

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

Advice Memorandum

DATE: July 17, 2009

TO : Dorothy L. Moore-Duncan, Regional Director
Region 4

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

SUBJECT: Teamsters Local 863 (East Coast
Distributors and Benchmark Distributors)
Cases 4-CB-10271, 4-CB-10272

536-2507
536-2522
548-4060
554-1467-0155
584-2583-3300
584-3740-5900

The Region submitted these 8(b)(1)(A), (2), and (3) cases for advice on whether the Union violated the Act by seeking arbitration and obtaining an arbitral award that would allow the Union monetary recovery based on a contract interpretation, which is alleged to be unlawful under the Act. We agree with the Region that the Union's seeking and obtaining the arbitral award did not have an illegal objective under the Act. Accordingly, the Region should dismiss the charges, absent withdrawal.

FACTS

East Coast (the Employer) operates a warehouse for Wakefern Food Corporation in Keasbey, New Jersey, and is principally owned by Frank Miraglia. The Employer distributes perishable products for ShopRite supermarkets, and its 230 employees are represented by Teamsters Local 863 (the Union). The collective bargaining agreement between the parties contains a transfer rights provision:

When a new branch, warehouse or terminal is opened at any location, the Employer shall offer to all persons covered by this Agreement the opportunity to transfer to the new branch warehouse, or terminal, in the order of his/her Company or payroll seniority.

Another article provides that the agreement is binding on "any entity who, for whom, or with whom, by contract, subcontract, service agreement, merger, acquisition, co-venture or any other business organization or relationship,

the Employer performs or supplies labor to perform, or hires or engages others to perform, any work covered by this Agreement."

In 2005, Wakefern signed a lease for a new warehouse in Breinigsville, Pennsylvania, located about 85 miles from the New Jersey facility. Frank Miraglia incorporated a new company named Benchmark, which contracted with Wakefern to perform warehouse work at the Pennsylvania facility.

Local 863 argued that Wakefern and East Coast were a single employer and demanded that the Employer offer the New Jersey unit employees transfer rights to the Pennsylvania facility, pursuant to the contract. The Employer refused. Instead, based on a August 2005 card check, Benchmark recognized Teamsters Local 773 as the Pennsylvania employees' exclusive collective bargaining representative. Local 773 and Benchmark quickly reached a five-year collective bargaining agreement.

The Union filed a demand for arbitration, claiming that the Employer violated the contract's transfer provisions. The Union claimed that 78 employees had expressed an interest in transferring to the Pennsylvania facility. In August 2005, 120 employees would have constituted a substantial and representative complement of employees at the Pennsylvania facility.

On September 14, 2005, the arbitrator ruled in favor of the Union, finding that the Employer violated its collective bargaining agreement by denying transfers to employees from the New Jersey store to the Pennsylvania store.

On February 26, 2006, the arbitrator issued a remedial award, which provided that East Coast "shall assign the work at the Benchmark facility in Pennsylvania to members of Teamsters Local 863;" and that East Coast

shall make Local 863 whole for lost dues (calculated at two times the hourly rate per month, plus one dollar) and other actual damages, to date and prospectively, from the point in time that employees commenced bargaining unit work at the Benchmark facility in Pennsylvania and to continue for as long as the work is not assigned to members of Teamsters Local 863.

The arbitrator reasoned that Miraglia, as East Coast, was obligated to the provisions of the 863 Agreement, including Article 17, requiring East Coast to offer all persons covered by the agreement the opportunity to transfer to the

new branch when a new warehouse is opened at any location. Thus, regardless of whether the legal entity performing the work in Pennsylvania was Benchmark or East Coast, Miraglia, as East Coast, was obligated to the transfer provisions.

On April 20, 2006, the Employer filed unfair labor practice charges (4-CB-9674 and 4-CB-9675), alleging that the Union's grievance had an illegal object and was not reasonably based. The Region submitted the case to the Division of Advice.

On October 31, 2006, we issued a memorandum finding that the Union's claims were not baseless and did not seek an illegal objective.¹ We determined that it was reasonable for the Union to claim that East Coast and Benchmark were a single employer and to claim that East Coast was obligated to transfer the work. Further, the evidence did not support an illegal objective because the Union was not seeking, nor did the arbitrator rule, that the Employer had to apply the New Jersey contract to the Pennsylvania facility, to install the Union (and supplant Local 773) as the Pennsylvania collective bargaining representative, or to require the Pennsylvania unit to join or pay dues to the Union unless a majority selected it as their collective bargaining represent. Finally, we concluded that no case stood for the proposition that dues that might have been paid to the Union by transferring employees is an improper measure of damages for the type of contract breach alleged by the Union.

The Employer appealed the decision to district court, which enforced the arbitration award as to liability but remanded the remedial portion for clarification.

On July 26, 2008, the arbitrator issued a Clarification Opinion and Award. The arbitrator reasoned that the Employer's actions prevented the Union from exercising its contractual rights when it opened a new Employer facility.

The arbitrator further determined that, based on his interviews with 59 of the 78 New Jersey employees that has expressed an interest in transferring, 50 of 59 confirmed that they had expressed such an interest in transferring. The arbitrator determined that, in any case, the Union did not have the burden of showing that over 60 employees applied for a transfer but rather, the Employer had an

¹ Teamsters Local 863 (East Coast Distributors and Benchmark Distributors), Cases 4-CB-9674, 4-CB-9675, Advice Memorandum dated October 31, 2006.

affirmative obligation to offer the employees the opportunity to transfer.

The arbitrator ordered that East Coast pay the Union damages measured as "lost dues" covering the period from September 1, 2005 through August 31, 2013. The Opinion further clarified that the award did not purport to affect Pennsylvania employees' representation by Local 773:

This Award is not intended to diminish the rights of Local 773 to represent the Benchmark bargaining unit nor to affect Local 773's recognized bargaining rights, in the present or future, with Benchmark or at the Benchmark (Pennsylvania) facility. Moreover, any payment by East Coast to Local 863 shall have no affect [sic] on the bargaining relationship, or dues obligations, between Benchmark and Local 773.

The arbitrator reasoned that, while the Employer unlawfully denied the Union members transfer rights to the Pennsylvania facility, and therefore prevented the Union from attaining majority status, it would not be "realistic" to remedy the violation by dislodging Local 773 at the unit's representative. Instead, damages would be assessed as the equivalent of dues that the Union would have received if it had successfully taken advantage of the violated provisions of the contract to attain majority support, recognition, and application of the East Coast collective bargaining agreement.

On January 23, 2009, the Employer filed the instant charges, alleging that the Union violated Section 8(b)(1)(A), (2), and (3) by securing and attempting to enforce an arbitral award based on an illegal interpretation and application of the collective bargaining agreement.

ACTION

We agree with the Region that, absent withdrawal, the charges should be dismissed.

In determining whether a union's demand for arbitration or the filing of a federal lawsuit has an illegal object, the Union must be trying to seek a result incompatible with Board law.² When a "[u]nion's arbitration demands are contrary to its statutory collective-bargaining

² See Bill Johnson's Restaurants v. NLRB, 461 U.S. 731, 737 fn. 5 (1983).

obligations, the Union's arbitration demands have an objective that is illegal under federal law."³ When a grievance is filed for an illegal objective, the protections of Bill Johnson's do not apply.⁴ A union's grievance has an illegal object if, for example, it seeks recognition as the representative of employees in stores where it admits it does not have majority status.⁵

The question here is whether an objective of seeking to represent the Pennsylvania unit, absent an affirmative showing of majority support, evidences an illegal objective. In Gitano Group,⁶ the Board held that, where an employer transfers a portion of its represented unit employees from one location to a new location, the Board will apply a rebuttable single facility presumption and will presume that the transferred employees support the union. If a majority of the employees in the unit at the new facility are transferees from the original unit, the employer will be obligated to recognize and bargain with the union. The Union need not demonstrate majority support; rather, if a majority of employees at the new

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) of the Act since the proposed merger would have introduced multifacility and multiemployer bargaining); 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 indicating primary employer had right to control separate entity). See Elevator Constructors (Long Elevator), 289 NLRB 1095 (1988), interpreting footnote 5 of Bill Johnson's to find an illegal objective where the union's construction of its contract in arbitration would necessarily result in a Section 8(e) violation.

⁴ See Signal Delivery, 279 NLRB at 906-907; Teamsters Local 705 (Emery Air Freight), 278 NLRB at 1304; Elevator Constructors (Long Elevator), 289 NLRB at 1095.

⁵ See Safeway Stores, Inc., 276 NLRB 944, 951 fn. 2 (1985) (an agreement to apply a contract to employees at new facilities, per an after-acquired stores clause, violated Section 8(b)(1)(A) where the employees were not an accretion to the represented unit); Signal Delivery, 279 NLRB at 906-907.

⁶ 308 NLRB 1172, 1175.

facility are transferees, the Board presumes that they support the union.⁷

Here, the Union asserted that East Coast and Wakefern were a single employer, and that a majority of employees (78) would have been transferees from the New Jersey to the Pennsylvania facility. The Employer, in turn, concedes that the Union would have required evidence of support from only 61 (of 120) employees at the Pennsylvania facility. Regardless of whether the Union's evidence was sufficient to show support from 61 employees, an argument that the Union had the presumed majority support of the Pennsylvania unit, entitling it to representation, is compatible with Board law under Gitano. Otherwise stated, the argument that had the Employer fulfilled its contractual transfer obligations, a sufficient number of New Jersey employees would have transferred to the Pennsylvania facility such that, the Union would have been presumed to have majority representation at that facility, is not incompatible with Board law.

Further, the arbitrator concluded that Wakefern would have been obligated to recognize the transferred employees, and sufficient evidence in the record as to Wakefern and East Coast's single employer status supports this finding. Both companies have common ownership, common management, and common labor relations. Further, the Union consistently argued that Wakefern and East Coast were a single employer—an argument that was certainly reasonably based. Thus, an argument that: East Coast and Wakefern were a single employer, the Union had evidence that, had employees been permitted to transfer, a majority of the Pennsylvania unit would have been comprised of former New Jersey employees; and the transferred employees are presumed to support the Union, does not seek an illegal object.

In any case, the arbitrator specifically found in his Clarification Opinion and Award that the Union was not, in fact, seeking this allegedly illegal object - representation of the Pennsylvania unit. The arbitrator notes that "Local 863 repeatedly confirmed that it was seeking **monetary damages in the form of lost dues for a beach of contract,**" (emphasis original) and that, despite the contractual violation, "the Union sought only monetary damages for in the measure of lost dues" (emphasis original).

⁷ Id.

Moreover, even if the Union at one point sought such a remedy, the Union certainly abandoned that argument in its briefing to the arbitrator during the Clarification proceedings –the only event occurring within the Section 10(b) period here. The Union therefore has not sought to represent or apply the collective bargaining agreement to the Pennsylvania facility within the Section 10(b) period.

Finally, the Employer argues that the arbitrator's award of lost dues is predicated on an illegal objective because the Union never represented the Pennsylvania employees. The Employer reasons that if the Union was never entitled to represent the Pennsylvania unit, the Union's seeking dues based on lost dues has an illegal objective. We disagree.

Even if the Union was not entitled to represent the Pennsylvania unit, no case stands for the proposition that it is unlawful to award damages based on the lost dues. In Bakery Workers Local 6 (Stroehmann Bakeries),⁸ the Board rejected the General Counsel's allegation that a union's lawsuit had an illegal objective where it sought damages "in an amount equal to accrued union dues for all bargaining unit employees," even though the Union lost a Board election. Thus, even though the Board in Stroehmann Bakeries had determined that the union lost the election, the Board found that the request for monetary damages was not tantamount to imposing a union-security obligation upon employees and did not seek an illegal object.⁹

Similarly, even if the Union here was not entitled to represent the Pennsylvania employees, the request for monetary damages for breach of contract in an amount equal to union dues does not have an illegal objective. Such a request for damages imposes no financial burden or union security obligation upon employees at either facility. Measuring damages as dues that might have been paid to the Union had employees been permitted to transfer is not repugnant to the Act or an improper measure of damages.

Moreover, the damages award, paid by the Employer to the Union, has no affect on the employees at either the New Jersey or the Pennsylvania facilities. Thus, it does not restrain or coerce employees in exercising Section 7 rights, cause or attempt to cause the Employer to discriminate against employees in violation of Section 8(a)(3), or constitute an unlawful refusal to bargain.¹⁰

⁸ 320 NLRB 133, 139 (1995).

⁹ Id.

We therefore agree with the Region that these charges should be dismissed, absent withdrawal.

B.J.K.

¹⁰ See id. (no violation of Section 8(b)(1)(A) where union's lawsuit was preempted but did not restrain or coerce employees).