The Region submitted this case for advice as to whether the Union violated Section 8(b)(1)(A), (2), (3), and (4)(ii)(D) by pursuing a grievance contesting the Employer’s continued assignment of videography work to employees in a job classification that the Board had previously determined to be outside the Union’s bargaining unit. We conclude that the Union violated Section 8(b)(3) because its grievance was in direct conflict with the Board’s unit clarification decision. However, we conclude that the Union did not violate Section 8(b)(1)(A) or (2) because its conduct did not reasonably tend to restrain or coerce employees in the exercise of their Section 7 rights or seek to cause the Employer to unlawfully discriminate against any employees. We further conclude that although the Union’s conduct arguably violated Section 8(b)(4)(ii)(D), it would not effectuate the purposes and policies of the Act to allege such a violation in the absence of a threat of picketing or a work stoppage.

FACTS

Meredith Corporation/WFSB-TV (the Employer) operates a television station in Rocky Hill, Connecticut. Employees are represented by two unions: the National Association of Broadcast Employees and Technicians-Communications Workers of America (NABET) represents “technicians and studio assistants,” which include photographers and other employees who operate the station’s broadcast equipment; the American Federation of Television and Radio Artists (AFTRA) represents “staff artists,” which include newsroom anchors and outside reporters.

In September 2010, the Employer notified both NABET and AFTRA that it intended to create a new “Multi-Media Journalist” (MMJ) position to produce news stories for its website and social media sites. The MMJs would develop, write, and perform news stories, as well as film and edit those stories using digital cameras and
desktop software. NABET proposed assigning half of the MMJs to each bargaining unit, but the Employer sought to place them all in the AFTRA unit, and ultimately, the Employer and NABET were unable to reach agreement. Discussions between the Employer and AFTRA, however, resulted in a letter of agreement placing the MMJ position in the AFTRA unit, with the understanding that the MMJs would not perform any duties within NABET’s exclusive jurisdiction unless that jurisdiction was determined to be non-exclusive through a unit clarification proceeding.

In June 2011, the Employer hired its first MMJ. NABET subsequently filed a grievance alleging that the Employer’s initial assignment of videography work to that employee violated the parties’ collective-bargaining agreement. In response to that grievance, the Employer filed a unit clarification petition. In August 2011, the Regional Director issued a decision placing the MMJ position in the AFTRA bargaining unit and excluding it from the NABET unit, based on his finding that the MMJ is primarily a reporter with only incidental filming and editing responsibilities. While the unit clarification petition was pending before the Board, the parties continued to process the grievance. In May 2012, an arbitrator concluded that NABET had exclusive jurisdiction over the MMJs’ video/photography work. The arbitrator ordered the Employer to compensate NABET members for unit work assigned to non-bargaining unit employees but rejected NABET’s request for a broad cease and desist order. Then, in June 2012, the Board issued an order adopting the Regional Director’s unit clarification decision.

On September 20, 2012, NABET filed a new grievance alleging that the Employer violated the arbitrator’s prior decision by continuing to assign video/photography work to various employees outside of NABET’s bargaining unit (whom the Employer had classified as MMJs). NABET again requested a cease and desist order and a make-whole remedy.

**ACTION**

We conclude that NABET violated Section 8(b)(3) because its pursuit of the September 2012 grievance was incompatible with the Board’s unit clarification decision. However, we conclude that NABET did not violate Section 8(b)(1)(A) or (2) because its conduct did not reasonably tend to restrain or coerce employees in the exercise of their Section 7 rights or seek to cause the Employer to unlawfully discriminate against any employees. We further conclude that although NABET’s conduct arguably violated Section 8(b)(4)(ii)(D), it would not effectuate the purposes and policies of the Act to allege such a violation in the absence of a threat of picketing or a work stoppage.
I. NABET violated Section 8(b)(3).

   The Board has held that a union violates its duty to bargain in good faith by using the grievance-arbitration process to seek a result incompatible with a prior Board decision on a representational matter. Moreover, such a use of the grievance-arbitration process has an “illegal objective” and therefore lacks any special protection under Bill Johnson’s Restaurants v. NLRB. Thus, in Teamsters Local 776 (Rite Aid), the Board found that a union violated Section 8(b)(3) by continuing to seek enforcement of an arbitration award after the Board issued a conflicting unit clarification decision. In that case, an arbitrator issued an award concluding that the employer violated the parties’ collective-bargaining agreement by failing to apply its terms to work that the employer had transferred to a non-union facility. Thereafter, the employer obtained a unit clarification determination excluding employees at the non-union facility from the union’s bargaining unit. The union, however, continued to seek enforcement of the arbitration award in federal court. The Board concluded that the union’s action violated Section 8(b)(3) because it was, in effect, an unlawful

1 See Teamsters Local 776 (Rite Aid), 305 NLRB 832, 834 (1991) (union violated Section 8(b)(3) by seeking to enforce an arbitration award that was in direct conflict with a Board unit clarification determination), enforced, 973 F.2d 230 (3d Cir. 1992), cert. denied, 507 U.S. 959 (1993). See also Allied Trades Council, 342 NLRB 1010, 1012 (2004) (union violated Section 8(b)(3) by using arbitration to seek accretion to bargaining unit that directly conflicted with Regional Director’s unit determination in representation election).

2 Rite Aid, 305 NLRB at 834–35 (holding that “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 [and thus] enjoys no special protection”). See also Bill Johnson’s Restaurants v. NLRB, 461 U.S. 731, 737 n.5 (1983) (recognizing that the Board may proscribe lawsuits that have an illegal objective under federal law). Cf. Stage Employees IATSE Local 695 (Vidtronics Co.), 269 NLRB 133, 133, 141–43 (1984) (union did not violate Section 8(b)(3) by invoking arbitration process where there was no prior Board determination, it was “merely seeking a determination whether it, in fact, ha[d] any contractual rights with regard to the group of employees in dispute[,]” and it was “speculative” as to whether the arbitrator’s award would include a finding on the accretion issue).

3 305 NLRB at 834.

4 Id. at 833.
insistence on a change in the scope of the existing unit, notwithstanding the union’s assertion that the dispute was contractual rather than representational. Moreover, since the union sought to achieve a result contrary to the Board’s unit clarification decision, its action had an “illegal objective” and could be proscribed under Bill Johnson’s.

Here, NABET’s pursuit of the September 2012 grievance was incompatible with the Board’s unit clarification decision and therefore violated Section 8(b)(3). NABET’s grievance attacked the Employer’s assignment of video/photography work to MMJs in the AFTRA unit. But despite NABET’s efforts to frame the grievance as a work assignment dispute rather than a representational issue, it directly conflicted with the Board’s unit clarification decision that the MMJ position was appropriately placed in the AFTRA unit rather than the NABET unit. Indeed, NABET’s grievance, if successful, would require the Employer either to reassign the MMJs’ videography work to non-MMJs or to pay double for that work. Thus, as in Rite Aid, NABET’s grievance essentially sought to circumvent the Board’s representation decision and amounted to an unlawful insistence on a change in the scope of the existing bargaining unit. NABET therefore violated Section 8(b)(3) and cannot claim any special protection under Bill Johnson’s, given the grievance’s illegal objective.

II. NABET did not violate Section 8(b)(1)(A) or (2).

Section 8(b)(1)(A) prohibits a union from engaging in conduct that has “a reasonable tendency to restrain or coerce employees in the exercise” of their Section 7 rights. Section 8(b)(2) makes it an unfair labor practice for a union to attempt to

5 Id. at 834.

6 Id. at 834–35.

7 Cf. International Die Sinters’ Conference, 197 NLRB 1250, 1253–54 (1972) (awarding disputed work to union whose certification had been clarified to include employees performing that work, in part because awarding that work to rival union would have conflicted with the Board’s unit clarification determination).

8 This conclusion is further supported by the fact that NABET originally sought to have half of the MMJs placed in its bargaining unit.

9 Bakery Workers Local 6 (Stroehmann Bakeries), 320 NLRB 133, 138 (1995) (finding that union’s lawsuit against employer for alleged breach of a stipulated election agreement that sought certification and damages in the amount of the dues it would have collected from unit employees did not constitute restraint or coercion within the meaning of Section 8(b)(1)(A)).
cause an employer to discriminate against employees on the basis of union membership in violation of Section 8(a)(3). A union violates Section 8(b)(1)(A) when it invokes the grievance-arbitration process in order to impose the terms of a collective-bargaining agreement on employees whom it does not represent and violates Section 8(b)(2) when application of one of those terms, such as a union security clause or exclusive hiring hall provision, would cause unlawful discrimination.

Thus, in Rite Aid, the Board found that the union violated Section 8(b)(1)(A) and (2) by seeking to enforce an arbitration award ordering application of the entire collective-bargaining agreement, including union-security provisions, to employees whom the Board had already determined the union did not represent. By contrast, in Bakery Local 6 (Stroehmann Bakeries), the Board held that a union’s maintenance of a preempted lawsuit did not violate Section 8(b)(1)(A) even though it sought certification as the employees’ bargaining representative and contract damages for the employer’s alleged breach of a stipulated election agreement in the amount of the dues it would have collected from unit employees. The Board held that “statutory restraint or coercion [was] lacking” because, among other things, the lawsuit was not filed against the employees themselves, the lawsuit sought monetary damages only from the employer rather than individual employees, and the union did not seek to impose a collective-bargaining agreement or a union-security obligation on the employees.

Here, NABET, in pursuing its grievance over the Employer’s assignment of disputed work, did not seek to represent the MMJs and did not attempt to impose its collective-bargaining agreement on them; it merely contested the Employer’s

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10 See, e.g., Allied Trades Council, 342 NLRB at 1012–13 (union violated Section 8(b)(1)(A) and (2) by seeking, through arbitration, to apply terms of its collective-bargaining agreement, including a union-security provision, to employees that it did not represent).

11 See, e.g., id.; Local Union #323, 242 NLRB 305, 309 (1979) (union violated Section 8(b)(1)(A) and (2) by invoking grievance-arbitration provision to impose exclusive hiring hall provision in contract on employees determined to be in separate bargaining unit not covered by that contract).

12 305 NLRB at 834–35.

13 320 NLRB at 138.

14 Id.
assignment of videography work to the MMJs. And, NABET clearly did not seek to enforce a union-security clause against the MMJs or otherwise cause the Employer to discriminate against them in violation of Section 8(a)(3). Moreover, as in Stroehmann Bakeries, NABET's grievance was directed at the Employer, not the individual employees, and sought compensation from the Employer for work assignments claimed by NABET. Thus, since NABET's pursuit of the grievance did not reasonably tend to restrain or coerce employees and did not seek to have the Employer unlawfully discriminate against employees on the basis of union membership, it did not violate Section 8(b)(1)(A) or (2).

III. Alleging a Section 8(b)(4)(ii)(D) violation would not effectuate the purposes or policies of the Act.

Section 8(b)(4)(ii)(D) generally prohibits a union from using threats, coercion, or restraint with an object of forcing or requiring an employer to assign certain work to one group of employees rather than another. A violation of Section 8(b)(4)(ii)(D) may be found where (1) there are competing claims to disputed work between rival groups of employees and (2) a party has used proscribed means to enforce its claim. If there is reasonable cause to believe that Section 8(b)(4)(D) has been violated, Section 10(k) requires the Board to defer issuing complaint and determine which group of employees is entitled to perform the disputed work.

The Board has held that a union's filing of an arguably meritorious grievance prior to a 10(k) determination is not, in itself, coercive within the meaning of Section 8(b)(4)(ii)(D). However, it is well established that a union violates Section

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15 E.g., Teamsters Local 179, 334 NLRB 362, 363 (2001) (finding reasonable cause to believe a union had violated Section 8(b)(4)(D) and determining the underlying work jurisdiction dispute pursuant to Section 10(k)).

16 See id. See also NLRB v. Radio & Television Broadcast Engineers Union (CBS), 364 U.S. 573, 579 (1961) (holding that Section 10(k) requires Board to decide jurisdictional disputes on the merits and to affirmatively award disputed work).

17 E.g., Longshoremen ILWU Local 7 (Georgia Pacific), 291 NLRB 89, 89, 92–93 (1988) (holding that arguably meritorious grievances filed prior to 10(k) proceedings are not coercive because grievance procedures pursued to arbitration further the policies of the Act by encouraging voluntary settlements of work assignment disputes), petition for review denied, 892 F.2d 130 (D.C. Cir. 1989). Cf. Roofers Local 30 (Gundle Construction), 307 NLRB 1429, 1430 (1992) (union violated Section 8(b)(4)(D) by refusing to withdraw lawsuit to enforce arbitration award after Board issued contrary decision in 10(k) proceeding; such action may be prohibited because it undermines the 10(k) award), enforced, 1 F.3d 1419 (3d Cir. 1993).
8(b)(4)(ii)(D) by pursuing an arbitration or lawsuit to obtain work or pay-in-lieu of work awarded by the Board under Section 10(k) to employees represented by another union. The Board has not directly dealt with the issue of whether that rule extends to situations in which the union’s underlying grievance directly conflicts with the Board’s resolution of a representational matter, such as in a unit clarification proceeding.

Assuming, as NABET asserts, that this case involves a work jurisdiction dispute, an argument could be made that NABET’s grievance violated Section 8(b)(4)(ii)(D). For even though there is no conflicting 10(k) award, the fact that the grievance is incompatible with the Board’s unit clarification decision may be sufficient to constitute unlawful coercion. In this regard, the unit clarification decision essentially resolved the work jurisdiction dispute by determining that the MMJs, who are assigned videography work as part of their regular job duties, are properly in the AFTRA bargaining unit.

However, this would be a novel argument, particularly given the absence of picketing or other economic coercion by either union, which would have been a necessary predicate to the holding of a 10(k) hearing. Moreover, pursuing this

18 See, e.g., Sheet Metal Workers Local 27 (E.P. Donnelly, Inc.), 357 NLRB No. 131, slip op. at 4 (Dec. 8, 2011) (union violated Section 8(b)(4)(ii)(D) by maintaining lawsuits incompatible with Board’s 10(k) award); Plasterers Local 200 (Standard Drywall, Inc.), 357 No. 160, slip op. at 3 (Dec. 30, 2011) (union violated Section 8(b)(4)(ii)(D) by pursuing arbitrations and lawsuit that ran counter to Board’s 10(k) decision).

19 See Carey v. Westinghouse Electric Corp., 375 U.S. 261, 263, 269–70 (1964) (distinguishing work assignment issues—where the controversy concerns whether certain work should be performed by employees in one bargaining unit or those in another—from representational issues, but recognizing that disputes are often difficult to classify).

20 See International Die Sinkers’ Conference, 197 NLRB 1250, 1252-54 (1972) (while the Board issued a 10(k) decision awarding work to the union whose certification had been clarified to include employees performing the disputed work, the basis for the underlying Section 8(b)(4)(D) charge was a threat by the union to strike over the employer’s assignment of the disputed work); T.I.M.E.–DC, Inc., 225 NLRB 1175, 1177 (1976) (declining to decide unit clarification petition because it did not present a representational issue but rather a work assignment dispute that could only be resolved in a proceeding under Section 8(b)(4)(D), and an 8(b)(4)(D) proceeding was inappropriate absent a strike or picketing).
allegation would not result in any additional remedy than that available for NABET’s violation of Section 8(b)(3). Under Section 10(l) of the Act, the Board has discretion in Section 8(b)(4)(D) cases to seek a preliminary injunction “where such relief is appropriate[,]” but a 10(l) petition is not mandatory. In the present case, where there has been no picketing, work stoppage or threat thereof, or coercive lawsuit, injunctive relief would not be appropriate. In light of these considerations, we conclude that it would not effectuate the purposes and policies of the Act to allege a Section 8(b)(4)(ii)(D) violation here.

Accordingly, the Region should issue complaint, absent settlement, alleging that NABET violated Section 8(b)(3) by pursuing a grievance that was incompatible with the Board’s prior unit clarification decision. The Region should dismiss, absent withdrawal, the Section 8(b)(1)(A), (2), and (4)(ii)(D) allegations.

/s/
B.J.K.

ADV.34-CB-090636.Response.NABET.