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

Advice Memorandum

DATE: August 29, 2008

TO : Helen Marsh, Regional Director
Region 3

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: UFCW District Union Local 1
(Rite Aid of New York)
Case 3-CB-8827

This Section 8(b)(1)(A) case was submitted for advice on whether the Union's request for arbitration sought an unlawful object under Bill Johnson's Restaurants[1] because the Union was seeking to force the Employer to recognize it unlawfully as a minority union. We conclude that the Union's request for arbitration did not seek the unlawful object of recognition as a minority union; the Union instead was seeking enforcement of a provision in a collective-bargaining agreement which would require the Employer to recognize the Union only if it established majority status.

FACTS

The parties' current bargaining agreement contains the following after-acquired stores provision:

> Article 1.4: In the event that the Employer builds, leases or acquires any new or existing stores in the geographic area in which these stores are located, the Employer agrees to recognize the Union as the sole bargaining agent ... provided that the Union can demonstrate that it has been authorized by a majority of the [store employees].

Pursuant to other provision of the parties' agreement, employees at a newly acquired store would become part of the existing multi-store unit.

Article 1.4 has been in successive bargaining agreements between the parties since 1996. For many years, the Employer accorded the Union recognition under this provision based on Union provided authorization cards. In

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[1] Bill Johnson's Restaurants v. NLRB, 461 U.S. 731, 737 note 5 (1983).

2002, the parties ceased this practice and entered into an agreement where the Union's majority was determined by an election conducted by the American Arbitration Association (AAA).

In early August 2007, the Employer informed the Union that it would no longer follow the AAA election procedure and that the Union instead should file election petitions with the Board. Nevertheless, the Union on August 14 notified the Employer that the Union had obtained majority status at the Employer's newly acquired Auburn store and thus was requesting an AAA election. The Employer declined to participate. The Union then filed a notice of arbitration concerning the following issue: "Whether the Employer violated the agreement by failing to grant the Union recognition for stores it has acquired upon the Union's showing that it has been authorized by a majority of employees to serve as the bargaining agent? If so, what shall be the appropriate remedy."

In May 2008, the Employer received a petition signed by eight of the 16 unit employees in the Auburn store at that time. The petition stated that the signatory employees had signed authorization cards but no longer wanted the Union to represent them. The petition further claimed that some of the card signers had called the Union to retrieve their cards, to no avail.

On May 16, 2008, the Employer provided the Union with a copy of the employee petition and asked that the Union withdraw its arbitration request and file an election petition. The Employer stated that if it were to voluntarily recognize the Union in the face of this employee petition, a decertification petition and thus Board involvement was inevitable. The Union declined to withdraw the arbitration; the Employer filed the instant charge.

The parties held an arbitration hearing on June 24, 2008. At the hearing, counsel for the Union framed the following issue to the arbitrator: "[I]f you were to rule in the Union's favor ... you should direct the Employer to follow the language of Article 1.4, which is to confer recognition upon the Union if it can establish that a majority of the employees support the Union ... either through a card check or through a AAA election, but certainly far short of making the Union file a petition with the NLRB."

The Union did not adduce any authorization cards into evidence at the hearing. The Employer introduced the May

2008 employee petition. The arbitration hearing closed; briefs were due August 15.

ACTION

The Union's arbitration did not seek an unlawful object of recognition as a minority union; the Union instead was seeking enforcement of a bargaining agreement provision which would require the Employer to recognize the Union if it proved its majority status.

A demand for arbitration or the filing of a federal lawsuit has an unlawful object where it seeks a result incompatible with Board law.[2] When a "[u]nion's arbitration demands are contrary to its statutory collective-bargaining obligations, the Union's arbitration demands have an objective that is illegal under federal law."[3] When a grievance is filed for an unlawful objective, the protections of Bill Johnson's do not apply.[4]

We first note that the Union's arbitration claim was based upon contract provisions providing that, upon proof of the Union's majority status, the employees at newly

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[2] Bill Johnson's Restaurants v. NLRB, 461 U.S. 737 fn. 5.

[3] Chicago Truck Drivers (Signal Delivery), 279 NLRB 904, 906-907 (1986) (union's insistence on the arbitration of grievances seeking to merge three historically separate bargaining units violated Section 8(b)(1)(A) and 8(b)(3) since the proposed merger would have introduced multifacility and multiemployer bargaining); Safeway Stores, Inc., 276 NLRB 944, 951 fn. 2 (1985) (agreement to apply contract to employees at new facilities per after-acquired stores clause violated Section 8(b)(1)(A) where the employees were not an accretion to represented unit); Elevator Constructors (Long Elevator), 289 NLRB 1095 (1988), (interpreting Bill Johnson's footnote 5 to find an unlawful object where union's construction of the parties' contract in arbitration would necessarily result in a Section 8(e) violation).

[4] See Signal Delivery, 279 NLRB at 906-907; Elevator Constructors (Long Elevator), 289 NLRB at 1095; Teamsters Local 705(Emery Air Freight), 278 NLRB 1301, 1304 (1986), enf. denied and remanded in part, 820 F.2d 448 (D.C. Cir. 1987) (filing of grievance for unlawful secondary objective absent any evidence primary employer had right to control separate entity).

acquired stores would become part of the existing unit.[5] We then conclude that the Union's arbitration claim merely sought Employer compliance with these provisions after the Employer summarily declined to follow them. In particular, the Union was seeking a determination from the arbitrator on how the Union may prove majority status under these contract provisions. The Union's arbitration claim was not seeking recognition as a minority union.

Since the Union's arbitration claim did not seek an unlawful object, and also was reasonably based given the Employer's admitted refusal to abide by the contract, the Region should dismiss this case, absent withdrawal.

B.J.K.

[5] See Pall Biomedical Products Corp., 331 NLRB 1674, 1675 (2000), enf. den. on other grounds 275 F.3d 116 (D.C. Cir. 2002). Compare Supervalu, Inc., 351 NLRB No. 41, slip op. at (September 2007) (employer did not violate Section 8(a)(5) by refusing majority card check recognition at three new stores despite the parties' "additional stores" clause, where the new employees would not become part of the same unit and the General Counsel did not introduce evidence to support a finding that the "additional stores" clause vitally affected the terms and conditions of the existing employees).