

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

Advice Memorandum

DATE: July 5, 2016

TO: Marlin O. Osthus, Regional Director
Region 18

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

SUBJECT: IBEW Local 31 (ALLETE, Inc. d/b/a Minnesota
Power and ALLETE Renewable Resources Inc.)
Case 18-CB-171088

542-3333-8900-0000
554-0125-0000-0000
554-1450-0875-0000
554-1450-5700-0000
554-1490-0000-0000

The Region submitted this case for advice as to whether the Union violated Section 8(b)(1)(A) or (b)(3) of the Act by instituting a Section 301 lawsuit to compel arbitration on whether the Employer was bound to an interest arbitration provision in its bargaining with the Union for a contract to cover a newly certified unit. We conclude that the Union's lawsuit does not violate the Act because it does not have an illegal objective. Thus, the Region should dismiss the charge, absent withdrawal.

FACTS

ALLETE, Inc. d/b/a Minnesota Power ("ALLETE") is an energy company that operates in the upper Midwest. It is signatory to a collective-bargaining agreement ("CBA") with IBEW Local 31 ("the Union") effective February 1, 2014 to January 18, 2018. Paragraph 2 of the CBA sets out the parties to the agreement. This paragraph defines "Company" as "Minnesota Power of Duluth, Minnesota, its successors and assigns, or firms owned or controlled by it, wholly or jointly, or operated under a management contract, and located in the State of Minnesota." It also states that the Union represents a bargaining unit composed of employees employed by the "Company" in the different classifications enumerated in Exhibit A of Article II. Wind technician is not one of the those classifications.

Article II of the CBA, entitled "Employment, Union Membership," contains an interest arbitration provision at Paragraph 24, which states:

Should there be employees of the Company who are not covered in the classifications in this Article who desire the Union to represent them, the

representatives of the parties hereto shall meet on ten (10) days written notice from either party to the other or at a date mutually agreed on for the purpose of negotiating, concerning wages, hours and other definite conditions of employment of such employees, and on their failure to fully agree, the points of difference shall be settled by arbitration in the manner as provided herein.¹

On May 19, 2015,² the Union filed a representation petition in Case 18-RC-152518 seeking to add four wind technicians employed at the Taconite Ridge Wind Energy Center in Mountain Iron, Minnesota to the bargaining unit defined in the CBA. The Taconite Ridge Wind Energy Center is operated by ALLETE Renewable Resources, Inc. (“ARRI”). ARRI is a subsidiary of ALLETE Enterprises. ALLETE Enterprises is a subsidiary of ALLETE. The Union named “Minnesota Power, an ALLETE Company” as the employer in that petition. ALLETE contested the appropriateness of including the wind technicians in the unit covered by the CBA because it asserted that ARRI, and not ALLETE, employed the wind technicians. The Union subsequently withdrew its petition.

On June 1, the Union filed a new petition in Case 18-RC-153293 seeking to represent the wind technicians as a stand-alone unit. The parties signed a consent election agreement defining the employer as “ALLETE, Inc. (d/b/a Minnesota Power) and ALLETE Renewable Resources, Inc., as a single employer” (referred to herein as “the Employer”). On June 23, the Region conducted an election for the four wind technicians employed at Taconite Ridge, and the Union won.

On June 24, the Union’s Business Manager sent a letter to the Employee/Labor Relations & Talent Acquisition Manager for ALLETE (“ALLETE Manager”) and requested collective bargaining for the four wind technicians. The Union’s Business Manager stated that the Union was making its request pursuant to the Employer’s obligation under the Act and under Paragraph 24 of the CBA between ALLETE and the Union. On July 1, the Board certified the Union as the wind technicians’ exclusive bargaining representative.

On July 24, the ALLETE Manager sent a letter responding to the Union in which he stated that the wind technicians were employed by ARRI and that ARRI would be

¹ It is not clear either how long the CBA has included the interest arbitration provision or the history of the parties’ use of the provision. The Employer asserts that the Union sought to represent a group of employees through Paragraph 24 through an agreed-upon private election in December 2012 but lost.

² All subsequent dates are in 2015 until otherwise noted.

bargaining a new labor contract with the Union. He stated that any past or present contractual provisions between ALLETE and the Union were not applicable to those negotiations.

On August 4, the Union's Business Manager responded by letter to the ALLETE Manager. He said that the ALLETE Manager had incorrectly characterized the employer of the wind technicians as ARRI and that the parties had agreed in the consent election agreement that the employer was "ALLETE, Inc. d/b/a Minnesota Power and ALLETE Renewable Resources, Inc., as a single employer." The Union's Business Manager also said that the Union believed that the wind technicians were "employees of the Company" as used in Paragraph 24 of the CBA. He explained that the ALLETE Manager should regard his letter as a grievance disputing both the Manager's characterization of the relevant employer and contention that the Union's agreement with ALLETE had no application to the wind technicians.

On August 19, the ALLETE Manager responded by letter stating that ALLETE agreed with the Union that "ALLETE/ARRI" was the employer for the purposes of the bargaining unit and negotiations. However, ALLETE disagreed as to the application of the CBA. The ALLETE Manager explained that there was no CBA between the Employer (ALLETE/ARRI) and the Union, and the CBA between ALLETE and the Union had no bearing on the wind technicians. The ALLETE Manager reiterated that the Employer intended to negotiate a new contract for the wind technician unit and that Paragraph 24 of the CBA did not apply to those negotiations.

Throughout August and September, the Union and Employer exchanged letters reiterating their positions. In late October, the parties met in person for a bargaining session, but they merely expressed their contrary positions regarding the application of Paragraph 24 to the four wind technicians and no bargaining occurred. On November 19, the Union's Business Manager sent a letter to the ALLETE Manager, which was attached to the Union's grievance form, explaining the Union's position in detail and stating that ALLETE should consider the letter a grievance pursuant to the parties' CBA. The letter stated that the Union was seeking an arbitrator's determination that: (1) the wind technicians are "employees of the Company" within the meaning of Paragraph 24 of the CBA such that the arbitrator had jurisdiction to determine their wages, hours, and other conditions of employment; (2) the parties' current CBA should include the wind technicians among the list of enumerated job classifications and find all provisions of the CBA applicable to them with a seniority date effective on their first date of hire; and (3) the wind technicians should have their wages increased in the same manner as the other bargaining unit employees in 2016 and 2017.

On January 11, 2016,³ the Union's Assistant Business Manager emailed the ALLETE Manager seeking to schedule dates for the "P.24 Wind Tech" arbitration. On January 13, the ALLETE Manager emailed back reiterating the Employer's position that the grievance was invalid because there was no contract or grievance procedure in place covering the wind technicians. The parties exchanged letters to this effect on January 13 and February 10.

On March 1, the Union filed a Section 301 suit in the United States District Court of Minnesota, requesting that the court compel arbitration on the application of Paragraph 24 of the CBA to the wind technicians. On March 4, the Employer filed the unfair labor practice charge in the instant case alleging that the Union had violated Section 8(b)(1) and (b)(3) by refusing to bargain in good faith. On March 21, ALLETE filed an opposition to the Union's motion to compel arbitration and a motion to stay the proceedings. ALLETE argued that the question before the district court was representational and, therefore, the court did not have subject-matter jurisdiction. Specifically, ALLETE argued that in order for the court to decide whether to compel arbitration, it would first have to determine the appropriate unit, which had already been determined by the Board in its certification. ALLETE argued in the alternative that the district court should stay proceedings on the Union's Section 301 suit pending the Board's determination on the Employer's unfair labor practice charge.

On March 31, the Union filed a reply to ALLETE's opposition, asserting that ALLETE was mischaracterizing the dispute as a representational issue when the Union was solely seeking an arbitrator's decision on whether Paragraph 24 of the CBA applied to the wind technician unit.

On April 7, the Employer amended its unfair labor practice charge to include an allegation that the Union's Section 301 suit to compel arbitration violated Section 8(b)(3) of the Act.

On May 24, the district court issued a Memorandum and Order granting ALLETE's motion to stay the proceedings pending the Board's resolution of the current charge and denying the Union's motion to compel arbitration without prejudice.⁴ The court's Memorandum said the following:

³ All subsequent dates are in 2016.

⁴ *International Brotherhood of Electrical Workers, Local 31 v. ALLETE, Inc. d/b/a Minnesota Power*, No. 16-00523, 2016 WL 3014654 (D. Minn. May 24, 2016).

[T]he relevant question is in fact whether the bargaining unit the NLRB defined in ruling on the second RC Petition precludes the Union from invoking the preexisting CBA to force arbitration of this dispute. This is something the NLRB must determine in the first instance. . . . Only when this issue is resolved can the parties either return to this Court to enforce the Petition or negotiate a separate CBA for the wind technicians.⁵

ACTION

We conclude that the Union's lawsuit did not violate Section 8(b)(1)(A) or (b)(3) because the Union's lawsuit seeking to apply the CBA's interest arbitration provision to the wind technician unit did not have an illegal objective. Thus, the Region should dismiss the charge, absent withdrawal.⁶

Whether a party violates the Act by invoking a contractual grievance-arbitration procedure is generally determined under the principles of the Supreme Court's decisions in *Bill Johnson's Restaurant v. NLRB*⁷ and *BE & K Construction Co. v. NLRB*.⁸ Specifically, the Board has held that a party's efforts in obtaining arbitration

⁵ *Id.*, 2016 WL 3014654, at *3.

⁶ The Employer's charge alleges that the Union disavowed its statutory duty to bargain pursuant to the certification of the unit by filing its petition seeking a court order compelling arbitration in lieu of bargaining. We analyze here whether that petition is unlawful. We note that it is not clear whether the Employer is alleging that the Union has refused to bargain with the Employer during the course of the litigation over the application of Paragraphs 2 and 24. The presence of an interest arbitration clause does not relieve employers and unions of their responsibility to engage in good-faith bargaining and the Board's review of that bargaining to ensure that the parties have bargained in good faith. *Electrical Workers IBEW Local 113 (Collier Electric)*, 296 NLRB 1095, 1098 (1989). Based on the evidence in the record regarding the conduct of the parties, we would not conclude that under the circumstances the totality of the Union's conduct both at, and away from, the bargaining table constitutes a failure to bargain in good faith under Section 8(b)(3). See *A.W. Farrell & Son, Inc.*, 362 NLRB No. 142, slip op. at 11 (July 1, 2015).

⁷ 461 U.S. 731, 737 n.5, 743-45 (1983).

⁸ 536 U.S. 516, 531-32 (2002). See, e.g., *Food & Commercial Workers Local 540 (Pilgrim's Pride Corp.)*, 334 NLRB 852, 855 (2001) ("preserving access to the grievance machinery closely parallels the First Amendment concerns cited by the Supreme Court in *Bill Johnson's*. . . . Accordingly, . . . [t]hese weighty interests, like the ones the Court discussed in *Bill Johnson's*, militate against a rule barring the

of a grievance are unlawful and may be enjoined where the grievance has an objective that is illegal under federal law.⁹ A party's grievance has been found to have an illegal objective where it seeks a change in the scope of an existing bargaining unit, which is a permissive subject of bargaining,¹⁰ or where it enforces a contract term that is itself unlawful.¹¹ A grievance also is in furtherance of an illegal objective where a party seeks to achieve a result in the arbitration that would conflict with a prior Board determination.¹²

processing of an arguably meritorious . . . grievance simply on a showing of prohibited motive.' The Board has consistently applied these principles to efforts by a party to obtain arbitration of a variety of disputes . . ."), and the cases cited therein.

⁹ Under the Supreme Court's decisions in *Bill Johnson's* and *BE & K*, a lawsuit (or grievance) may also be unlawful if it is retaliatory and objectively baseless. *See also BE & K Construction Co.*, 351 NLRB 451, 457-58 (2007). Because the Employer here has not asserted that the Union's suit is retaliatory, and the evidence in the record would not support such a claim, we do not analyze the current case under that distinct two-part test. In any event, as further alluded to below, we would not find the Union's Section 301 suit to be objectively baseless where it is grounded on a reasonable interpretation of Paragraphs 2 and 24 of the CBA and the close business relationship between ALLETE and ARRI. *See, e.g. Hotel & Restaurant Employees Local 274 (Warwick Caterers)*, 282 NLRB 939, 940-41 (1987) (union's efforts through grievance arbitration to apply an agreement to a group of employees outside the unit that it represented found reasonable even though the Board ultimately found that the agreement did not cover those employees). *Cf. Milum Textile Services Co.*, 357 NLRB 2047, 2053 (2011) (holding that a respondent's ongoing lawsuit is objectively baseless where the General Counsel establishes that the respondent "did not have, and could not reasonably have believed it could acquire through discovery or other means, evidence needed to prove essential elements of its causes of action").

¹⁰ *See, e.g., Chicago Truck Drivers (Signal Delivery)*, 279 NLRB 904, 906-07 (1986) (union's insistence on the arbitration of grievances seeking to merge three historically separate bargaining units violated Section 8(b)(1)(A) and (b)(3)).

¹¹ *See, e.g., Murphy Oil USA, Inc.*, 361 NLRB No. 72, slip op. at 20-21 (Oct. 28, 2014) (finding that employer's effort to enforce a mandatory arbitration agreement precluding employees from filing class or collective actions was unlawful because a party acts with an illegal objective when it seeks to enforce an unlawful agreement), *enforcement denied in relevant part*, 808 F.3d 1013 (5th Cir. 2015).

¹² *See Allied Trades Council (Duane Reade, Inc.)*, 342 NLRB 1010, 1012 (2004) (union's attempts at arbitrating unit determination issue that would directly conflict with the bargaining unit found appropriate in the Regional Director's Decision and Direction of Election had an illegal objective); *Teamsters Local 776 (Rite Aid)*, 305

Applying these principles, we conclude that the Union's Section 301 lawsuit does not have an illegal objective. Initially, the Union's Section 301 suit merely sought to compel arbitration on the application of Paragraph 24 to the wind technicians, and therefore did not unlawfully seek to force a change in the scope of the existing units. Whether or not the parties had agreed to use interest arbitration in bargaining over a newly certified unit like the one in question is an issue independent of the composition of the bargaining units. Specifically, as noted below, parties can agree to use interest arbitration to resolve bargaining issues involving other bargaining units not otherwise covered by the parties' contract.¹³ Because application of the interest arbitration provision would not compel a merger of units, we cannot conclude that the Union is unlawfully insisting that the parties bargain over a permissive subject of bargaining, i.e., a change in the scope of the existing units.¹⁴ Although the Union, in its November 19 letter, indicated that it intended to submit to interest arbitration the question of whether the CBA should be modified to include the wind technicians in the same bargaining unit, such a request is not in itself insisting to impasse on that issue.¹⁵ If the interest arbitration tribunal includes nonmandatory subjects in its final award, these provisions are merely unenforceable.¹⁶

NLRB 832, 834-35 (1991) (union's suit to enforce an arbitrator's award that conflicted with a Regional Director's unit clarification had an illegal objective), *enforced*, 973 F.2d 230 (3d Cir. 1992), *cert. denied*, 507 U.S. 959 (1993).

¹³ *Cf. Central Parking System*, 335 NLRB 390, 391 (2001) (affirming dismissal of employer's RM petition in part because the issue of representation was properly deferred to arbitration as it involved the interpretation of an after-acquired clause in the parties' contract).

¹⁴ *See, e.g., Service Employees Local 32B-32J*, 313 NLRB 267, 272-73 (1993) (union's pursuit of demand for arbitration seeking remedies under its CBA regarding subcontracting was lawful and was not an effort to merge separate bargaining units). *Cf. Chicago Truck Drivers (Signal Delivery)*, 279 NLRB at 907 (because union was not seeking to arbitrate whether a merger occurred but was seeking to force the merger of historically separate units, the union's efforts were unlawful).

¹⁵ While it is unlawful for a party to attempt to force a merger of units through the grievance and arbitration process, the Board has held that the mere submission of permissive subjects of bargaining to interest arbitration does not in itself constitute an unlawful insistence to impasse in the context of bargaining. *See Sheet Metal Workers Local 20 (Baylor Heating)*, 301 NLRB 258, 260 (1991) (union did not violate the Act by submitting nonmandatory subject to interest arbitration; there was no evidence that the union insisted to impasse on the issue during the bargaining preceding the submission to interest arbitration); *IBEW Local 716 (KST Electric, Ltd.)*, Case 16-CB-7938, Advice Memorandum Dated March 23, 2010 (union did not

The Union's 301 lawsuit also does not seek to enforce an unlawful contract term. The Board has held that it is lawful for a union and employer to agree to certain provisions, including interest arbitration, that would apply to bargaining units that the union does not yet represent.¹⁷ Thus, the Union and Employer's agreement to utilize interest arbitration in bargaining over new units of the Employer's employees did not constitute unlawful pre-recognition bargaining, and the Union's lawsuit does not seek to impose an unlawful, pre-recognition contract term on the wind technicians.

Finally, the Union's Section 301 suit does not seek to achieve a result in the arbitration that would conflict with a prior Board determination. The Union's position in its grievance and lawsuit is that the wind technicians working for the Employer at Taconite Ridge are "employees of the Company," as those terms are used in Paragraph 24 and 2 of the CBA, and therefore covered by the interest arbitration clause. The Union is merely seeking an arbitrator's determination that the Employer, which operates the Taconite Ridge facility, is part of "the Company" in light of the fact that ARRI is both a subsidiary of and stipulated single employer with ALLETE. Because the Board has never been presented with or ruled on this issue, an arbitral award affirming the Union's grievance would not create a conflict.¹⁸

violate Section 8(b)(3) by including nonmandatory subjects in its submission to the interest arbitration tribunal).

¹⁶ See *Sheet Metal Workers Local 263 (Sheet Metal Contractors)*, 272 NLRB 43, 45 (1984).

¹⁷ See *Dana Corp.*, 356 NLRB 256, 257, 259 (2010) (no Section 8(a)(2) violation where union and employer agreed to a pre-recognition agreement, including, among other things, a provision stating the parties would submit unresolved issues in bargaining to interest arbitration), *enforced sub. nom. Montague v. NLRB*, 698 F.3d 307 (6th Cir. 2012).

¹⁸ Our conclusion that the Union's lawsuit does not have an illegal objective does not decide the merits of the Union's grievance. See, e.g., *Service Employees Local 32B-32J (Vaux Condominium)*, 313 NLRB at 272-73 (the decision that the union did not violate the Act in no way decides the merits of the union's grievance; it is up to the arbitrator to decide what the contract requires and whether it has been violated).

Accordingly, because the Union's Section 301 suit did not have an illegal objective, the Region should dismiss the charge, absent withdrawal.

/s/
B.J.K.