FORM NLRB-5026 (4-80)

UNITED STATES GOVERNMENT
National Labor Relations Board

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Memorandum

A.D. 05235

DATE: January 30, 1987

RELEASE

TO : Roy H. Garner, Director
Region 28

FROM : Harold J. Datz, Associate General Counsel
Division of Advice

SUBJECT:

542-3333-9200
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Sheet Metal Workers, Local Union No. 359
(HVAC Systems, Inc.)
Case 28-CB-2594

This case was resubmitted for advice as to whether the Union violated Sections 8(b)(1)(B) and (3) by filing a Section 301 lawsuit on October 7, 1986, to enforce portions of the August 6, 1986 NJAB award discussed in the earlier Advice Memorandum. 1/ Although the agreement that the NJAB ordered the Employer to execute contains a number of nonmandatory subjects of bargaining, the prayer for relief in the complaint filed by the Union in the Section 301 suit specifically provides only for an order requiring the Employer's compliance with the wages and terms and conditions specified in the award. Thus, the wording of the prayer for relief does not indicate that the Union is seeking enforcement of the entire agreement contained in the award,including nonmandatory subjects.

We concluded that the Union additionally violated Sections 8(b)(1)(B) and (3) by filing a Section 301 suit to enforce portions of the NJAB arbitration award against the Employer, who had no obligation to submit the dispute to interest arbitration and therefore was not bound to comply with any

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1/ In the previous memorandum in this case, dated December 19, 1986, we concluded that the Union had violated Section 8(b)(3) by submitting to NJAB its dispute with the Employer, who had timely withdrawn from a multiemployer association and was negotiating a new agreement to replace the expired multiemployer agreement. We also concluded that the Union violated Section 8(b)(3) by insisting to impasse on the nonmandatory subjects contained in its proposal to NJAB. The Region had previously determined that the Union had violated both Sections 8(b)(1)(B) and (3) by insisting to impasse on certain other nonmandatory subjects.

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portion of that award. 2/ Based on our view that the agreement to use interest arbitration pertains only to the multiemployer unit, 3/ the Union, by legal action or otherwise, could not lawfully compel this Employer, bargaining in a single-employer unit, to accept the results of interest arbitration. By doing so, the Union forced the Employer to use bargaining representatives whom it had not chosen in violation of Section 8(b)(1)(B) and further refused to bargain with the Employer within the meaning of Section 8(b)(3). Under these theories of violation, it is irrelevant that the Union may have been attempting to enforce only those portions of the award that pertain to mandatory subjects of bargaining. 4/

Consequently, as the Union filed the lawsuit for an unlawful object, i.e., to force the Employer to bargain through an unchosen representative, Bill Johnson's Restaurants v. NLRB, 461 U.S. 731 (1983), is inapplicable to this case. Id. at 737, n. 5; Quarterly Report of the General Counsel, July 8, 1985 at p. 4. We reach this result despite the holdings of the Court of Appeals for the Ninth Circuit that an interest-arbitration clause is enforceable in a Section 301 action against an employer who has timely withdrawn from the multiemployer unit for which the agreement containing the clause was negotiated. 5/ In those

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3/ Sheet Metal Workers Local No. 9 et al. (Air-Eze Heating & Air Conditioning, Inc.), Case 27-CB-1998, Advice Memorandum dated September 26, 1984.

4/ It should be noted that Sheet Metal Workers, Local Union 162 (B.J. Heating and Air Conditioning, Inc.), Case 28-CB-5361, Advice Memorandum dated July 21, 1982, which could be read as drawing a distinction between mandatory and nonmandatory subjects involved in NJAB awards, was expressly overruled by Air-Eze Heating & Air Conditioning, supra, at p. 4 n. 9.

5/ American Metal Products v. Local 104, ___ F.2d ___, 123 LRRM 2824 (9th Cir. July 24, 1986); Sheet Metal Workers Local 420 v. Huggins Sheet Metal, Inc., 752 F.2d 1473, 118 LRRM 2603 (9th Cir. 1985); Sheet Metal Workers Local 252 v. Standard Sheet Metal, 699 F.2d 481, 112 LRRM 2878 (9th Cir. 1983). See

cases the Ninth Circuit had before it only the contractual claims and was not purporting to rule on any unfair labor practice issues. 6/ Although the Board has not yet addressed these issues, it is the General Counsel's position, based on established Board precedent, that the lawsuit is unlawful and should be enjoined. In such a conflict, "(t)he superior authority of the Board may be invoked at anytime." 7/

H. J. D.

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also Sheet Metal Workers Local 104 v. Andrews, ___ F.Supp. ___, 119 LRRM 3516 (N.D. Cal. 1985); Welfare Fund v. Tampa Sheet Metal Co., ___ F.2d. ___, 122 LRRM 2161 (11th Cir. Mar. 6, 1986).

6/ See American Metal Products v. Local 104, supra, 123 LRRM at 2827 ("[Employer's] duty to bargain arose from its collective bargaining agreement and not from statutory obligations."); Sheet Metal Workers Local 252 v. Standard Sheet Metal, supra, 112 LRRM at 2880 (in enforcing an interest arbitration award, the court refused to rule on the unfair labor practice issue pending before the Board, stating that it would not "invade at will the province of the NLRB.")

7/ Carey v. Westinghouse Electric Corp., 375 U.S. 261, 272 (1964).