

Local 32B-32J, Service Employees International Union, AFL-CIO and Nevins Realty Corp.
Case 29-CC-1030

November 24, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND RAUDABAUGH

On December 17, 1992, Administrative Law Judge Edwin H. Bennett issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed a brief in support of the judge's decision.

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,¹ and conclusions and to adopt the recommended Order.

The judge found that the Respondent violated Section 8(b)(4)(ii)(B) by exerting coercive pressure against a neutral employer in furtherance of its ongoing labor dispute with a cleaning subcontractor whose employees are represented by another union. Unlike our dissenting colleague, we fully agree with the judge's analysis and find that the Respondent's conduct was directed at a neutral party and was, in fact, coercive.

On May 15, 1991, Nevins Realty Corp., a manager of commercial office buildings in Brooklyn, New York, subcontracted the cleaning services at one of its buildings to Golden Mark Maintenance Service Industries, Inc., an independent cleaning contractor. At the time, the Respondent had a bargaining relationship with Nevins, covering a superintendent.² The Respondent also had a separate bargaining relationship with Guardian, the immediate predecessor to Golden. This relationship covered four employees. Golden refused to hire the four employees of Guardian, and did not maintain the wages and benefits of the Guardian-union contract.³ Thus, there was a primary labor dispute between Golden and the Respondent. On May 17, the

¹The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The judge erroneously stated the Respondent's position on the jurisdiction issue. We note that the Respondent's posthearing brief to the judge concedes that the Board's assertion of jurisdiction over the parties is proper in this matter.

²On those occasions when Nevins hired a helper, the relationship covered the helper as well.

³Golden had a contract with the Laborers.

Respondent pressured Nevins to have Golden hire the four Guardian employees and maintain their existing wages and benefits. When this tactic failed, the Respondent made a similar hiring request on Golden a few days later. Then, on June 5, the Respondent filed an arbitration demand against Nevins over Golden's refusal to hire the Guardian employees. The Respondent claimed that Nevins had breached the subcontracting clause of the parties' contract.

For the reasons given by the judge, we find that resorting to arbitration against Nevins over the selection of Golden was not aimed at resolving a dispute involving Nevins' employees but rather was done to satisfy the Respondent's interests elsewhere. In particular, an object of the Respondent's pressure was to disrupt Nevins' business dealings with Golden because the latter does not employ members of, or have a contract with, the Respondent. Contrary to the dissent's view, this secondary object is apparent on examination of the basis for the Respondent's grievance. In arguing a work preservation claim, the Respondent relied on the subcontracting clause of the parties' contract. However, the language of that clause makes it clear that it pertains only to the subcontracting of work "performed by employees covered by this Agreement." Here, there is no question that the cleaning work contracted out to Golden had always been performed by employees of various independent cleaning contractor companies and that the superintendent and the helper of Nevins had never been responsible for any duties similar to those performed by the employees of the cleaning contractor. Thus, the Respondent's contractual claim is not reasonably based on the language of the contract, and its work preservation defense to the instant 8(b)(4)(B) allegation is similarly without a colorable basis.⁴

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Local 32B-32J, Service Employees International Union, AFL-CIO, Brooklyn,

⁴ See, e.g., *Carpenters Local 419 v. NLRB*, 467 F.2d 392 (D.C. Cir. 1972), enfg. 190 NLRB 143 (1971). In that case, while attempting to organize the employees of certain installers of home floor-covering material, including Sears carpeting, the union picketed Sears. The Board found that Sears was a neutral party to the union's dispute with the installers. In upholding the Board's finding, the court emphasized that no Sears employee had ever performed any floorcovering installations.

In finding a violation, Member Raudabaugh also relies on the fact that the grievance had an unlawful secondary objective. See his position set forth in *Plasterers Local 337 (Marina Concrete)*, 312 NLRB 1103 fn. 8 (1993).

New York, its officers, agents, and representatives, shall take the action set forth in the Order.

MEMBER DEVANEY, dissenting.

Contrary to my colleagues, I would dismiss the 8(b)(4)(ii)(B) allegation because I find no unlawful coercion directed at a neutral employer.

It is undisputed that the Respondent Union's demand for arbitration was unaccompanied by any unlawful secondary activity, including strikes or threats. Rather, in accord with our national labor policy favoring grievance/arbitration resolutions, the Union filed a grievance directed only at Nevins, the entity that was required by the building tenants' leases to provide the actual cleaning services in question. The grievance was premised on the Union's arguable theory that the parties' subcontracting clause was intended to apply to work covered by the contract's unit description and that the clause was not restricted to the actual job classifications in existence or employees employed at Nevins at any particular time. The fact that the Union's interpretation of the contract clause was ultimately rejected by the judge does not make it any less defensible. See my dissent in *Carpenters Local 745 (SC Pacific)*, 312 NLRB 903 (1993).

Aqie Kapelman, Esq., for the General Counsel.

Ira Sturm, Esq. (Manning, Raab, Dealy & Sturm), for the Respondent.

Stuart Bochner, Esq. (Horowitz & Pollack, P.C.), for the Charging Party.

DECISION

STATEMENT OF THE CASE

EDWIN H. BENNETT, Administrative Law Judge. On June 11, 1992, a hearing was conducted in this case based on a complaint which issued on September 30, 1991, and a charge filed by Nevins Realty Corp. (Nevins) on June 24, 1991, and served on June 27, 1991, on Local 32B-32J, Service Employees International Union, AFL-CIO (the Union). The principal issue to be decided is whether or not the Union violated Section 8(b)(4)(ii)(B) of the Act by seeking, through arbitration, to require Nevins to cease doing business with Golden Mark Maintenance Ltd. (Golden), a cleaning contractor it had retained to perform services at one of its buildings. Subsidiary to this ultimate question are the following issues: (1) Was the Union's sole dispute a primary one with Nevins over the latter's alleged violation of a "work preservation" clause in the collective-bargaining agreement, which in turn raises such issues as the identity of the principal work unit, the nature of the work performed, or fairly claimed, by the Union and whether or not the so-called right of control test applies? (2) Is resort to arbitration in this case coercive conduct? and (3) Is this complaint time barred by Section 10(b) or the dispute otherwise barred from resolution by the Board by virtue of an earlier prior settlement to which the Board must defer? Finally, are the operations of New York City and New York State, the tenants of Nevins in the building affected by the labor dispute, subject to the Board's jurisdiction?

On the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Nevins, a New York corporation located in Brooklyn, New York, owns, operates, and manages commercial rental properties including the six-story building involved herein located at 350 Livingston Street, Brooklyn, New York (also bearing the address of 333 Schermerhorn Street) (the Building). Annually, Nevins derives gross revenue in excess of \$100,000, of which in excess of \$25,000 is derived from the New York State Department of Motor Vehicles (DMV), an agency of the State of New York. The State, through its office of general services, leases most of the Building for occupancy by DMV and, to a lesser extent, by the division of parole. The only other lessee, of 1-1/2 floors, is the New York City General Services Administration for occupancy by its human resources administration. Thus, the only tenants in the Building are three agencies of the State and city of New York.

Golden, a New York corporation located in Staten Island, New York, is in the business of providing cleaning and maintenance service to commercial customers located in New York State. It annually performs such services valued in excess of \$50,000 for enterprises which are themselves directly engaged in interstate commerce meeting a Board standard for the assertion of jurisdiction exclusive of indirect outflow or indirect inflow.

It is admitted and I find that Nevins and Golden, and each of them, is an employer engaged in commerce and in an industry affecting commerce within the meaning of Section 2(1), (2), (6), and (7) and Section 8(b)(4) of the Act. Respondent, while admitting that New York State engages in sufficient business and commercial activities that would satisfy one of the Board's standards for asserting jurisdiction, exclusive of an indirect standard, nevertheless maintains that in a secondary boycott case the Board cannot assert jurisdiction where it rests on the business of a government agency. Respondent's position is wrong as a matter of law. The Board long has held that in 8(b)(4)(B) cases the jurisdiction of the Act extends to political subdivisions, as well as to other persons not qualifying as 2(2) employers, whether those persons are defined as "primary" or "secondary," because it was the intent "of Congress that the terms of Section 8(b)(4)(B) be given full effect in protecting municipal and state governments from secondary pressures." *City of Juneau*, 176 NLRB 889 (1969). Accordingly, as the alleged secondary activities of the Union would impact on the activities of New York State and New York City, I find those governmental units are subject to the Board's jurisdiction in this case, and they are persons within the meaning of Section 8(b)(4)(B) of the Act.¹

¹ Although there is no allegation regarding New York City's commercial activities, I take official notice of the fact that the operations of the city generally and at the location have an impact on commerce and that it is appropriate to assert jurisdiction over both governmental units since, "it is well settled that the Board's discretionary jurisdictional standards may be met in an 8(b)(4)(B) proceed-

Continued

II. THE UNFAIR LABOR PRACTICES

As noted, occupancy of the Building by the State and city of New York began in 1965, since which time a series of leases have been entered into between Nevins and the various governmental agencies. A standard feature of those leases required Nevins to provide the tenants with cleaning and porter service including such duties as cleaning toilets, moping, sweeping and waxing floors, and washing the windows. The frequency with which these several services are to be provided are specified in the leases prepared by the tenants. To accomplish these cleaning functions Nevins has, since the opening of the Building, consistently and without variation utilized the services of independent cleaning contractor companies. The managing official of Nevins responsible for the operation and maintenance of the Building from its construction to the present is Raymond McKaba, Nevins' secretary-treasurer from 1961 to 1973, and its president thereafter. The evidence he gave was entirely credible and essentially undisputed and the critical facts of this case are based largely on his testimony and documentary evidence.

McKaba described in detail the unbroken practice of engaging cleaning contractors to provide the various cleaning services required by the leases between Nevins and its tenants. Generally, these contractors used cleaning crews of about four individuals who performed their services in the evening, a fairly common practice in commercial office buildings. There is nothing in the record to suggest that any of the various contractors engaged over the years were related in any way, by ownership or control, to Nevins, or that Nevins in any way exercised day-to-day control over the work performance of the contractors' employees or influenced the labor relations policies or practices of these completely independent entrepreneurs.

What also is beyond doubt is that the only persons ever employed by Nevins at the Building have been one superintendent, whose identity has changed from time-to-time and a superintendent's helper for the period between 1975 and 1989. The primary responsibilities and duties of the superintendent and his helper are to repair and maintain the physical premises, for example, to repair windows, faucets, and pipes, change air conditioning filters, and generally maintain building equipment. In situations where the repair or maintenance was beyond the superintendent's expertise it was his responsibility to obtain an outside contractor, e.g., elevator or boiler repair services.

Neither the superintendent nor his helper are responsible for, nor did they ever perform, duties similar to those contracted to the outside cleaning companies except on the unexpected and rare occasion when an emergency cleaning function was required in the leased or common areas of the building. For example, as explained by McKaba, a visitor to the Building would use a stairway as a toilet, an occurrence that obviously could not await the arrival of the cleaning crew in the evening. In addition, although the superintendent would receive complaints about inadequate cleaning from the tenants, his sole recourse would be to relay those to the

cleaning contractor for remedy. In no other sense, did Nevins' employees perform cleaning services in the Building and in no manner or form did any employee of any contractor do any maintenance or repair work that was performed by the superintendent or his helper or was within the scope of their responsibility. And, it is noted that while Nevins' leases with its tenants required that Nevins was required to clean the leased premises, nothing in those leases compelled Nevins to accomplish that end with its own employees.

In 1965 Nevins entered into a collective-bargaining agreement with the Union and thereafter, until 1987, executed renewal agreements on a 3-year basis. McKaba credibly, correctly, and reasonably testified that these agreements were intended to, and did apply exclusively to the superintendent and the helper, when there was one, as these were the only Nevins employees at the Building. Thus, although the 1972-1975 agreement, the earliest one in evidence, provides that its terms are applicable to "all classifications of service employees under the jurisdiction of the Union," the wages for categories of "handyman," "porter-foremen," "starters" and "others," which appear on the preprinted form contract, are crossed out and in its place a "Rider" was inserted providing wage rates for the superintendent. The 1975-1978 agreement similarly contains a typed insert providing wages for "superintendent" and "porter" where the various other categories appear on the preprinted form. McKaba was not sure what the designation "porter" meant, or why it was used, but it is certain it was intended to cover the superintendent's helper whose employment began in 1975. The 1978 form contract again sets forth wage rates for various categories including guards, which had no applicability to Nevins, and in its place appears the typed Rider for superintendent and porter.

The next agreement in evidence entitled "1987 Office Agreement" is a form agreement which, while providing wage rates for the classifications not employed at the Building by Nevins, does not have a typed Rider, as is the previous contracts, applicable to workers actually employed by Nevins. There is no explanation for this departure from the earlier practice noted. I have no difficulty in concluding, however, despite the casual drafting of contractual language, that the Union never was the bargaining representative for any Nevins employees at the Building other than the superintendent and his helper who was employed between 1975 and 1989. In this regard not only is McKaba's testimony unrefuted, but the Riders providing for coverage over a superintendent and porter use the singular, not plural form, as is used in the preprinted contracts when designating wage rates for various job classifications. It also is beyond doubt, as described more fully below, that the agreements with Nevins did not apply, and were not intended to apply, to any of Nevins' building service contractors or their employees.

In addition, the bargaining history subsequent to the 1987 contract puts to rest any lingering doubt concerning the very limited scope and composition of the Nevins' bargaining unit. It is undisputed that Nevins did not sign any post-1987 successor agreement although the Union proffered one for signature for a period to expire December 31, 1992. On October 30, 1990, Nevins' attorney at the time wrote to the Union rejecting the form agreement submitted for execution because it failed "to delete any references to any category other than the superintendent," as was done in the 1972 con-

ing by the operations of either the primary employer or the secondary employer, or the combined operations of the primary and secondary employers at the location affected by the allegedly unlawful conduct." Teamsters Local 400 (*Bondis Mother Hubbard Market*), 118 NLRB 130 (1957).

tract by a special rider. In addition, the letter informed the Union that at the time “the only person covered by this agreement at the premises, is the superintendent” and further, “that no employees of any contractor are covered by the agreement” a reference to a dispute on this issue discussed below. There is no evidence the Union replied to this letter or otherwise questioned its contents. Thus, the facts are indisputable that prior to 1989 the Nevins bargaining unit consisted of the superintendent and his helper, that after 1989 the superintendent was the only unit employee, and that the Union’s nonresponse to the October 1990 letter is a fairly clear indication that even the Union did not seriously take issue with these facts.

These findings and conclusions are not affected at all by the Union’s argument that the 1987 agreement automatically renewed itself thereby obviating the need to secure a successor agreement in writing. Furthermore, this position is contrary to the evidence relied on by Respondent in support. I reach this issue because it was fully litigated by Respondent despite the General Counsel’s theory of the case which rests on the premise that Nevins was subject to an arbitration proceeding the resort to which, by the Union, constituted coercive conduct under the circumstances. But, if no contract existed and therefore Nevins was not bound to arbitrate, then the legality of the Union’s conduct very well might be affected by this additional circumstance. In addition, the contractual provisions relevant to the Union’s claim that the 1987 contract was automatically renewed, even as seen from the Union’s vantage point, serve to illuminate and reinforce the conclusions concerning the scope of the Nevins bargaining unit and my findings below that the purported work preservation provision of the 1987 contract does not apply to the Nevins’ unit but rather was intended by the Union to regulate employment conditions elsewhere, namely nonunion cleaning contractors with whom Nevins sought to do business.

The 1987 agreement, which was signed on January 19, 1988, recites at page 2 in article II(2) that, except as otherwise provided (a phrase not readily explainable), it is effective as of January 1, 1987. The expiration of that agreement, however, varies for different classifications of employees and is found at different provisions of the agreement. Thus, for all but two classifications, the expiration date is December 31, 1989, as provided by article VIII at page 5. That same article, however, sets February 28, 1990, as the expiration date for guards, and January 31, 1990, for “former Local 164 Superintendents,” a category not otherwise defined. With regard to other superintendents, the only classification employed by Nevins after 1989 the expiration date would seem to appear in article X under a heading “Paragraph 51—Superintendents.” At section II(10) thereof, on an unnumbered page inserted between pages 14 and 15, it is stated that “This agreement covering the Superintendent shall expire January 31, 1990.” By process of elimination, it appears this provision applies to the Nevins superintendent inasmuch as article X, paragraph 51, section 1 is the only portion of the contract providing wage rates for superintendents, notwithstanding the further provision at article X, paragraph 51, section II(9) that all of paragraph 51 of article X applies only to superintendents previously covered under a Local 164 contract. That would appear to be redundant in light of the expiration date for the same employees set forth in article VIII, and, if it means what it says, it would leave non-Local

164 superintendents without a wage rate. Moreover, the reason for inserting this otherwise unconnected page in the Nevins contract, would be a mystery. Rather, the inference seems warranted that it was intended to serve the same purpose as the riders in the earlier agreements and to provide what the form agreement lacks, namely specific terms of employment for the Nevins superintendent.

As difficult as it is to determine an applicable expiration date from this maze of contractual provisions, it is almost a Herculean task to find an automatic renewal clause to which any of these possible expiration dates reasonably would be connected. The only such provision in the 1987 contract, and the one relied on by the Union according to the testimony of Kevin McCulloch, assistant to the president of the Union, is to be found at article VI,1(c), which by its terms provides for continuation of the agreement on its expiration pursuant to article VIII, a provision of doubtful applicability inasmuch as there is not a suggestion in the record to conclude that the Nevins employee was a “former Local 164 superintendent.” Furthermore, reference to article VI for automatic renewal should cause even greater concern, if not a healthy dose of skepticism. That article, consisting of seven paragraphs (1,a through c, and 2 through 4), is entitled “Sale or Transfer of Building” and paragraph 1(c) thereof is an integral and interdependent part thereof. Without belaboring the issue, that entire article is devoted exclusively to a variety of circumstances surrounding the sale or transfer of a building and the imposition of the agreement on a transferee, and by its clear and explicit terms would seem, to even a casual reader, to have no relevance to the Building here which has been owned and operated continuously since 1965 by Nevins. Therefore, I conclude the Union was not genuinely concerned with any of the terms and conditions of employment of Nevins’ unit employee but, as its conduct makes abundantly clear, it was seeking to regulate the labor conditions of Nevins’ cleaning contractors. We turn then to the proximate events leading to the complaint.

Prior to 1989 the cleaning contractor engaged by Nevins was a firm call ISS Maintenance (ISS). In about early 1989 McKaba was seeking to replace ISS because of tenant complaints over the poor performance of ISS. In a conversation with the Union’s representative who serviced the Building, Tony Poccio, McKaba was told that if he did not replace ISS with a union contractor who would retain ISS’s union employees, “the Union might do something, might walk or something” a euphemism in the parlance of labor relations for a threatened strike. Although McKaba protested that his agreement with the Union only covered his superintendent, and not the contractor, and that ISS’s employees were so incompetent his lease with the State was in jeopardy, he deemed it the better part of discretion to heed the threat. Consequently, Nevins replaced ISS with Guardian Service Industries, Inc., a union contractor, on September 26, 1989. Although Poccio had warned against replacing the ISS employees, they were not retained by Guardian without any evident protest by the Union. The conclusion is inescapable that the Union’s focus was on employment opportunities for members generally, and not at preserving jobs for unit employees at a specific contractor. This is not to imply that the Union was entitled to use coercive means against Nevins to achieve even this object, it was not. The Union’s conduct at the time of ISS’s replacement by Guardian is noted because

it tends to demonstrate that the defense of work preservation not only is inapplicable in this case but is a suspect claim in any event.

Prompted by the Union's conduct, Nevins, on October 20, 1989, filed a notice of intention to arbitrate, claiming that by insisting on a restriction requiring that only union contractors be engaged to do cleaning services at the Building, the Union violated article VII of the collective-bargaining agreement (on that date, the 1987 agreement was still in effect under any of the possible expiration dates), which places certain limitations on subcontracting "of work heretofore performed by employees covered by this Agreement." It was Nevins' position that only the superintendent was protected by that article and the Union's strike threat to extend such protection to ISS's employees violated the article.

On November 10, 1989, union counsel wrote to Nevins' lawyer as follows:

Our firm represents Local 32B-32J, Service Employees International Union. We have received a copy of a Notice of Intention to Arbitrate from your firm in connection with the above captioned matter. I would like to clarify the Union's position in connection with your demand for arbitration.

Under the terms of the collective bargaining agreement, in the event the Employer wishes to subcontract any portion of the work which work comes under the jurisdiction of the Union, it may do so in accordance with the subcontracting clause of the Agreement. It appears that your company had subcontracted portions of the work and that it now wishes to switch contractors. Under the Union agreement, the new contractor would be required to hire the former employees and maintain the wage and benefit structure. There is no requirement that the new contractor sign a union agreement.

After several meetings between counsel and the arbitrator produced no resolution of the dispute, the arbitration demand was withdrawn by Nevins. McKaba explained that on advice of his counsel he withdrew the matter because of fear that the State would terminate its lease if there was any disruption of the cleaning service. Although Guardian had already been retained, his counsel also advised him to use a union contractor, a comment not entirely clear in its meaning under the circumstances, but of no significance either.

Thus, the arbitrator made no rulings whatsoever, no hearings were conducted, no evidence was presented to the arbitrator, and no settlement was entered into and the parties reached no bilateral understanding of the meaning of article VII. Nevins simply made a business judgment to capitulate to the Union's demand and threat. It is this oral surrender, on a date which does not appear in the record, that Respondent relies on in support of its double defense that the instant complaint is time barred by Section 10(b) and by the Board's policy of deferral to the arbitral process and settlements reached pursuant thereto.

After a period of time Guardian's services proved no more satisfactory to McKaba than ISS's, and once again Nevins proceeded to find a replacement contractor. On May 1, 1991, McKaba sent a letter to Guardian terminating their services at the Building on May 31, and on May 15, following oral negotiations, Nevins retained Golden Mark Maintenance to

begin the cleaning services on June 1, 1991. According to the credited testimony of Timothy Harper, Golden's general manager, Golden began this work with a crew of four employees who worked from 4:30 p.m. to 1 a.m. and who were represented by, and worked pursuant to a collective-bargaining agreement with, Local 445 Laborers' International Union of North America, AFL-CIO. The Golden employees employed at the Building were not new hires but rather had been employed prior to June 1. And further, it is admitted by Respondent that it has had a labor dispute with Golden because Golden does not employ members of, or have a contract with, Respondent. In furtherance of this dispute Respondent has leafletted buildings where Golden's employees have been performing cleaning services.

On May 17, 1991, in response to Nevins' retention of Golden, union counsel wrote the following to Nevins' lawyer:

This letter is submitted on behalf of Local 32B-32J, Service Employees International Union, AFL-CIO. It has come to the Union's attention that your client, Nevins Realty Corp., has decided to contract out certain of the building service work at 333 Schermerhorn Street to Goldenmark Cleaning Contractors. You may recall that in November 1989, I clarified to you the Union's position vis a vis the subcontracting clause of the "Office Agreement." This provision provides that should your client subcontract any portion of the work or switch subcontractors, then the new contractor must be required to hire the former employees and maintain the wage and benefit structure. There would be no requirement that the new contractor sign a contract with Local 32B-32J.

It is requested that you provide us with proof as to compliance with the above provision. Should any of the information summarized above be incorrect, it is requested that you advise the undersigned immediately.

On May 23, 1991, the Union's assistant to the president wrote to Golden that it represented the four Guardian employees at the Building (names and addresses supplied in the letter) and that an "unconditional application for continued employment" was made on their behalf. In addition, the letter closed with the following: "Please contact the undersigned as soon as possible to commence negotiations for a Collective Bargaining Agreement to cover these employees."

When Nevins failed to respond to the Union's satisfaction, a demand for arbitration was made on Nevins by the following letter to the contract arbitrator on June 5, 1991:

Local 32B-32J is signatory to the 1987 Independent Office Agreement covering the above mentioned building. That agreement designates the Office of the Contract Arbitrator as arbitrator in the event of disputes.

The subcontracting provision of the Collective Bargaining Agreement provides that in the event that a replacement contract, or [sic] is hired, the successor contractor shall hire the existing employees and maintain their wages and benefits. On June 3, 1991, Golden Mark Maintenance replaced Guardian Cleaning Contractors as contractor in the above building and refused to hire the former employees.

It is the position of the Union that the former employees of Guardian must be maintained in the building under the same terms and conditions. The Union is demanding the immediate reinstatement with full back pay for all employees plus such other relief as the arbitrator deems appropriate. The employer is:

Nevins Realty Corp.
c/o Raymond McKaba
350 Livingston Street
Brooklyn, NY 11217

The full text of the subcontracting provision referred to in the aforesaid union demand is as follows:

ARTICLE VII—Subcontracting

1. The Employer shall not make any agreement or arrangement for the performance of work and/or for the categories of work heretofore performed by employees covered by this Agreement except within the provisions and limitations set forth below.

2. The Employer or contractor shall give advance written notice to the Union at least three (3) weeks prior to the effective date of its contracting for services, or changing contractors, indicating name and address of the contractor.

3. The Employer shall require the contractor to retain all bargaining unit employees working at the location at the time the contract was awarded and to maintain the existing wage and benefit structure. The Union may reject said contractor where the contractor has not made proper payments to the Health, Pension, Training, Legal and/or Annuity Funds or has habitually failed to comply with labor agreements with the Service Employees International Union (SEIU) covering other buildings in New York City, Nassau and Suffolk Counties and New Jersey in the industry.

The Employer agrees that employees then engaged in the work which is contracted out shall become employees of the initial contractor or any successor contractor, and agrees to employ or re-employ those employees working for the contractor when the contract is terminated or cancelled. This provision shall not be construed to prevent termination of any employee's employment under other provisions of this Agreement relating to illness, retirement, resignation, discharge for cause, or layoff by reason of reduction of force; however, a contractor may not reduce force or change the work schedule without first obtaining written consent from the Union.

With respect to all jobs contracted for by the Employer where members of the Union were employed when the contract was acquired, it is agreed that the Employer shall retain at least the same number of employees, the same employees under the same work schedule, and assignments including starting and quitting times of each employee.

If the contractor adopts this Agreement and fails to comply with this Agreement, the Employer shall be liable severally, and jointly with the contractor, for any and all damages sustained by the employees as a result thereof, or for any unpaid Health, Pension, Training,

Legal and/or Annuity contributions. The Employer's liability shall commence the date it receives written notice from the Union of the contractor's failure to so comply.

Any cleaning contractor who performs services for an owner and/or managing agent who is signatory to this agreement shall be entitled to the following provisions of this agreement at the signatory building: Seniority, Hours, Flexibility, and Work of Absentees.

4. This Article and Article VI are intended to be work preservation provisions for the employees employed in a particular building. In the event that the application of this Article or Article VI, or any part thereof, is held to be in violation of law, then this Article or Article VI, or any part thereof, shall remain applicable to the extent permitted by law.

Discussion

The General Counsel's brief states the well-established principle that Section 8(b)(4)(B) expresses

the dual congressional objectives of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own.

NLRB v. Denver Building Trades Council, 341 U.S. 675, 692 (1951). As aptly described by Judge Learned Hand in *Electrical Workers IBEW Local 501 (Samuel Langer) v. NLRB*, 181 F.2d 34, 37 (1950), aff'd. 341 U.S. 694 (1951):

The gravamen of a secondary boycott is that its sanctions bear, not upon the employer who alone is a party to the dispute, but upon some third party who has no concern in it. Its aim is to compel him to stop business with the employer in the hope that this will induce the employer to give in to his employees' demands.

Our task then is to determine whether the Union's pressure directed at Nevins was aimed at resolving a dispute involving Nevins' employees or was it for a goal of satisfying union interests elsewhere, in this case the nonunion employer Golden. If the latter, then it can be concluded that an object of the Union's conduct was to disrupt Nevins' business dealings with Golden. That need not have been Respondent's only object since Section 8(b)(4)(B) is violated if "any object of [the coercive activity] is to exert improper influence on secondary or neutral parties." *Electrical Workers IBEW Local 501 (C. W. Pond Electric) v. NLRB*, 756 F.2d 888, 892 (D.C. Cir. 1985); see also *NLRB v. Denver Building Trades Council*, supra.

Analysis of the circumstances here fully supports the General Counsel's argument that Nevins is a neutral employer within the meaning of Section 8(b)(4)(B). Thus, the Union certainly was engaged in a labor dispute with Golden because it did not employ union members at the Building or have a union contract. The nature of this dispute manifested itself in numerous ways. Respondent leafleted Golden, it's lawyer wrote to Nevins that Golden was required to employ Guardian's employees under the Union's wages and benefits, albeit without having to sign a union contract, and the Union wrote to Golden claiming to represent the Guardian employ-

ees on whose behalf employment was requested coupled with a demand for a union contract, a different but more candid and credible approach to the employment of union members who are to receive union wages and benefits.

Then, we have the Union's demand for arbitration claiming that the subcontracting provision of the agreement had been violated by Nevins because it had not required Golden to hire the Guardian employees and to maintain their wages and benefits and seeking by way of relief the establishment of these conditions and such other relief deemed appropriate which of course, as testified to by the union representative, means such relief as the Union would request. In light of the Union's letter and the 1989 incident described here, it is reasonable to infer that such other relief would also have included a union contract. We can not be blind to the fact that the Union, if it wanted to protect the wages and benefits of the Guardian employees as it so vigorously claimed, would have, of necessity, required a contract. The Union did not disclaim such relief or disavow wanting those benefits, e.g., health and welfare contributions, that require a contract. As discussed more fully below, this was not a demand to interpret a contract provision, but rather a demand that an arbitrator write a new provision and impose it on Nevins under the guise of arbitration, which provision would have contravened Section 8(e).

Additional evidence of the Union's secondary objective in resorting to the language of the 1987 contract, is the incident in 1989 when the Union aborted a similar attempt by Nevins to replace an unsatisfactory union contractor by threatening a strike unless any new contractor hired the very employees Nevins wanted replaced. Despite this preferred union desire, however, the matter was resolved to the satisfaction of the Union by Nevins simply securing the services of another union contractor with new and different employees. The Union was content with such an outcome notwithstanding that it sought to bar Nevins from obtaining a new contractor by invoking the same contract language at issue here. Thus is revealed the true relief sought by the Union.

In sharp contrast to the Union's concern with regulating the employment terms and conditions of Nevins' contractors there is not so much as a hint of dissatisfaction with Nevins over the terms and conditions of any of Nevins' employees at any building, particularly the one superintendent who comprised the bargaining unit at the Building. That the Union's pressure on Nevins was in furtherance of its primary dispute with Golden simply is beyond argument. Any one of the several union actions described above prove this conclusion and, taken together, the combination of events establishes Nevins as a neutral or secondary employer, within the contemplation of Section 8(b)(4)(B). And, it matters not for determining Nevins' neutrality whether the Union wanted a contract with Golden covering the union employees it wanted hired as the Union sought in its letter to Golden, or simply wanted to dictate to Golden the composition of its labor force and their terms of employment even without benefit of a contract, as the Union's lawyer so disingenuously stated in his letters to Nevins demanding that Nevins require that any new contractor hire the unionized employees and maintain their union benefits. In either situation, the Union was seeking to regulate employment conditions at an employer other than Nevins.

Nor does it really matter in resolving Nevins' status as a neutral whether the Union genuinely was seeking to secure jobs for the displaced unionized employees or would have been equally satisfied if Nevins merely replaced one union contractor with another union contractor as it did in 1989. Again, in either instance the Union's objective was to satisfy its interests generally rather than at the pressured employer, Nevins. Although the Union argues that the 1989 incident regarding ISS's replacement by Guardian constitutes a "settlement" of the immediate dispute to which the Board should defer, and therefore dismiss this complaint, an argument I find without merit,² I conclude that it is relevant for a different purpose. Namely to demonstrate that by invoking the same contract language then as now an object of the Union's conduct was to regulate the employment conditions of contractors with whom Nevins could do business to union signatories not merely contractors meeting union standards and hiring union employees.

We turn then to a fuller discussion of the Union's arbitration demand premised on Nevins' alleged violation of article VII of the 1987 collective-bargaining agreement, assuming arguendo that Nevins was a party to that agreement on May 15, 1991, when Nevins retained Golden. The plain unambiguous language of subparagraph (1) is that the clause purports to protect employees covered by the agreement (unit employees), and only those employees, in the event the principal employer (Nevins) subcontracts unit work. Thus, the thrust of the clause, on its face, does not appear to run afoul of Section 8(e) (it is unnecessary to decide whether or not other provisions of article VII violate Section 8(e) under the circumstances herein). Nothing in that clause speaks to protecting jobs or standards of employees employed by a contractor of Nevins, in this case, Guardian. And, if it did, it would immediately raise 8(e) concerns because its focus would be directed at union interests outside the principal work unit. By invoking this clause to protect jobs of Guardian's employees, the Union was asking the arbitrator to rewrite, under the guise of interpreting, article VII in such a way as to render it a provision which would violate Section 8(e), for it is beyond doubt that a clause which seeks to protect union interests generally, or jobs outside the principal work unit, is a clause with secondary objectives in violation of Section 8(e). See *NLRB v. Maritime Union (Commerce Tankers)*, 486 F.2d 907 (1973), enfg. 196 NLRB 1100 (1972).

The illegal objective inherent in the arbitration demand is further manifested in the almost simultaneous letter of the Union to Golden claiming representative status of its em-

²Lengthy discussion is not required to conclude this was not a settlement which could be likened to an arbitration award meeting all of the deferral standards, if, for no other reason, the settlement was repugnant to the Act. Furthermore, language would be stripped of all common sense meaning to characterize Nevins' surrender to a strike threat as a voluntary settlement. Cases such as *Alpha Beta Co.*, 273 NLRB 1546 (1985), relied on by Respondent are factually inapposite for the reasons set forth earlier in this decision. Nor does Sec. 10(b) bar this complaint. While the 1989 incident sheds light on Respondent's secondary objective, the events giving rise to this complaint and the violation flowing therefrom are not inescapably grounded on any time barred events. Indeed, this violation exists even if the 1989 event never occurred. Respondent's argument to the contrary is without merit. This case presents a new contracting by Nevins to a different contractor which resulted in an entirely new and different course of conduct by all parties.

employees and requesting a union contract. This one-two punch by the Union and its counsel, in light of the 1989 incident, demonstrates that the Union, by resorting to arbitration, was seeking to convert the so-called work preservation clause into a union signatory clause, restricting Nevins to engaging only union cleaning contractors. Absent an 8(e) allegation, it is not necessary to decide if the unilateral conduct of the Union constitutes a reaffirmation of an 8(e) clause within the 10(b) period. It is enough for this case that the Union, if successful, would at least have had an 8(e) clause imposed on Nevins because it would have disrupted its business dealings with others. "An attempt to cause a significant change in a secondary person's method of doing business constitutes a 'cease doing business' objective." *AGC of California v. NLRB*, 514 F.2d 433, 437 fn. 6 (citation omitted) (9th Cir. 1975).

In addition, this effort of the Union would have resulted in violations of the Act other than Section 8(e). Surely, Respondent must have intended to accomplish the immediate and direct consequences of its demand on Golden, which when coupled with the arbitration demand, would have required Golden to replace its work crew with Respondent's members and sign a union contract, despite the fact it already employed members of another union (Local 445 Laborers) under that union's contract. There is no doubt such intended results are equatable with an object of Respondent's conduct. The net result, of course, is that Golden would have been compelled to violate Section 8(a)(3) by conditioning employment on union membership and by signing a union-security agreement with Respondent, Section 8(a)(2) by recognizing Respondent under these circumstances, and Section 8(a)(5) by disregarding its lawful obligations to Local 445 Laborers. For its part, Respondent would then have been in violation of Section 8(b)(1)(A) and (2). Accordingly, I find several illegal objectives embodied in the arbitration demand and, in so doing I reject the Union's major defense that in reality Nevins was not a neutral but rather a primary employer in the dispute thereby immunizing union pressure against it under the accepted doctrine of work preservation as articulated in *National Woodwork Mfrs. Assn. v. NLRB*, 386 U.S. 612 (1967).

In that case, a general contractor (Frouge) had a union agreement which provided that its own carpenter employees would not be required to install doors that had been finished off the job, work which the jobsite carpenters traditionally performed. When Frouge ordered prefinished doors, which it was not required to do by its contract with the project owner, the union would not allow Frouge's employees to install them. The Court concluded that the union's boycott in support of the contractual restriction was primary because, in the words of Justice Harlan, it had as the "sole objective the protection of Union members from a diminution of work" that "traditionally had been performed . . . on the jobsite." (386 U.S. at 648.) The analytical framework to be applied is "whether, under all the surrounding circumstances, the Union's object was preservation of work for Frouge's employees, or whether the agreements and boycott were tactically calculated to satisfy union objectives elsewhere. Were the latter the case, Frouge, the boycotting employer, would be a neutral bystander, and the agreement or boycott would . . . become secondary." (386 U.S. at 644-645, fn. omitted.)

The Union is correct that *National Woodwork*, supra, principles govern this case but they do so to support a violation, not to privilege the Union's conduct. Nevins, unlike Frouge, did not contract out work which its own employees had traditionally and historically performed. The record is clear and uncontradicted that from the day the Building opened in 1965 Nevins always, without interruption, contracted out the general cleaning work to a series of contractors and that it is that work exclusively that is the subject of the Union's work preservation claim. It is axiomatic that Nevins could not preserve work for its employees which its employees never performed and that pressure directed to Nevins therefore is pressure against a neutral employer. Confronted by Respondent's demands, Nevins had the following options available; it could have required Golden, as a condition of doing business, to fire its employees, hire the Guardian employees, and sign a Union contract as Respondent demanded of Golden, or failing that, it could have terminated its contract with Golden and reinstated Guardian or retained another union contractor. In any case, the pressure on Nevins was not "a shield carried solely to preserve the members' jobs" for the contracting employer but was a sword used "to reach out to monopolize jobs or acquire new job tasks" (386 U.S. at 630-631) which quite properly has been long viewed as secondary activity.

The Union seeks to refute Nevins' status as a neutral, unoffending employer, by arguing further that since Nevins had the right to control the award of the work, indeed had the right to perform it with its own employees, action directed against Nevins was lawful primary activity in furtherance of the work preservation language in the contract. I find no merit to this argument because it is a distortion of the "right to control" test under the factual circumstances of this case. In *NLRB v. Plumbers Local 638*, 429 U.S. 507 (1977), the Supreme Court approved the Board's utilization of the "right to control" test which, under certain circumstances, is a method of analysis for finding a union's objective secondary, not primary, despite a contractually valid work preservation clause. Briefly, that case stands for the proposition that when an employer has no power to assign to its own employees work which its own employees traditionally had performed, union pressure on its employer to obtain that work is considered secondary because of the inexorably logical conclusion that such pressure tactically is calculated to satisfy union objectives elsewhere. The Court held that mere existence of a work preservation clause is insufficient to convert such conduct into lawful primary activity. Conversely, if the targeted employer had the right to control the assignment of the traditional unit work, then the union's activity to compel the employer to abide by a valid work preservation agreement would be primary under the *National Woodwork* framework.

But, central to the right to control analysis, and preliminary to its significance in a given dispute, is a threshold finding that the work in question, the work the union seeks to preserve, must have been work traditionally done, or fairly claimable by, the employees of the targeted employer. There must first be a semblance of validity to the work preservation claim. The Respondent casually ignores the single, uncontested, firmly evidenced fact that Nevins' employees, the principal work unit, never did the building cleaning work the Union seeks "to preserve." It is unit work, not union

work, that may be preserved, see *Plumbers Local 638*, 429 U.S. at 517, and *National Woodwork*, 386 U.S. at 629.

Therefore, having found that the Union was not seeking to preserve unit work at Nevins, there is no occasion to weave into the analysis the “right to control” doctrine. It is irrelevant to the genuine issues in the case even if there existed a valid work preservation agreement between Respondent and Nevins, a finding that I do not make by any means. In effect, the Union, by arguing that Nevins had the right to control the disposition of nonunit work, admits that it wanted Nevins to exercise the power it had to resolve the dispute by ceasing to do business with Golden. Manifestly, an object of its conduct was to induce this result. The right to control doctrine is a refuge for a union seeking to preserve bargaining unit work at the contracting employer. It is not a device for intruding into the business practices of an employer as Respondent argues here.

Lastly, the Union’s claim that it only was lawfully seeking to preserve work fairly claimable, even if not actually done, by Nevins’ employees has no record support and is without factual or legal merit. Again, the Union erroneously focuses on the type of work union members may have done in the building cleaning trade rather than on the work traditionally performed by the unit employees at Nevins. Where, as here, the unit employees have not lost the work they performed, let alone threatened with such loss, it is a nonsequitur to assert that the work the union wants to preserve is fairly claimable by the unit. And where, as here, the principal work unit has remained intact and unaffected by any change or threatened change in the employer’s method of doing business, e.g., where no technological changes or subcontracting has occurred, there is no possible basis for considering what work, if any, is fairly claimable by the unit. Inasmuch as Nevins’ employees did not lose work, union efforts to require Nevins to undertake the cleaning tasks previously performed by contractors, because Nevins controlled the ultimate disposition of the cleaning work, as suggested in the union brief, would be an impermissible attempt to acquire work that had been performed outside the bargaining unit.

This case presents a very simple, uncomplicated task on the issue of work preservation. The nature of the work done by Nevins’ employees involved superintendent/repair functions while the general cleaning of the Building, from the day the Building opened in 1965, was done by employees of contractors in different bargaining units. This practice has continued without interruption to the present day and the Union all but admits that the work in dispute in this case is the cleaning work contracted to Golden. In order to circumvent this obvious fact the Union argues, in effect, that the contractor’s work is fairly claimable by Nevins’ unit because cleaning tasks fall within the Union’s trade jurisdiction and is capable of performance by the superintendent or helper. While this is the only argument available to the Union, it is contrary to clearly established precedent because it would focus on the work done by members outside the bargaining unit. See *NLRB v. Longshoremens ILA*, 447 U.S. 490 (1980), a case involving a complex and difficult task of determining whether or not certain container work done off the pier was the functional equivalent or sufficiently related to the type of work previously done by unit employees at the pier which work was eliminated by technological changes in the industry. If so, then it could be said the work was fairly

claimable by the unit employees and subject to a lawful claim of work preservation. Pertinent here is the Court’s observation that

to determine whether an agreement seeks no more than to preserve the work of bargaining unit members, the Board must focus on the work of the bargaining unit employees, not on the work of other employers who may be doing the same or similar work. [447 U.S. at 507 (fn. omitted).]

It bears repeating that Respondent here was lawfully entitled only to preserve work fairly claimable by Nevins’ unit, which unit was not even threatened with a loss of the superintendent’s duties or those of his helper.

Having concluded that an object of Respondent’s arbitration demand was to force or require Nevins to cease doing business with Golden, or any other contractor unsatisfactory to Respondent, we turn to the more troubling issue presented by the General Counsel’s argument that the arbitration demand constitutes coercive conduct prohibited by Section 8(b)(4)(ii). Article V of the 1987 agreement provides that either party can seek arbitration over any dispute or grievance before one of the contract arbitrators named in the agreement. If either party fails to abide by the award, the other “party, may, in its sole and absolute discretion, take any action necessary to secure such award including but not limited to suits at law.” Pursuant thereto, the Union sent its June 5, 1991 letter to the contract arbitrator claiming, as noted above, a violation of the subcontracting provision. That letter demand is alleged as coercive conduct, under the circumstances and in accordance with the holdings of the Board in *Teamsters Local 705 (Emery Air Freight)*, 278 NLRB 1303, 1304–1305 (1986), remanded in relevant part 820 F.2d 448 (D.C. Cir. 1987), and of the Board and court in *Teamsters Local 25 (Boston Deliveries)*, 282 NLRB 910 (1987), *enfd.* 831 F.2d 1149 (1st Cir. 1987).

In the first case, certain of Emery’s employees had been represented by Local 705 while other delivery work had been contracted to a company (Stepping) whose employees were represented by another union. When Emery changed to a nonunion contractor (DPD) Local 705 threatened to and did strike Emery for not using a union contractor, which conduct had a clear object to force Emery, a neutral, to cease doing business with DPD. The union also filed a grievance claiming a violation of the collective-bargaining agreement’s requirement that contractors pay the equivalent of union wages and benefits, which grievance was upheld by a board of arbitrators. In evaluating the legality of the grievance the Board also observed that Local 705 had not performed the work in question for Emery nor had it represented the employees of Stepping and under those circumstances the grievance could not be in furtherance of a legitimate work preservation object. It thus concluded that the grievance filing was in furtherance of the cease doing business object evidenced by the threat and strike and therefore was itself a violation of Section 8(b)(4)(ii)(B).

The instant case has certain parallels as well as distinctions. Here, Nevins, like Emery, never did the work with its own employees despite having a union contract covering other of its employees. But, unlike the *Emery* situation, the Union here had represented the contractor’s employees.

However, I believe this circumstance does not undermine in any way the concept espoused in the overwhelming body of case law that a lawful work preservation defense can be sustained only where the targeted employer's unit performed the work in question. If it were otherwise, Emery would not have been found to be neutral in its union's dispute with DPD. Rather, the only significance to the aforesaid observation regarding Steping, appears to relate to the legitimacy of the union's grievance which at least facially sought to preserve area standards—presumably Steping met those standards—and the claim that contracting to a totally nonunion contractor violated those standards. Moreover, it does not appear that Local 705 sought by way of arbitrable relief that DPD do more than meet these standards, a far cry from Respondent's demand which substantially and materially distinguishes the instant case from *Emery*. Furthermore, that observation was passed over by the court in affirming a violation predicated on the strike and threat against Emery, a neutral employer. In addition, the court remanded the case to the Board to determine if the demand for arbitration would have resulted in an 8(e) violation.

The *Emery* court agreed with the Board that the Supreme Court's decision in *Bill Johnson's Restaurant*, 461 U.S. 731, 737 fn. 5 (1983), would not protect a grievance filed for an illegal object where for example the "remedy could not lawfully be imposed under the Act," assuming *arguendo* the applicability at all of *Bill Johnson's* to a grievance as distinguished from a lawsuit. *Teamsters Local 705 v. NLRB*, 820 F.2d 448, 452 (D.C. Cir. 1987). However, the court took issue with the Board's failure to explicitly find an object of the grievance to be secondary in which case "the contract provision sought to be enforced must *itself* have been illegal," in light of the grievance board's conclusion that the clause was no more than an area standards agreement. *Ibid.* It is significant that in discussing whether or not the clause had a legitimate work preservation object the court did not hold that the Steping unit employees could be protected by enforcing a contract against Emery. Rather, the court reiterated that: "In determining the agreement's legality, the Board must, to be sure, consider whether it had a legitimate work preservation objective, or was instead directed at affecting the fortunes of non-bargaining unit employees." *Id.* at 452-453.

I believe that the *Emery* decision, both by the Board and court, are persuasive in finding a violation in this case in light of my earlier conclusion that the clause as applied to Nevins by way of an arbitration demand had a secondary object as well as other objectives illegal under the Act. The Respondent invoked a clause that was not applicable to Nevins in the first place inasmuch as Nevins was not subcontracting its own work and, unlike the Emery union, Respondent here was not even pretending to protect area standards but rather was seeking to acquire work for union members outside the principal work unit by trying to impose a union signatory agreement. This object renders irrelevant the fact that Respondent's members had performed the work as employees of Nevins' contractors since they had not been employed in the Nevins' bargaining unit.

In *Boston Deliveries*, *supra*, the union filed grievances for pay in-lieu-of performing work which it claimed should have been done by Boston's unit employees rather than by Boston's customer, Sears. In support of the grievance, and to

bring pressure on Boston in order that Boston pressure Sears to change its work assignments, the union struck and picketed Boston. The grievance was upheld by an arbitration panel. The Board found all of the conduct coercive and violative of Section 8(b)(4)(i) and (ii)(B) but expressly refused to find that the grievance filing and processing alone violated the Act. The Board decision therefore neither supports nor invalidates the General Counsel's theory. However, the court specifically addressed and rejected the union's argument on appeal that it was improper for the Board to include grievance filing as a form of coercive conduct and made several telling observations instructive to the resolution of the instant matter.

The court noted the well-established principal that Section 8(b)(4)(ii) interdicts "any form of economic pressure of a compelling or restraining nature" and "a contract clause, however innocuous on its face, cannot be implemented by striking a secondary employer." *Teamsters Local 25 (Boston Deliveries) v. NLRB*, 831 F.2d 1149, 1153 (1st Cir. 1987) (emphasis in original, citations omitted). The court then proceeded to apply the portion of *Bill Johnson's*, *supra*, dealing with lawsuits filed with an improper motive and without a reasonable basis, rather than focus on footnote 5 which excludes from protection suits filed for an illegal object, the basis on which *Emery* was decided. The court concluded that the Union's objective was so clearly secondary and without even a colorable contract claim that it could be characterized both as improper and insubstantial or baseless and thus without a reasonable basis. *Id.* at 1154. While it affirmed the Board's holding that the grievances were properly held to be coercive as part of the entire course of conduct, the language of the court strongly suggests that in similar circumstances, grievances alone will be viewed as coercive.

In *Teamsters Local 776 (Rite Aid)*, 305 NLRB 832 (1991), *affd.* 141 LRRM 2176 (3d Cir. 1992), which involved a lawsuit to enforce an arbitration award contrary to a Board unit finding, the Board restated that under *Bill Johnson's*, lawsuits are not immune from constituting an unfair labor practice if, wholly apart from motive, they are filed for an illegal object. Additionally, lawsuits filed for a retaliatory motive and lacking a reasonable basis in fact or law similarly are not immune from such finding. Under the particular facts in *Rite Aid*, illegal objective was defined as "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." *Id.* at 835. In *Emery*, *supra*, both the Board and court also defined a lawsuit for an illegal objective as one seeking a "remedy that could not lawfully be imposed under the Act," and as discussed above, that is the situation we are faced with here.

Nevertheless, the court reasoning in *Boston Deliveries*, *supra*, concluding that *Bill Johnson's*, did not protect the type of unreasonable grievance Respondent pursued in this case, loses none of its relevance and remains applicable within the *Rite Aid* framework.³ Improper, if not retaliatory, mo-

³ It also is pertinent to note the court's reservation and uncertainty that *Bill Johnson's* restrictions are germane to an arbitration proceeding in contrast to a suit instituted in a court of law. *Boston Deliveries*, 831 F.2d at 1149 fn. 4.

The grievance procedure is, of course, largely a matter of private contract. Unlike access to the state courts for purposes of

tive can be found in the fact that the arbitration had no achievable legitimate purpose or goal. It sought only the illegal purpose of imposing a hot cargo clause on Nevins and creating a disruption of its business and commercial activities by resort to a secondary boycott. The absence of a reasonable basis both in fact and in law is evidenced by the following findings. The contract clause Respondent relied on in its arbitration demand does not reasonably apply to its dispute with Nevins. The clause purports to prevent the contracting employer from subcontracting unit work which, of course, can not apply to Nevins' effort to retain a new contractor to do nonunit work. Thus, the dispute simply is not arbitrable. Moreover, it is not arbitrable because of my finding that there was no collective-bargaining agreement in existence between the parties at the time the dispute arose. Nor is there any basis for finding that the dispute remained arbitrable because it arose under the expired agreement thereby surviving its expiration. *Litton Business Systems v. NLRB*, 111 S.Ct. 2215 (1991). Accordingly, although the distinction between an improperly motivated and unreasonably based arbitration can be a blurry one, as the facts here would indicate, the analysis supports a conclusion that Respondent's arbitration can be so described and that this case is removed from special protection under all of the *Bill Johnson's* standards. *Teamsters Local 483 (Ida Cal)*, 289 NLRB 924 (1988), and *Hotel & Restaurant Employees Local 274 (Warwick Caterers)*, 282 NLRB 939 (1987), are factually inapposite and clearly distinguishable. Those cases involved reasonable attempts to clarify unit descriptions pursuant to applicable contract language. Such efforts did not violate Section 8(b)(3) because the fact findings requested of the arbitrators would not have necessarily violated any statutory policy. A favorable arbitration ruling in the instant case would have resulted only in consequences inimical to the Act, a situation which could have been further exacerbated by the right of the Union under the contract to enforce such arbitration award by nonjudicial self-help. See *Sheet Metal Workers Local 48 v. Hardy*, 332 F.2d 682, 686 (5th Cir. 1964). Unlike those cases, the instant arbitration required consideration of a question of law, not merely a factual determination, that could only be decided by resort to the statute and the body of case law developed under Section 8(b)(4) and Section 8(e).

Arbitrators normally do not consider public policy, nor are they particularly expert in such matters, but rather confine their consideration to their view of contractual language in a given factual context. Permitting arbitration to proceed in an 8(b)(4) setting, even to judicial confirmation, where the same matter is alleged as a violation, can have irreparable and economically damaging consequences of enormous mag-

suit, the processing of grievances is not implicative of the same concerns of comity, federalism, and First Amendment rights which occupied the attention of the *Bill Johnson's* Court. E.g., 461 U.S. at 741-743. Thus, a strong argument can be made that the Board's condemnation of the union's course of conduct in this case need not measure up to the stringent *Bill Johnson's* benchmark. Inasmuch as we find that the grievances in this case were filed to achieve an impermissible end and without any reasonable hope of success, see text post, we simply note the distinction and leave for another day the generic question of whether some other (less rigorous) standard ought to apply when a party to a labor dispute grieves rather than sues for allegedly improper purposes.

nitude as was graphically illustrated in *Maritime Union v. Commerce Tankers*, 457 F.2d 1127, 1131 (2d Cir. 1972), setting aside enforcement of an arbitration award in violation of Section 8(e) noting that the arbitrator failed to consider the 8(e) issues and also reversing the District Court's refusal to grant a temporary injunction under Section 10(one) barring enforcement by the union of the hot cargo provision. See also *NLRB v. Maritime Union*, 486 F.2d 907, 910 (2d Cir. 1973), enfg. *Maritime Union (Commerce Tankers)*, 196 NLRB 1100 (1972), where the court details the unhappy aftermath of an improvident arbitration award. The lesson to be drawn I believe is that, at least in the context of a meritorious 8(b)(4) charge, it would be sheer folly to permit an unreasonable arbitration for an illegal object to proceed to enforcement at which time only ashes remain to be salvaged, as was the situation in *Commerce Tankers* when Section 8(e) was relied on to attack the effects of the improper arbitration award. It well may be that the reservations expressed by the courts in *Emery*, supra, and *Boston Deliveries*, supra, about applying the restrictive standards of *Bill Johnson's*, supra, to a grievance and arbitration proceeding are ripe for consideration, perhaps in this case, although I am of the view expressed above that even under those standards, Respondent's arbitration demand was unlawfully coercive.

Perhaps the most comprehensive recent discussion of the issue is to be found in *Longshoremen ILWU Local 7 (Georgia-Pacific)*, 291 NLRB 89 (1988). While that case dealt with arbitration as a form of coercion in the context of a jurisdictional dispute arising under Section 8(b)(4)(D), I glean from the body of that decision a willingness to find a violation under the circumstances of the instant case. In *Georgia-Pacific* the Board distinguished between time-in-lieu-of pay grievances filed before, from those filed after, an award of work made under Section 10(k). As to the former, the Board found no violation of Section 8(b)(4)(ii)(D) but did find such violation with respect to post 10(k) grievance filing "because at that point the grievance filings lacked a reasonable basis and reflected an improper motivation to undermine the Board's 10(k) award." 291 NLRB at 92. See also *Teamsters Local 85*, 224 NLRB 801 (1976). In distinguishing the two situations the Board (291 NLRB at fn. 10) noted the Congressional preference for private resolution of jurisdictional disputes which underlies the statutory scheme and the interplay of Sections 8(b)(4)(D) and 10(k). Therefore, it found not applicable to pre-10(k) situations those cases finding violations of Section 8(b)(4)(ii)(B) based on grievance filing, including *Emery*, supra, and *AGC of California v. NLRB*, 514 F.2d 433 (9th Cir. 1975). The warranted inference is that noncompliance with post 10(k) awards implies the same kind of illegal objective (or improper and unreasonable one) as is present in an 8(b)(4)(B) case where object is determined without resort to any prior proceeding.⁴ In such situation, the dispute is not contractual but rather statutory, and arbitration can not be classified as an arguably reasonable method of resolution. The clear lesson is that arbitration, under certain circumstances, constitutes a form of coercion interdicted by Section 8(b)(4)(ii) and that Section 8(b)(4)(B) reflects a Congressional policy, in tandem with Section 8(e), to prohibit parties from voluntarily arriving at a cease doing business

⁴The same situation that was applicable in *Rite Aid* where an 8(b)(3) violation turned on an earlier unit determination.

object. This reflects a policy poles apart from one which encourages parties to voluntarily resolve jurisdictional awards or even unit questions (cf. *Ida Cal*, supra, and *Warwick Caterers*, supra).

Indeed, in *Georgia-Pacific*, 291 NLRB at 93 fn. 11, Chairman Stephens considered it an open question (now before us) as to whether or not arbitration before the 10(k) awards might not constitute a violation of Section 8(b)(4)(B) because of the arguable cease doing business object indirectly present in filing grievances for a monetary penalty. The Chairman reasoned that in order to avoid such penalty the employer would be limited to doing business only with contractors who employ union members to do the disputed work, a circumstance almost identical to the instant case. A fortiori, a grievance which directly seeks to accomplish this forbidden object, violates the Congressional intent underlying Section 8(b)(4)(B), and harmonizes that section of the Act with Section 8(e). A contrary result would create an unacceptable tension between those two sections. The full Board panel, id. at fn. 12, joined Chairman Stephens in noting that grievances which are not arguably meritorious, e.g., post Section 10(k) and those where the Board can make such determination as in an 8(b)(4)(B) case, could be unlawful.

It also is significant that Chairman Stephens found support for his views in the Ninth Circuit opinion in *AGC of California*, supra. In that case the court reversed the Board's holding (207 NLRB 698) that a grievance for limited monetary damages against a neutral employer was not coercive because the contract as applied did not violate Section 8(e). Although that Board decision is factually distinguishable from the instant case and therefore not binding here, the court discussion does offer an analytical approach very much supporting a violation in this matter. Also, as noted by Chairman Stephens, that Board case was decided before the Supreme Court decision in *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731, implying that the precedential value of the Board decision is questionable in any event. The Ninth Circuit traced the history of work preservation and right of control doctrines to conclude that an employer who installed sinks manufactured with certain prefabricated piping work claimed by his union was a neutral, and that by seeking pay, through arbitration, its members supposedly would have earned had they installed the piping, the union did engage in 8(b)(4)(ii) conduct.

Having done the analysis the Board declined to undertake,⁵ and having concluded, contrary to the Board, that an object of the grievances were secondary and the clause as applied therefore violated Section 8(e), there was no reasonable basis for not finding arbitration in furtherance of such objects, unlawfully coercive. *AGC of California* 514 F.2d at 438-439. Citing well-established authority that "coerce" in Section 8(b)(4)(ii) includes "any form of economic pressure of a compelling or restraining nature" it required no great leap of logic to bring within that definition arbitration, even for money damages equal to lost pay. "The desired effect" the court noted, was to pressure the neutral employer "to

pressure others to change their business practices." Ibid. In my judgment this reasoning applies to the case at hand where, we will recall, the Respondent through pressure on Nevins sought not only backpay for work its members presumably would have done had Golden not been awarded the cleaning contract, but a collective-bargaining agreement with Golden, as well. And, of overriding importance, Respondent sought an arbitration award requiring that Nevins cease doing business with Golden thereby effectively imposing on Nevins a provision, which if written by the parties, would have violated Section 8(e). In accordance with the foregoing discussion and mindful "that the Act's language should be construed broadly when necessary to give effect to its spirit," *Teamsters Local 812 (Canada Dry Distributors)*, 302 NLRB 258 (1991), Respondent's demand for arbitration violated Section 8(b)(4)(ii)(B).

CONCLUSIONS OF LAW

1. Nevins Realty Corp. (Nevins) and Golden Mark Maintenance, Ltd. (Golden) are persons and employers engaged in commerce and in an industry affecting commerce within the meaning of Sections 2(1), (2), (6), and (7) and 8(b)(4)(ii)(B) of the Act.

2. New York State and New York City and their various agencies, including New York State Office of General Services, Department of Motor Vehicles, and the Division of Parole and New York City General Services Administration and Human Resources Administration are persons engaged in commerce and in an industry affecting commerce within the meaning of Sections 2(1), (6), and (7) and 8(b)(4)(ii)(B) of the Act.

3. Local 32B-32J, Service Employees International Union, AFL-CIO (Respondent) is a labor organization within the meaning of Section 2(5) of the Act.

4. By resorting to arbitration against Nevins where an object thereof is to force or require Nevins to cease doing business with Golden, New York State, New York City, and other persons, Respondent has threatened, coerced, and restrained Nevins in violation of Section 8(b)(4)(ii)(B), which conduct and activity affects commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent violated Section 8(b)(4)(ii)(B) of the Act, I shall recommend that it cease and desist therefrom as well as take certain affirmative action designed to effectuate the purposes of the Act. Respondent shall be required to withdraw the arbitration demand giving rise to this case and reimburse Nevins for all reasonable expenses and legal fees, with interest, incurred in defending against the arbitration demand, see *Rite Aid Corp.*, 305 NLRB 832-835 fn. 10 (1991). Interest shall be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Inasmuch as the violation stems from the policy of the Union to interpret and apply its industrywide collective-bargaining agreement in a consistent and uniform manner throughout the industry and in light of the similar action against Nevins at an earlier time, I shall recommend a broad order protecting parties to the union contract in addition to Nevins.

⁵The Board concluded that it did not have to consider the work preservation issues because the means used to enforce a contract not violative of Sec. 8(e) as applied—only money damages were sought in arbitration—could not be considered coercive under Sec. 8(b)(4)(ii).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁶

ORDER

The Respondent, Local 32B-32J, Service Employees International Union, AFL-CIO, Brooklyn, New York, its officers, agents, and representatives, shall

1. Cease and desist from seeking to enforce or apply, through arbitration, any collective-bargaining agreement with Nevins Realty Corp., or any other person having an agreement with it who is engaged in commerce or in an industry affecting commerce, where an object thereof is to force or require Nevins, or any such other person, to cease doing business with Golden Mark Maintenance, Ltd., the State of New York, the city of New York or any other person.

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

(a) Withdraw the demand for arbitration filed against Nevins on June 5, 1991.

(b) Reimburse Nevins for all reasonable expenses and legal fees with interest incurred in defending against the arbitration demand.

(c) Post at its business office copies of the attached notice marked "Appendix."⁷ Copies of the notice, on forms provided by the Regional Director for Region 29, after being

⁶If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

⁷If 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."

signed by the Respondent's authorized representative, shall be posted by the Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Furnish the Regional Director for Region 29 signed copies of such notice for posting by Nevins, if willing, at its premises.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

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

WE WILL NOT seek to enforce or apply, through arbitration, any collective-bargaining agreement with Nevins Realty Corp., or any other person having an agreement with us who is engaged in commerce or in an industry affecting commerce, where an object thereof is to force or require Nevins, or any such other person, to cease doing business with Golden Mark Maintenance, Ltd., the State of New York, the City of New York, or any other person.

WE WILL withdraw the demand for arbitration we filed against Nevins on June 5, 1991, and reimburse Nevins for all reasonable expenses and legal fees with interest incurred in defending against the arbitration demand.

LOCAL 32B-32J, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO