

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

Advice Memorandum

DATE: October 4, 2016

TO: David E. Leach III, Regional Director
Region 22

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

SUBJECT: Communication Workers of America 530-6083-0125
(Avaya, Inc.) 554-1450-0140
Case 22-CB-175238 554-1450-0180
554-1450-4100
554-1467-7300
554-2850-0000

The Region submitted this case for advice as to whether the Union violated Section 8(b)(3) of the Act by filing a grievance alleging that the Employer breached the parties' new collective-bargaining agreement by not restoring retiree healthcare benefits as they existed under their 2009 contract, where the contract extension the parties signed stated that all terms of the 2009 contract remained in effect except for specified wage increases. We conclude that the Union did not violate Section 8(b)(3) because its grievance is reasonably based on the language of the extension agreement, and it does not have an illegal objective. Accordingly, the Region should dismiss the charge, absent withdrawal.

FACTS

Avaya, Inc. ("the Employer") and Communications Workers of America ("the Union") have been parties to numerous collective-bargaining agreements. The last fully-negotiated collective-bargaining agreement was signed on May 24, 2009 ("the 2009 contract"), and it had an expiration date in 2012. The 2009 contract included a National Memorandum of Understanding that governed, among other things, retiree healthcare benefits. The National Memorandum stated, in relevant part, that the Employer "shall not have any obligation to bargain over post-retirement medical and dental benefits, which the parties acknowledge is a permissive subject of bargaining."

In 2011, the parties reopened the 2009 contract and reached an extension agreement on October 12, 2011. The language of that agreement stated that the parties agreed to extend the 2009 contract until June 7, 2014, and that except for the new wage increases set forth in the extension agreement, all the provisions of the 2009 contract would remain in full force and effect.

In November 2013, the parties again extended the 2009 contract, this time until June 13, 2016. As before, the extension agreement stated that except as specified, all provisions of the 2009 contract remained in full force and effect. The following language modifying healthcare benefits was included among the six specified changes to the 2009 contract:

Medical benefits for represented employees under the Avaya Inc. Medical Expense Plan (the Medical Plan) and postretirement medical benefits under the Avaya Inc. Retiree Medical Expense Plan (the Retiree Medical Plan) will be modified as described below effective January 1, 2015 and January 1, 2016. The Medical Plan and Retiree Medical Plan will be amended to reflect such changes.¹

By letter dated October 15, 2015 (“the October 15 letter”), the Employer notified employees that it was making changes to retiree healthcare benefits. The letter stated that the Employer would no longer provide health insurance coverage through the group retiree medical plan for all former employees who were retired as of October 15, 2015. Instead, the retirees (and their dependents) would enroll in a medical plan through an exchange, with the Employer contributing a certain amount of money towards the costs of this coverage credited through a health reimbursement arrangement. The letter also stated that the changes would take effect on January 1, 2017. The Employer had provided the Union advance notice that it would be sending the October 15 letter. Shortly after sending the letter, the Employer made another change to retiree healthcare benefits by announcing that as of January 1, 2017, it would increase its contribution to medical coverage for retirees below the age of 65. The Employer also notified the Union of this change.

On or about December 7, 2015, the parties began negotiations for a third extension of the 2009 contract. Between December 7, 2015 and February 12, 2016, the parties had multiple phone calls during which they discussed several issues, including the length of an extension, wages, the 401(k) plan, no layoff provisions, benefits coordinator positions, and healthcare for both retirees and active employees. The parties also exchanged a number of emails during this time. Specifically, on January 6, 2016,² the Union memorialized its understanding of where the parties’ stood as to what was being discussed as parameters for an extension agreement.

¹ This extension agreement also included a chart that reflected the different medical services provided and the in-network and out-of-network costs effective in 2015 and 2016.

² All dates hereafter are in 2016, unless otherwise noted.

Among other things, the Union included in its email that there would be no change in healthcare benefits for current employees as well as those who retired on or after October 2015. The next day, January 7, the Employer responded by email stating that its understanding included, among other things, that there would be no change in healthcare for current employees as well as those who retired on or after October 16, 2015.

On February 10, the parties met in person for the only time during negotiations. At the meeting, the Union repeatedly raised the subject of retiree healthcare benefits and stated that it wanted the Employer to rescind the changes it had announced in the October 15 letter. The Employer repeatedly rebuffed the Union's overtures saying that it was not going to discuss the changes to the retiree healthcare benefits. The meeting ended without the parties reaching an agreement on an extension.

On February 11, by phone, the parties continued discussing an extension. The Employer requested that the Union write up a wage increase and extension it could live with, but did not mention any rescission of the October 15 letter.

On February 12, the Union proposed extending the contract for 24 months with a 2.5% wage increase in each year of the contract. The Employer responded that, in order to close the deal, it could agree to extend the contract to June 14, 2018, no layoff protection, no suspension of the 401(k) company match, and a 2.25% wage increase effective October 2, 2016. Neither party referred to retiree healthcare benefits. The Union agreed to the proposed terms and the Employer drafted an extension agreement that both parties signed. The extension agreement in its totality reads:

[The Employer] and [the Union] do hereby agree to extend the 2009 collective-bargaining agreement effective May 24, 2009 (previously extended to June 7, 2014 and June 13, 2016) until June 14, 2018. Except as set forth below, all provisions of the 2009 collective-bargaining agreement remain in full force and effect:

- Effective October 12, 2016, wage schedules shall be increased by 2.25% on the Maximum Rates and by 2.25% on the Minimum Rates in effect on October 1, 2016.

By letter dated March 11, the Union asked the Employer when it planned to retract its October 15 letter. The Union said that its understanding was that retiree healthcare benefits, as set forth in the 2009 contract, would continue in full force and effect until June 14, 2018.

By letter dated March 16, the Employer responded that although during bargaining for the contract extension the Union repeatedly had raised the issue of the October 15 letter, the Employer consistently had stated that it was not going to

discuss retiree healthcare benefits since that was a permissive subject of bargaining. The Employer also stated that the contract extension agreement had no bearing on the changes to retiree healthcare benefits as set forth in the October 15 letter, and therefore there would be no retraction of that letter.

On March 31, the Union filed a grievance pursuant to the grievance-arbitration provision in the extended 2009 contract asserting that the Employer had violated the agreement by not rescinding the announced changes to the healthcare benefits for all employees retired as of October 15, 2015.

ACTION

We conclude that the Union did not violate Section 8(b)(3) where its grievance is reasonably based because it is grounded in the language of the parties' most recent contract extension agreement and does not have an illegal object. Therefore, the Region should dismiss the charge, absent withdrawal.

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*³ and *BE & K Construction Co. v. NLRB*.⁴ Thus, a grievance is not unlawful unless it either is both objectively baseless and filed with a retaliatory motive, or "has an objective that is illegal under federal law."⁵ Here, as explained below, we conclude that the Union's grievance is not unlawful because it is reasonably based and does not have an illegal objective.

³ 461 U.S. 731, 737 n.5, 743-44 (1983).

⁴ 536 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 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.

⁵ *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. at 737 n.5, 743-44; *see also BE & K Construction Co.*, 351 NLRB 451, 457 (2007); *Allied Trades Council (Duane Reade, Inc.)*, 342 NLRB 1010, 1013 n.4 (2004) (stating that the Supreme Court's more recent decision in *BE & K Construction* did not affect the "illegal objective" exception in footnote 5 of *Bill Johnson's*); *Service Employees Local 32B-32J (Vaux Condominium)*, 313 NLRB 267, 272 (1993).

First, we conclude that the Union's grievance is reasonably based because it is grounded in the language of the parties' most recent extension agreement.⁶ Parties have the same good faith bargaining obligation in grievance processing as they do in collective bargaining itself.⁷ During the grievance-arbitration process, this means that they should make a sincere effort to resolve real contractual disputes, and not use the process to harass the other party into agreeing to changes in contractual terms.⁸ However, where there is a reasonable basis for a union's contentions, the Board has found that its efforts in obtaining an adjudication through the grievance-arbitration process are not unlawful.⁹ Indeed, even if a union's contentions are ultimately rejected, the fact that the union pursued those contentions through arbitration does not establish that it acted unlawfully.¹⁰

⁶ Because we conclude that the Union's grievance is reasonably based, there is no need to consider the other prong of this two-part test, i.e., whether the Union had a retaliatory motive for filing the grievance.

⁷ See *Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 578 (1960) ("arbitration of labor disputes under collective bargaining agreements is part and parcel of the collective bargaining process itself"). Cf., e.g., *Electrical Workers Local 1186*, 264 NLRB 712, 721 (1982) (failure of either an employer or a union to process grievances "may be equated to a refusal to bargain in good faith"), and the cases cited therein, enfd. 714 F.2d 152 (9th Cir. 1983).

⁸ Cf., e.g., *Elevator Constructors (Long Elevator)*, 289 NLRB 1095, 1095 (1988) (where Board concluded that because grievance was based on reading of contract clause that would convert it into unlawful hot cargo provision in violation of Section 8(e), union's filing of grievance violated 8(b)(4)(ii)(A)), enfd. 902 F.2d 1297 (8th Cir. 1990).

⁹ See, e.g., *Electrical Workers Local 113 (Collier Electric)*, 296 NLRB 1095, 1100 & n.21 (1989) (dismissing Section 8(b)(1)(B) and (b)(3) charges against union where grievance that employer remained bound to interest arbitration clause, a permissive bargaining subject, was reasonably based); *Electrical Workers Local 532 (Brink Construction Co.)*, 291 NLRB 437, 438 (1988) (respondent-union's contention that employer remained bound to contract because of automatic renewal was reasonable and a legitimate interest of seeking resolution through Section 301 suit); *Teamsters Local 483 (Ida Cal Freight)*, 289 NLRB 924, 925 (1988) (union had a legitimate interest in seeking resolution through grievance arbitration and a Section 301 lawsuit regarding whether owner-operators were statutory employees).

¹⁰ See, e.g., *Electrical Workers Local 532 (Brink Construction Co.)*, 291 NLRB at 438-39 (although union's Section 301 lawsuit had been proven to be without merit, "that does not mean that the suit was ipso facto an unfair labor practice") (citing *Teamsters*

Here, the parties' 2016 extension agreement explicitly states that except for the specified modifications, all provisions of the 2009 contract remained in full force and effect. The only modification listed in the 2016 extension agreement concerned a wage increase, specifically, that both the maximum and minimum wage rates in effect on October 1, 2016 would increase by 2.25% effective October 12, 2016. The 2016 extension is silent as to retiree healthcare benefits. This is in direct contrast to how the parties had extended the 2009 contract in 2013, where they included specific language in that extension agreement describing the modifications to the healthcare benefit provisions of the 2009 contract for both current and retired employees. In this round of bargaining, the Employer drafted, agreed to, and signed the 2016 extension agreement but took no action to include the October 15 letter's modifications to retiree healthcare benefits.¹¹ Although there were significant discussions about retiree healthcare benefits, as well as other issues, the parties ultimately agreed to include only the one modification as drafted by the Employer. We find that in these circumstances, the Employer is at least arguably bound to the terms in the 2009 contract as it related to retiree healthcare benefits.¹² Therefore, the Union had a reasonable basis for grieving this contract issue.¹³

Local 483 (Ida Cal Freight), 289 NLRB at 925); *Hotel & Restaurant Employees Local 274 (Warwick Caterers)*, 282 NLRB 939, 940-41 (1987) (union's efforts through grievance arbitration to apply an agreement containing a union-security clause to a group of employees outside the unit which it represented found reasonable even though the Board ultimately found that the agreement did not cover those employees); *Hanford Atomic Metal Trades Council (Rockwell International)*, 291 NLRB 418, 424-25 (1988) (dismissing Section 8(b)(3) charge against union that demanded arbitration over a grievance concerning the employer's refusal to assign certain work to employees represented by one of the council's members even though federal district court had granted the employer's summary judgment motion to enjoin arbitration proceedings).

¹¹ As to any potential defense by the Employer that the October 15 letter already had become part of the 2009 contract before the parties entered the 2016 contract extension, the Employer distributed it prior to the parties negotiating and reaching agreement on the 2016 extension. There is no language in the 2016 extension signaling that the parties agreed or intended to include the October 15 letter as part of the new extension agreement.

¹² See, e.g., *Electrical Workers Local 113 (Collier Electric)*, 296 NLRB at 1098 ("If the collective-bargaining agreement at least arguably binds the employer to the arbitration provision, the union will be free to seek enforcement of its contractual rights by submitting the unresolved bargaining issues to interest arbitration, and by

Although we acknowledge the Employer's defense that the Union should have known that the new extension had no bearing on the October 15 letter because it had consistently refused to discuss retiree healthcare benefits during bargaining in early 2016, the terms of the 2016 extension agreement are not ambiguous. Thus, arguably it would not be appropriate to consider the parol evidence on which the Employer relies.¹⁴ As a result, the bargaining history that the Employer relies on here does not undermine the conclusion that the Union's grievance is reasonably based.¹⁵

pursuing a Section 301 suit in court, without violating Section 8(b)(3) or Section 8(b)(1)(B) of the Act.”).

¹³ Cf. *Electrical Workers Local 113 (Collier Electric)*, 296 NLRB at 1099, 1100 & n.21, with *Chicago Truck Drivers (Signal Delivery)*, 279 NLRB 904, 907 (1986) (arbitration demands designed to force merger of historically separate units violated Section 8(b)(1)(A) where union had no reasonable basis in fact or law for its demands).

¹⁴ See, e.g., *America Piles, Inc.*, 333 NLRB 1118, 1119 (2001) (refusing to consider companies' evidence that they only intended to agree to project agreements where agreements “clearly and unequivocally” bound the companies to the full term of the collective bargaining agreements); *NDK Corp.*, 278 NLRB 1035, 1035 (1986) (refusing to consider testimony that union assured company that contract would not be enforced where agreement's terms were unambiguous); *Made 4 Films, Inc.*, 337 NLRB 1152, 1158-59 (2002) (refusing to consider company's testimony that, despite collective-bargaining agreement referencing addenda on health and welfare contributions, those addenda were not part of agreement).

¹⁵ In light of the parties' specific reference in their prior 2013 extension agreement to modified retiree healthcare benefits, and the Employer's statement during the phone call on February 11 that the Union propose an extension it could live with, this is also not a situation where there was arguably an obvious error in the 2016 extension agreement such that the Union should have realized the Employer was making a mistake. See, e.g., *Hospital Employees Local 1199 (Lenox Hill Hospital)*, 296 NLRB 322, 326 (1989) (union violated Section 8(b)(3) by refusing to sign agreed-on contract because its unilateral mistake was not so obvious as to put employer on notice that union did not understand employer's offer where parties' representatives clearly understood handymen were excluded from wage increase, but union did not inform employees of this exclusion before they ratified contract). Cf. *Apache Powder Co.*, 223 NLRB 191, 191 (1976) (finding parol evidence rule did not exclude testimony showing no agreement was reached because employer's unilateral mistake over correct pension break date in proposed contract was so obvious as to put the union on notice of the mistake).

Second, we also conclude that there is no present basis to allege that the Union sought to adjudicate the issue through the grievance-arbitration process in furtherance of an illegal object. When a grievance is filed for an illegal objective, the Board can enjoin further processing of that grievance as an unfair labor practice without infringing on the First Amendment right to resolve disputes through the legal process.¹⁶ A union's grievance has an illegal objective where it seeks a result incompatible with Board law. Thus, a grievance has been found to have an illegal objective where it seeks to compel agreement on a permissive subject of bargaining, such as a change in the scope of an existing bargaining unit,¹⁷ or where it enforces a contract term that is itself unlawful.¹⁸ A grievance also is in furtherance of an illegal objective where a party seeks an outcome that would conflict with a prior Board determination,¹⁹ or otherwise results in an unfair labor practice.²⁰

¹⁶ See, e.g., *Elevator Constructors (Long Elevator)*, 289 NLRB at 1095; *Chicago Truck Drivers (Signal Delivery)*, 279 NLRB at 906-07; *Teamsters Local 705 (Emery Air Freight)*, 278 NLRB 1303, 1304 (1986), enf. denied and remanded in part 820 F.2d 448 (D.C. Cir. 1987).

¹⁷ See, e.g., *Chicago Truck Drivers (Signal Delivery)*, 279 NLRB at 906-07 (union's insistence on the arbitration of grievances seeking to merge three historically separate bargaining units, which was a permissive bargaining subject, violated Section 8(b)(1)(A) and (b)(3)).

¹⁸ 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), enf. denied in relevant part, 808 F.3d 1013 (5th Cir. 2015).

¹⁹ See *Allied Trades Council (Duane Reade, Inc.)*, 342 NLRB at 1012 (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 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), enf. 973 F.2d 230 (3d Cir. 1992), cert. denied 507 U.S. 959 (1993).

²⁰ See, e.g., *Elevator Constructors (Long Elevator)*, 289 NLRB at 1095 (finding an illegal objective where the union's construction of its contract in arbitration would have resulted in a Section 8(e) violation).

Here, the Union's grievance does not further any of the illegal objectives mentioned above. Rather, the Union simply takes the position that because no changes regarding the retiree healthcare benefits were set forth in the 2016 extension agreement, the provisions contained in the 2009 contract remain in effect. Where the resolution of a grievance could result in the lawful application of a contract, the Board has declined to find the grievance to be an unfair labor practice.²¹ If the Union's grievance is resolved in its favor, it would result in lawful application of the 2016 extension agreement as currently written. Thus, there is no merit to the Employer's position that the Union's grievance, because it would require rescission of the October 15 letter, is an unlawful attempt to compel the Employer to agree to terms other than those the parties agreed to during negotiations. We reach this conclusion even though retiree healthcare benefits are a permissive subject of bargaining. Although the Board has held that absent mutual consent one party may not insist to impose on the inclusion of a permissive bargaining subject in a collective-bargaining agreement,²² that is not the Union's objective here. Rather, it is pursuing the legitimate objective of obtaining a determination of what the parties already have agreed on, and then having the parties abide by those terms.²³

²¹ See *Service Employees Local 32B-32J (Vaux Condominium)*, 313 NLRB at 272-73; *Electrical Workers Local 113 (Collier Electric)*, 296 NLRB at 1100, n.21; *Electrical Workers Local 532 (Brink Construction Co.)*, 291 NLRB at 438-39; *Teamsters Local 483 (Ida Cal Freight)*, 289 NLRB at 925.

²² See, e.g., *Chicago Truck Drivers (Signal Delivery)*, 279 NLRB at 906 & n.4; *NLRB v. Borg-Warner Corp., Wooster Div.*, 356 U.S. 342, 349-50 (1958).

²³ See, e.g., *Electrical Workers Local 113 (Collier Electric)*, 296 NLRB at 1099, 1100 & n.21 (dismissing Section 8(b)(1)(B) and (b)(3) charges against union and deferring to grievance-arbitration procedure and related court proceedings to determine whether employer that withdrew from multiemployer association remained bound to permissive subject in contract).

Accordingly, absent withdrawal, the Region should dismiss the charge because the Union's grievance is reasonably based and does not seek an illegal object.

B.J.K.

H:ADV.22-CB-175238.Response.Avaya (b) (6), (b) (7)