

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

DATE: May 3, 2016

TO: Rhonda P. Ley, Regional Director
Region 3

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

SUBJECT: Community Action Organization of Erie County, *Bill Johnson's Chron*
Inc. 506-6050-6200
Case 03-CA-165733 506-6050-6210
512-5012-0133-8800
775-8712

The Region submitted this case for advice as to whether the Employer violated Section 8(a)(1) by pursuing a grievance interpreting the “work interruption” clause of its collective-bargaining agreement with the Union as a waiver of employees’ Section 7 right to engage in non-worktime informational picketing. We conclude that, even if employees’ Section 7 right to engage in non-worktime informational picketing is waivable under *NLRB v. Magnavox Company of Tennessee*,¹ there was no clear and unmistakable waiver of that right in this case. Therefore, the Employer violated Section 8(a)(1) by maintaining a grievance directed at protected activity with the unlawful objective of seeking an arbitrarily-imposed waiver of employees’ Section 7 right where it is clear under Board law that the Union did not waive that right.

FACTS

Community Action Organization of Erie County (Employer) operates early childhood education centers throughout Erie County, New York. On November 6, 2013, Early Childhood Staff, NYSUT, AFT, AFL-CIO (Union) was certified as the collective-bargaining representative of the Employer’s teachers, family services staff, and maintenance employees. After contentious negotiations, the parties entered a collective-bargaining agreement effective, by its terms, from June 1, 2015 through May 31, 2017. The parties’ agreement contained the following provision:

¹ 416 U.S. 322 (1974).

ARTICLE VIII –WORK INTERRUPTION

8.1 Prohibitions

8.1.1 The Union, its officers or agents, or the Employees, must not call, sponsor, condone, importune, advocate, engage in, continue or assist in any strike, sympathy strike, slowdown, work stoppage, work disruption, picketing, concerted refusal to work overtime, or interference with the Employer's operation during the term of this Agreement.

8.2 Consequences

8.2.1 If an Employee, either singularly or in concert with other Employees or persons, does or threatens to do any act mentioned in paragraph 8.1.1, the Union must (i) give the Employer written notice that the Union disavows such act or threat; and (ii) instruct the Employees concerned verbally and in writing to cease doing such act or threatening to do it and give a copy of such written instructions to the Employer.

8.2.2 If an Employee, either singularly or in concert with other Employees or persons, does or threatens to do any act mentioned in paragraphs 8.1.1 he may be disciplined or discharged. Such disciplinary action or discharge may not be the subject of a grievance or arbitration concerning only whether the Employee committed a violation of 8.1.1 but if found guilty of the violation the arbitrator may not change the discipline or discharge imposed.

8.2.3 To remedy a violation of paragraphs 8.1.1 other than by disciplining or discharging Employees, the Employer may institute an arbitration proceeding or a civil action of injunctive relief, damages, or any other relief, and resort to the one shall not be prerequisite for, nor shall it preclude, resort to the other.

Article 8 was proposed by the Employer during negotiations for the agreement, but neither the Employer nor the Union discussed or negotiated the scope or meaning of Article 8 prior to the agreement's execution.

Shortly after the agreement became effective, the Employer informed unit employees that they had lost two weeks of paid vacation as a result of bargaining. On

June 11, 2015,² the Union filed unfair labor practice charges against the Employer alleging that it had unlawfully failed to negotiate the elimination of vacation pay and for discouraging employee support for the Union by informing employees they had lost vacation pay.

On June 12, the Union conducted informational picketing to gather community support outside the Buffalo Convention Center while the Employer was holding its Annual Dinner and Celebration there. From 5:45 PM through 6:15 PM, twenty people—ten of whom were off-duty employees of the Employer—participated in the informational picketing. The participants marched in a circle, carried signs, and chanted, among other things, that the Employer’s CEO was a “union buster.” The picketers carried two-foot by three-foot poster board signs stating “CAO keep your promise to us” and distributed handbills to event attendees stating “CAO honor your contract. Keep your promises.” The picketing was not proximate to any location where the Employer conducted business.

On June 19, the Employer filed a grievance with the Union alleging that the picketing violated Article 8 of the parties’ collective-bargaining agreement and seeking discipline—in the form of written warnings—for the employees who participated in the June 12 picketing. On July 13, the Union denied the Employer’s grievance. The Employer, pursuant to the parties’ agreement, filed for arbitration with FMCS.

On December 9, the Union filed the instant charge. On December 11, the parties arbitrated the Employer’s grievance. On January 11, 2016, the Region informed the Employer that deferral to the December 11 arbitration would likely not be appropriate because the arbitral award would probably not resolve the unfair labor practice charge.

On February 22, 2016, the arbitrator issued [REDACTED] award and sustained the Employer’s grievance. The arbitrator first concluded that [REDACTED] only had authority to hear the contractual claim and any other claims “would be properly placed before the NLRB or the courts.” The arbitrator also concluded that Article 8’s prohibition on picketing applied to all picketing, rejecting the Union’s contention that the provision only barred activity, such as strike-related picketing, that disrupts the Employer’s operation. The arbitrator required the Union to disavow the June 12 picketing and inform employees that such activity violates the parties’ collective-bargaining agreement.

On March 2, 2016, the Union and the Employer entered into an informal Board settlement covering all but the instant unfair labor practice charges. The Union

² All dates are in 2015 unless otherwise indicated.

informed the Region that it did not intend to comply with the arbitrator's award and would likely file a motion to vacate it. The Employer informed the Region that it intended to enforce the February 22 arbitration award if the Union refused to comply with it.

ACTION

We conclude that, even if employees' Section 7 right to engage in non-worktime informational picketing is waivable under *Magnavox*, there was no clear and unmistakable waiver of that right in this case. Therefore, the Employer violated Section 8(a)(1) by maintaining a grievance directed at protected activity with the unlawful objective of seeking an arbitrarily-imposed waiver of employees' Section 7 right where it is clear under Board law that the Union did not waive that right.

It is well settled that unions, in their role as collective-bargaining representative, are empowered to waive certain Section 7 rights of their members.³ But in *Metropolitan Edison Co. v. NLRB*, the Supreme Court held that it would "not infer from a general contractual provision that the parties intended to waive a statutorily protected right unless the undertaking is 'explicitly stated.'"⁴ In other words, any such waiver of statutory rights must be "clear and unmistakable."⁵ In determining whether a contract provision contains a clear and unmistakable waiver, the Board will consider: (1) the wording of the proffered sections of the agreement at issue; (2) the parties' past practices; (3) the relevant bargaining history; and (4) any other provisions of the collective-bargaining agreement that may shed light on the parties' intent concerning bargaining over the change at issue.⁶

The Board analyzes no-strike clauses, including language restricting picketing, under the "clear and unmistakable" waiver standard. In *Engelhard Corp.*, for

³ See, e.g., *Lear Sigler, Inc.*, 293 NLRB 446, 447 (1989).

⁴ 460 U.S. 693, 708 (1983). See also *Provena St. Joseph Medical Center*, 350 NLRB 808, 812 (2007).

⁵ 460 U.S. at 708. See also *Georgia Power Co.*, 325 NLRB 420, 420–21 (1998) ("[E]ither the contract language relied on must be specific or the employer must show that the issue was fully discussed and consciously explored and that the union consciously yielded or clearly and unmistakably waived its interest in the matter."), *enforced mem.*, 176 F.3d 494 (11th Cir. 1999).

⁶ See *Provena St. Joseph Medical Center*, 350 NLRB at 810–813; *American Diamond Tool*, 306 NLRB 570, 570 (1992); *Johnson-Bateman*, 295 NLRB 180, 184–87 (1989).

example, the Board concluded that a contractual provision stating that “[t]he Union agrees that it will not call, participate in, or sanction, during the term of this Agreement, any strike, boycott, picketing, work-stoppage or slow-down whatsoever” did not clearly and unmistakably waive employees’ right to engage in non-worktime picketing at an off-site meeting of the employer’s shareholders.⁷ In so holding, the Board noted the absence of any extrinsic evidence of the parties’ intent regarding that provision and instead relied on the professed purpose of the contractual clause—to prevent work stoppages.⁸

Similarly, here, the Union did not clearly and unmistakably waive the employees’ Section 7 right to engage in off-duty, off-site handbilling and picketing.⁹ Initially, Article 8.1 prohibits “any strike, sympathy strike, slowdown, work stoppage, work disruption, picketing, concerted refusal to work overtime, or interference with the Employer’s operation” but does not explicitly prohibit non-worktime or off-site activities, i.e., activities that cause no work disruption. Accordingly, we also consider other contractual language and extrinsic evidence (e.g., the relevant bargaining history and the parties’ past practices) that may shed light on the parties’ intent. In this regard, the clause falls under Article 8 of the contract, which is titled “WORK INTERRUPTION.” This indicates that the parties intended Article 8.1 to apply to

⁷ 342 NLRB 46, 48 (2004), *enforced*, 437 F.3d 374 (3d Cir. 2006).

⁸ *Id.* See also *Verizon New England, Inc.*, 362 NLRB No. 24, slip op. at 1 (Mar. 9, 2015) (concluding that a contractual provision stating that the union “will not cause or permit its members to cause, nor will any of the [u]nion take part in any strike of or other interference with any of the Company’s operations or picketing of any of the Company premises” did not clearly and unmistakably waive employees’ Section 7 right to display picket signs in their vehicles).

⁹ Since the Union clearly did not waive the right to engage in off-duty, off-site picketing, we need not decide whether the Union would have been permitted to waive that right under *NLRB v. Magnavox Co. of Tenn.*, 416 U.S. 322 (1974) (unions cannot waive employee Section 7 rights that implicates employees’ exercise of their right to choose a bargaining representative). We note, however, that the June 12 picketing did not have an object of supporting a campaign to displace the Union nor has Article 8 been applied to ban the kind of picketing or other employee conduct that would implicate *Magnavox* concerns. Cf. *Zurn Nepco*, 316 NLRB 811, 813 (1995) (finding that union could waive employee’s right not to cross picket line because the no-strike clause was not being applied to ban a work stoppage whose “principal objective was to support a campaign to displace” the union; rather, the pickets were protesting the employer’s unlawful discharges and refusals to hire employees).

activities that constitute a work interruption.¹⁰ Additionally, there is no extrinsic evidence that indicates that the Union intended to waive employees' Section 7 right to engage in non-worktime picketing. The parties' past practice with regard to Article 8.1's application to non-worktime, off-site picketing is non-existent. The parties' bargaining relationship is new, and this was their first collective-bargaining agreement. Indeed, the June 12 picketing occurred a mere eleven days after the agreement's effective date. With regard to bargaining history, the parties neither discussed what "Work Interruption" meant nor any particularities of the scope of Article 8.1. Therefore, there is no evidence that the "issue was fully discussed and consciously explored" and that the Union "consciously yielded" employees' right to engage in off-duty, off-site picketing during negotiations.¹¹

Finally, the Employer's grievance is not entitled to protection under *Bill Johnson's* principles. In *Bill Johnson's Restaurants v. NLRB*, the Supreme Court held that First Amendment considerations insulate the filing and prosecution of a reasonably based lawsuit from being enjoined as an unfair labor practice, even if the lawsuit was motivated by an intent to retaliate against employees for exercising their rights under the Act.¹² However, under footnote 5 of *Bill Johnson's*, the Board may

¹⁰ The Employer has not contended that any other contractual provision clarifies the scope or meaning of Article 8.1.

¹¹ *Georgia Power Co.*, 325 NLRB at 420–21. We note that, even if the Region had deferred this case prior to the arbitration hearing, post-arbitral deferral would be inappropriate because the arbitrator did not consider the unfair labor practice issue. *Babcock & Wilcox Construction Co.*, 361 NLRB No. 132, slip op. at 7 (Dec. 15, 2014). Additionally, issuance of complaint is not precluded on the ground that the arbitrator's interpretation of Article 8 was incorporated into the collective-bargaining agreement nunc pro tunc, because the Union invoked the Board's superior jurisdiction to resolve the statutory issue prior to the December 11 arbitration. See *Carey v. Westinghouse Elec. Co.*, 375 U.S. 261, 272 (1964) (Board can exercise its jurisdiction without regard to potential or pending arbitration proceedings); cf. *SOC Los Alamos*, Cases 28-CA-089207, et al., Advice Memorandum dated June 6, 2013 (concluding that arbitral award interpreting parties' agreement was incorporated into parties' agreement nunc pro tunc and unreviewable where the arbitral award pre-dated the filing of unfair labor practice charges with the Board).

¹² 461 U.S. 731, 740–44 (1983). The Board has applied *Bill Johnson's* principles to the filing and maintenance of a grievance. See, e.g., *Hotel & Restaurant Employees Local 274 (Warwick Caterers)*, 282 NLRB 939, 940–41 (1987) (union did not violate Section 8(b)(1)(A) when it sought to use a grievance to apply a contract to employees whom the Board ultimately found the union did not represent because the union's

enjoin a lawsuit as an unfair labor practice if the suit has an “objective that is illegal under federal law,” as such suits enjoy no First Amendment protection regardless of merit.¹³ A grievance or lawsuit has an illegal objective “if it is aimed at achieving a result incompatible with the objectives of the Act.”¹⁴ For example, in *Long Elevator*, the Board found that a union violated Section 8(b)(4)(ii)(A) because it sought in a grievance proceeding a construction of a facially valid contract clause that, if successful, would have converted the clause into a *de facto* “hot cargo” provision in violation of Section 8(e).¹⁵

In the instant case, the Employer’s grievance had an illegal object and thus is not entitled to First Amendment protection under *Bill Johnson’s*.¹⁶ As in *Long Elevator*, the Employer’s grievance sought an interpretation of Article 8.1 that would effectively transform that facially lawful provision into one that is incompatible with the objectives of the Act. Thus, employees’ peaceful primary picketing of an employer regarding terms and conditions of employment is a fundamental right protected by the Act. Absent a clear and unmistakable waiver, employer interference with such picketing violates Section 8(a)(1). Although the Union waived employees’ right to engage in picketing that constitutes a work interruption, the Employer’s grievance interpreted Article 8.1 to also prohibit off-site, non-worktime picketing. For the reasons described above, the Union clearly did not waive that kind of picketing. Therefore, we conclude that the Employer’s grievance had an unlawful objective of converting Article 8.1 into a provision that unlawfully restricts fundamental employee rights protected by the Act.

position on single-employer and accretion issues relevant to its representational status were reasonably based).

¹³ 461 U.S. at 737 n.5; see also *Can-Am Plumbing, Inc. v. NLRB*, 321 F.3d 145, 151 (D.C. Cir. 2003) (stating that Supreme Court’s decision in *BE & K Constr. Co. v. NLRB*, 536 U.S. 516 (2002), “did not affect the footnote 5 exemption in *Bill Johnson’s*”).

¹⁴ *Manno Electric, Inc.*, 321 NLRB 278, 297 (1996), *enforced mem.*, 127 F.3d 34 (5th Cir. 1997).

¹⁵ *Elevator Constructors (Long Elevator)*, 289 NLRB 1095, 1095 (1988), *enforced*, 902 F.2d 1297 (8th Cir. 1990).

¹⁶ The Region should not allege that the grievance lacked a reasonable basis in fact or law.

Accordingly, the Region should issue a Section 8(a)(1) complaint, absent settlement, alleging that the Employer's grievance interpreting Article 8.1 as banning off-site, non-worktime picketing is unlawful.

/s/
B.J.K.

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