significantly, the court ruled only on the question of whether to grant the Board’s request for temporary injunctive relief and not on the merits of whether the Respondent violated Sec. 8(b)(4)(D). Accordingly, its statements regarding the merits of the allegation are not binding on the Board. See *Roofers Local 30*, supra at 1431 fn. 7. Likewise, the court’s reaffirmance of those statements in Local 27’s breach of contract suit, *Sheet Metal Workers Local 27 v. E.P. Donnelly, Inc. and Sambe Construction Co.*, supra, is not binding on the Board and is contrary to clear Third Circuit precedent. *United State, Tile & Composition Roofers Local 30 v. NLRB*, supra, 1 F.3d at 1429 (holding lawsuit to recover damages for work awarded to employees represented by another union in a 10(k) proceeding violates Sec. (b)(4)(ii)(D)).

⁹ The Respondent and the court treat the PLA as authoritative because of its “supremacy” provision. But a PLA is a “prehire” collective bargaining agreement.” *Boston Harbor*, 507 U.S. at 230. In its 10(k) decision, the Board did not give the PLA special deference because of its “supremacy” provision, contrary to the Respondent’s contention. Rather, the Board noted that “[e]very contract implies an expectation of the parties that its terms will be honored, notwithstanding the existence of any conflicting agreements entered into by any of the parties.” 351 NLRB at 1420. Accordingly, consistent with prior precedent, the Board considered the PLA on the same basis it considered the Donnelly-Carpenters’ collective-bargaining agreement and concluded that “the factor of collective-bargaining agreements does not favor an award to employees represented by either union.” *Id.* See *Operating Engineers Local 318 (Kenneth E. Foeste Masonry)*, 322 NLRB 709, 712 (1996) (neither project agreement nor other union’s labor agreement favored award of work to employees represented by either union; work awarded based on other factors).

and announcing it would no longer find union's grievances before issuance of 10(k) award to be coercive within meaning of Section 8(b)(4)(ii)(D)).¹⁰

Further, the Respondent's interpretation of the Board's language fails to consider it in the context of the Respondent's asserted defense in the 10(k) case. The Board's statement about the PLA was part of its response to Local 27's assertion that the Board "cannot make an affirmative award of the disputed work . . . because the PLA is authorized by a New Jersey statute . . . which (according to Local 27) is not subject to NLRA preemption." 351 NLRB at 1419. The Board rejected the assertion that it lacked jurisdiction as "without merit," because the award of the disputed work would neither preclude Egg Harbor Township from negotiating and executing project labor agreements pursuant to the state statute nor invalidate the PLA involved here. *Id.* at 1419–1420.

The Board continued its response by stating, "the parties to the PLA would retain any rights they may have under state law to bring a suit for damages against the Employer for any breach of the PLA." *Id.* at 1420. In context, the Board merely pointed out that the exercise of its statutory authority to resolve this particular jurisdictional dispute over certain roofing work would neither amount to a general preemption of the New Jersey statute nor generally nullify the parties' rights and obligations under the PLA.

The remainder of the Board's analysis confirms this interpretation. Immediately after the sentence relied on by the Respondent, the Board emphasized that even if its exercise of jurisdiction put it "at cross purposes with the New Jersey statute" authorizing the PLA, "it does not follow that the Board is precluded from exercising its statutory authority," or that "the Board has no jurisdiction over this dispute. . . . Such a suggestion is contrary to the Constitution's Supremacy Clause." *Id.*

By invoking the Constitution's Supremacy Clause, the Board affirmed the primacy of its 10(k) determination in this case over any conflicting contractual claims or arbitral awards concerning the disputed work. Simply put, it is unreasonable to interpret the Board as having sanctioned the Respondent's continuing pursuit of a contractual claim that would "totally frustrate" "the very purpose of Section 10(k)—to authorize the Board to resolve

the jurisdictional dispute." *Longshoremen's & Warehousemen's Union v. NLRB*, 884 F.2d at 1414.

Moreover, the legality of Local 27's lawsuit was not at issue in the 10(k) proceeding. As noted, Board precedent is clear that, before the Board issued its 10(k) award, Local 27's lawsuit did not have an illegal objective. See *Longshoremen ILWU Local 7 (Georgia Pacific)*, 291 NLRB at 92–93 (union's grievances before issuance of 10(k) award not coercive under Section 8(b)(4)(ii)(D)). Once the Board issues a 10(k) award, a respondent has a reasonable period to refrain from pursuing its conflicting grievance or lawsuit. *Council of Laborers (W. B. Skinner, Inc.)*, 292 NLRB 1035, 1035 fn. 6 (1989). Local 27's violation of Section 8(b)(4)(ii)(D) began only when it continued its lawsuit after the Board awarded the work to the Carpenters-represented employees. Because a 10(k) award takes precedence over contrary claims and determinations, the Board would have had no reason to even consider Local 27's existing lawsuit in connection with its 10(k) determination.

In sum, we agree with the judge that by maintaining the suit against Donnelly after the Board made its 10(k) determination, the Respondent sought to undermine the Board's 10(k) award and to coerce the Employer into reassigning to members of Local 27 the work that the Board found had been properly assigned to employees represented by Local 623. Accordingly, the Respondent's conduct in maintaining the suit against Donnelly after the 10(k) determination issued violated Section 8(b)(4)(ii)(D) of the Act.

ORDER

The Respondent, Sheet Metal Workers' International Association, Local 27, AFL–CIO, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Threatening, coercing or restraining E.P. Donnelly, Inc., or any person engaged in commerce, or in an industry affecting commerce, where an object thereof is to force or require Donnelly to assign the work of installing prefabricated standing seam metal roofing, soffit, fascia and related trim on the Community Center Project in Egg Harbor Township, New Jersey, to employees who are members of, or are represented by, Local 27, rather than to employees who are members of, or represented by, Local 623.

(b) Maintaining after December 31, 2007 a lawsuit entitled *Sheet Metal Workers Local 27 v. E.P. Donnelly, Inc. et al.* Civil No. 07-3023 (RMB/JS) in the United States District Court for the District of New Jersey, or any lawsuit that it maintains, that requests that the Employer comply with the terms of the LJOB or the arbitrator's award herein, or requests monetary damages for its

¹⁰ Indeed, the courts have found that the Board "acts unreasonably if it departs from established policy without giving a reasoned explanation for the change." *Chelsea Industries v. NLRB*, 285 F.3d 1073, 1075–1076 (D.C. Cir. 2002); *Bro-Tech Corp. v. NLRB*, 105 F.3d 890, 897 (3d Cir. 1997) ("The Board may not, by *ipse dixit*, simply issue new rules (or "interpret" its old ones) without explaining the reason for their issuance (or reinterpretation).") (citation omitted).

failure to assign the disputed work to employees who are members of, or are represented by, the Respondent or the Sheet Metal Workers' International Association.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Withdraw the above-described lawsuit. Within 7 days, notify the Employer of its action.

(b) Reimburse payments, if any, that were made by E.P. Donnelly to the Respondent pursuant to the award of the LJAB or the arbitrator, following the Board's Section 10(k) Determination issued on December 31, 2007, with interest. Interest is to be computed in the manner described in *New Horizons*, 283 NLRB 1173 (1987), and as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

(c) Within 14 days after service by the Region, post at its union office and hiring hall in Farmingdale, New York, as well as any other offices it maintains, copies of the attached notice marked "Appendix."¹¹ Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its members by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Within 21 days after service by the Region, file with the Regional Director for Region 4 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

¹¹ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain on your behalf with your employer
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT maintain a lawsuit seeking to require E.P. Donnelly, Inc. to pay monetary damages to us, with an object of forcing it to assign certain work to individuals who are members of, or are represented by us, contrary to a ruling by the National Labor Relations Board at 351 NLRB 1417 (2007), in which the Board awarded the work to employees who were represented by United Brotherhood of Carpenters and Joiners of America, Local Union No. 623.

WE WILL withdraw our lawsuit against Donnelly.

WE WILL reimburse Donnelly for any payments, with interest as prescribed in the Board's Order, it may have made to us for the above described work following the issuance of the Board's 10(k) Determination.

SHEET METAL WORKERS' INTERNATIONAL
ASSOCIATION, LOCAL 27, AFL-CIO

Henry Protas, Esq., for the General Counsel.

Robert O'Brien, Esq. (O'Brien, Belland & Bushinsky, LLC), for the Respondent.

Louis Rosner, Esq., for the Employer.

DECISION

STATEMENT OF THE CASE

JOEL P. BIBLOWITZ, Administrative Law Judge. This case was heard by me on May 29, 2008, in Philadelphia, Pennsylvania. The complaint herein, which issued on April 16, 2008, and was based upon an unfair labor practice charge that was filed on January 11, 2008, by E. P. Donnelly (the Employer), alleges that Sheet Metal Workers' International Association, Local 27, AFL-CIO (Local 27 or the Respondent) violated Section 8(b)(4)(ii)(D) of the Act by filing and maintaining a lawsuit in order to obtain certain work, even though the Board had issued a 10(k) decision and determination of dispute awarding of the work in question to United Brotherhood of Carpenters and Joiners of America, Local Union No. 623 (Local 623), rather than to Local 27.

FINDINGS OF FACT

I. JURISDICTION

Respondent admits, and I find, that the Employer has been an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. LABOR ORGANIZATION STATUS

Respondent admits, and I find, that it and Local 623 are each labor organizations within the meaning of Section 2(5) of the Act.

III. THE FACTS

The facts herein are straightforward and uncontroverted. The Employer, a contractor in the construction industry, specializes in the installation of prefabricated standing seam metal roofs and related jobs mostly in south and central New Jersey. It has maintained a collective-bargaining relationship with Local 623 since about 1999, and it is a signatory to the Carpenters' international agreement, which binds it to the Local 623 agreements when working within its jurisdiction. Further, it employs a "core group" of seven or eight carpenter-represented employees and supplements this group by hiring additional carpenters, as needed, through the applicable local carpenter agreement.

On March 30, 2007,¹ the Employer obtained a subcontract from Sambe Construction Company, Inc. (Sambe), to install prefabricated standing seam metal roofing and related work at the Egg Harbor Township Community Center project (the Project), which is covered by a project labor agreement (PLA). The signatories to the PLA are the Egg Harbor Township, Sambe, the South Jersey Building and Construction Trades Council, and certain local unions, including Local 27; Local 623 was not a signatory to the PLA. Upon entering into the subcontract with Sambe, the Employer signed a letter of assent agreeing to be bound by the PLA. Pertinent portions of the PLA are:

This Agreement, together with the local Collective Bargaining Agreements appended hereto . . . represents the complete understanding of all signatories and supersedes any national agreement, local agreement or other collective bargaining agreement of any type which would otherwise apply to this Project. . . . [Art. 2, sec. 4.]

Where there is a conflict, the terms and conditions of this Project Agreement shall supersede and override terms and conditions of any and all other national, area, or local collective bargaining agreements. [Art. 3, sec. 1.]

The Contractors recognize the signatory Unions as the sole and exclusive bargaining representative of all craft employees who are performing on-site Project work within the scope of this Agreement. . . . [Art. 4, sec. 1.]

The PLA also provides for a procedure for resolving jurisdictional disputes, and appended to the PLA is a collective-bargaining agreement between Local 27 and Sambe, effective June 1, 2006, through May 31, 2009, encompassing the disputed work in question.

On April 4, at a prejob meeting provided for in the PLA, Sambe assigned the disputed work to the Employer, and Local 27 claimed the disputed work. On April 13, the Employer stated that it was assigning the work to employees represented by Local 623. On April 16, Local 27 invoked the PLA's provisions for settlement of jurisdictional disputes, resulting in a

¹ Unless indicated otherwise, all dates referred to herein relate to the year 2007.

hearing before Arbitrator Stanley Aiges on June 5; the Employer, Sambe and Local 27 participated in this hearing, Local 623 did not. On July 2, Aiges issued his decision awarding the disputed work to Local 27. The award states, *inter alia*: "For the reasons set forth above, I find that based on area practice within the jurisdiction of the South Jersey BCTC, Sambe/Donnelly violated the Egg Harbor Community Center PLA by assigning the disputed work to members of the Carpenters Union, Local 623. They are directed to reassign that work to members of Sheet Metal Workers Local 27." On June 26, Local 27 filed a grievance against Sambe and the Employer with the Local Joint Adjustment Board (LJAB) concerning the assignment of work at the Project. The LJAB met on July 16 to consider the grievance; although Sambe and the Employer were invited to attend, neither one did. On July 23, the LJAB issued its decision finding that Sambe and the Employer, by assigning the disputed work at the Project to Local 623 members rather than to Local 27 members, were in violation of the collective-bargaining agreement, as well as the PLA and, additionally found that they failed to comply with the award issued by Arbitrator Aiges on July 2. The LJAB award concludes:

Assuming the aforementioned work is not reassigned to Sheet Metal Workers from Local #27, the LJAB finds Sambe Construction Company, Inc. and E. P. Donnelly, Inc. jointly, severally and in the alternative responsible to pay fair and justifiable compensation to Sheet Metal Workers Local Union #27 for lost wages and benefits in the amount of \$428,319.26, as determined by averaging the shop and field hours required to complete the project, as estimated by Local 27 contractors, and multiplying those hours by SMW Local Union #27's hourly rate of \$67.42.

On April 30, Local 623 informed the Employer that the assignment of this work to another trade would be considered a breach of its contract and would result in a grievance, picketing or any other means available to preserve the work for its members. On May 2, the Employer filed 8(b)(4)(D) charges against both Local 623 and Local 27. The Board dismissed the charges against Local 27 and a 10(k) proceeding ensued on July 2, 3, and 5. On December 31, the Board issued its decision and determination of dispute at 351 NLRB 1417 (2007). Based upon employer preference, current assignment and past practice, and economy and efficiency of operations, the Board awarded the work to employees represented by Local 623.

On June 27 and August 3, Local 27 filed a complaint and a first amended complaint under Section 301 of the Act against the Employer, Local 623, Sambe and the New Jersey Regional Council of Carpenters. In the first amended complaint, Local 27 states, *inter alia*, that the Employer and Sambe have refused to abide by the award issued by Arbitrator Aiges, which award is legal and binding upon them as parties to the PLA of the Project, and that this refusal has caused damage to Local 27 and its membership, and that the Employer and Sambe have also refused to abide by the award issued by the LJAB, which also continues to damage Local 27 and its members. As a remedy, Local 27 requested the reassignment of the work to employees that it represents, monetary relief for the damages caused by the Employer and Sambe's breach of contract in accordance with

the LJOB award of July 23, permanent injunctive relief compelling them to comply with the PLA and Aiges' arbitration award, and permanent injunctive relief enjoining them from contracting work at the Project to any entity not a signatory to the PLA.

On March 27, 2008, Renee Marie Bumb, United States District Judge of the District Court for the District of New Jersey, issued an opinion wherein she denied the Plaintiff's motion for summary judgment, without prejudice, and granted the Respondents' motion to vacate the LJOB award that issued on July 23. On June 25, 2008, the Respondent filed its second amended complaint, amending its remedy request. In count one of this complaint, the Respondent requests that declaratory judgment be entered finding that the PLA is valid, legal, and binding on the Employer and Sambe for the Project, and that Aiges' arbitration award is also valid, legal, and binding on them "... to the extent that Arbitrator Aiges held that Donnelly and Sambe violated said PLA." Count two requests "monetary relief" and costs and attorney's fees for the damage caused by the Employer and Sambe's breach of the PLA, and count three requests damages for their breach of the New Jersey statutes. The important difference between this second amended complaint and the earlier complaints is that this latter complaint does not request compliance with, and damages pursuant to, the arbitration award and the LJOB award. Rather, this second amended complaint seeks "generic" monetary relief for the breach of the PLA and enforcement of the arbitration decision to the extent that the arbitrator found that the Employer and Sambe violated the PLA.

IV. ANALYSIS

The complaint before me alleges that Local 27 violated Section 8(b)(4)(D) of the Act by continuing to maintain this lawsuit in the United States District Court after the Board issued its 10(k) ruling on December 31, ordering that the work in question be assigned to employees who were represented by, or were members of, Local 623. As a defense, Local 27 points to certain Board language in its 10(k) determination in response to Local 27's contention that the Board "cannot make an affirmative award of the disputed work" because the PLA was authorized by New Jersey statute, which is not subject to preemption. In that regard, the Board stated:

Local 27 thus appears to suggest that a Board award of the work in dispute to employees represented by Local 623 would effectively and impermissibly preempt New Jersey law authorizing public entities such as Egg Harbor Township to negotiate project labor agreements. An award of the disputed work to Local 623 would not prevent Egg Harbor Township from exercising its authority under state law to negotiate and execute project labor agreements, nor would it invalidate the PLA. *The Employer would continue to be bound under the terms of the PLA, and the parties to the PLA would retain any rights they may have under state law to bring a suit for damages against the Employer for any breach of the PLA.* [Emphasis added.]

In addition to arguing that this language in the 10(k) determination permitted (in fact, encouraged) the Respondent to act as it

did, the Respondent has two additional defenses herein. That even without this language, its second amended complaint does not go over the line in seeking to abrogate or undermine the effect of the 10(k) determination, and that under *Bill Johnson's Restaurant v. NLRB*, 461 U.S. 731 (1983), and *BE&K Construction Co.*, 351 NLRB 451 (2007), the Board cannot find a violation enjoining its second amended complaint because its lawsuit was "reasonably based."

The law is clear (at least it was prior to December 31, when Board issued the 10(k) determination herein) that any post-award conduct (usually picketing, grievances, or a lawsuit) by the losing party in a 10(k) proceeding that undermines that determination is unlawful. In *Local 30 United Slate (Gundle Lining Construction Corp.)*, 307 NLRB 1429, 1430 (1992), the Board stated: "Such post-award conduct is properly prohibited under Section 8(b)(4)(D) because it directly undermines the 10(k) award, which under the congressional scheme, is supposed to provide a final resolution to the dispute over which group of employees are entitled to the work at issue." The court, at 1 F.3d 1419, 1426 (3d Cir. 1993), in enforcing, stated: "The pursuit of a section 301 breach of contract suit that directly conflicts with a section 10(k) determination has an illegal objective and is enjoined as an unfair labor practice under Section 8(b)(4)(ii)(D)." And in *Iron Workers Local 433 (Otis Elevator Co.)*, 309 NLRB 273, 274 (1992), the Board said, "... allowing the losing party in a 10(k) dispute to pursue payments for work that the Board awarded to employees other than those involved in the grievance necessarily subverts the Board's 10(k) award."

I find that all of the complaints filed in its Section 301 suit, including the second amended complaint, tend to undermine the Board's 10(k) determination herein. The original complaint and the first amended complaint clearly undermined the 10(k) determination by requesting the reassignment of the work that the Board awarded to Local 623, ordering that the parties comply with the arbitration award and requesting monetary relief in accordance with the LJOB award. While the second amended complaint is an improvement over the earlier complaint it still tends to undermine the Board's earlier determination. There is nothing improper in count one, which requests a finding that the PLA is valid and binding upon the Employer and Sambe and that the arbitration award, to the extent that it found that the Employer and Sambe violated the PLA, is also valid and binding on them. However, count two requests monetary relief for damages caused by the Employer and Sambe's breach of the PLA. Although, on its face, this appears to be less objectionable than the demands in the earlier complaints, the end result is the same as if the Respondent had requested that the Employer and Sambe pay damages in accordance with the LJOB award—that they would have to pay damages for assigning the work to Local 623 members, as the Board determined in its 10(k) determination, thereby undermining that ruling. I therefore find that *under normal circumstances*, by filing and maintaining its second amended complaint, the Respondent violated Section 8(b)(4)(D) of the Act. This is where the Respondent's principal defense comes in, i.e., the language contained on page 4 of the Board's determination.

Prior to deciding the merits of the dispute, the Board stated that awarding the work to Local 623 would not prevent the township from exercising its authority under state law to negotiate or execute agreements, nor would it invalidate the PLA. More relevant, and confusing, is the language that follows: "The employer would continue to be bound under the terms of the PLA, and the parties to the PLA would retain any rights they may have under state law to bring a suit for damages against the Employer for any breach of the PLA." The Respondent (correctly) points out that is all that it did herein, and therefore the complaint should be dismissed. I, reluctantly, disagree for two reasons. As stated by counsel for the General Counsel, in his brief, if the Board wanted to overrule such longstanding precedent, as the Respondent argues it meant to do, it would have specifically stated that it was doing so, but it did not do so. In addition, if the Board really meant to say what the Respondent alleges, it should be for the Board to so state rather than for me to make that determination and overrule longstanding precedent.

Finally, the Respondent defends that under *BE&K*, supra, there can be no finding of a violation herein, which would enjoin its lawsuit; I disagree. Initially, I find that because the second amended complaint, if successful, would undermine the Board's 10(k) determination, it was not "reasonably based," i.e., the Respondent must have been aware that it conflicted with that determination and would therefore be subject to challenge. In *Northern California District Council of Laborers (W. B. Skinner, Inc.)*, 292 NLRB 1035 (1989), the Board stated:

The Board issued a decision under Section 10(k) of the Act awarding certain disputed work to employees of W. B. Skinner who were represented by IBEW Local 202, rather than to employees who were represented by Respondents. That decision put the Respondents, who fully participated in the 10(k) hearing, on notice that there was no longer any reasonable basis for continuing to prosecute the lawsuit that they filed prior to the 10(k) award to confirm a contrary arbitral award.

See also *Longshoremens ILWU Local 32 (Weyerhaeuser)*, 271 NLRB 759 (1984), and *ILWU Local 13 (Sea-Land)*, 290 NLRB 616, 617 (1988). In addition, as counsel for the General Counsel states in his brief, *BE&K*, supra, did not affect footnote 5 in the Supreme Court's decision in *Bill Johnson's*, supra, which

states: "We are not dealing with . . . a suit that has an objective that is illegal under [F]ederal law. Petitioner concedes that the Board may enjoin these latter types of suits." As I have found that the Respondent's suits herein violate the Act because they undermine the Board's 10(k) determination, they can be enjoined.

Based upon all of the above, I find that by bringing and maintaining its Section 301 lawsuit, including the second amended complaint on June 25, 2008, the Respondent violated Section 8(b)(4)(ii)(D) of the Act.

CONCLUSIONS OF LAW

1. E. P. Donnelly, Inc. has been an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Sheet Metal Workers' International Association, Local 27, AFL-CIO and United Brotherhood of Carpenters and Joiners of America, Local Union No. 623 have each been labor organizations within the meaning of Section 2(5) of the Act.

3. By maintaining its Section 301 lawsuit against the Employer and Sambe after the Board issued its 10(k) determination, the Respondent violated Section 8(b)(4)(ii)(D) of the Act.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist therefrom and to take certain affirmative action necessary to effectuate the policies of the Act. As stated above, the difficulty that I had with the Respondent's lawsuit was its request for damages. Whether it was stated as damages for breach of the PLA and a violation of the New Jersey statutes (as set forth in the second amended complaint), or as a request that the Employer and Sambe be ordered to comply with the LJAB and the arbitrator's award and pay damages pursuant to those awards, the result is the same. The Employer and Sambe would be penalized for complying with the Board's 10(k) determination, thereby undermining that determination. I recommend that the Respondent be ordered to delete from its second amended complaint paragraphs B and C in its remedy request for count one, as well as its entire remedy request for counts two and three or, in the alternative, to withdraw the lawsuit in its entirety.

[Recommended Order omitted from publication.]