

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

DATE: January 2, 2018

TO: William B. Cowen, Regional Director
Region 21

FROM: Jayme L. Sophir, Associate General Counsel
Division of Advice

SUBJECT: Pacific Maritime Association
Case 21-CA-198968

Bill Johnson's Chron
512-5009
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530-6067-6000
530-6067-2070-6760
530-6067-6001-2500
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The Region submitted this case for advice as to whether: (1) the multi-employer Pacific Maritime Association (PMA) violated Section 8(a)(5) by refusing to provide information about workplace injuries to the Union on the rationale that doing so would violate a state statute concerning confidentiality of medical information; and (2) PMA violated Section 8(a)(1) by filing and maintaining a grievance alleging that the Union violated the parties' collective-bargaining agreement by filing a Section 8(a)(5) charge without first exhausting contractual remedies.

First, we conclude that PMA violated Section 8(a)(5) by refusing to provide the information because the Union did not request any confidential medical information and, even if PMA had a legitimate confidentiality concern, it failed to seek an accommodation with the Union that would have effectuated the Union's legitimate interest in obtaining the information. Second, we conclude that PMA violated Section 8(a)(1) by filing and maintaining a grievance with the illegal objective of seeking to interfere with the Union's statutory right to ask the Board to remedy PMA's refusal to provide relevant information where it is clear under Board law that the Union did not waive that right in the parties' collective-bargaining agreement. The Region should therefore issue complaint, absent settlement.

FACTS

A. Background

Since 1938, local unions of the International Longshore and Warehouse Union (ILWU) have represented units of longshore workers on

the Pacific Coast. Since 1948, PMA has served as the multi-employer collective-bargaining agent that negotiates and administers collective-bargaining agreements with the ILWU and its local unions. Currently, ILWU Local 13 (the Union) represents longshore workers who work for approximately 14 PMA member employers at the Ports of Los Angeles and Long Beach. Local 13 is a party to the current ILWU-PMA collective-bargaining agreement (CBA) effective July 1, 2014 through June 30, 2019.

For many years, the parties' CBA has contained Section 17.15, a grievance-arbitration procedure mandating that "no other remedies shall be utilized by any person with respect to any dispute involving this Agreement until the grievance procedure has been exhausted." Section 17.15 was the subject of a 1979 grievance originally filed by PMA to challenge certain work stoppages by ILWU Local 10; an area arbitrator found that the union's work stoppages to protest PMA's selection of certain supervisors violated the CBA. Local 10 ignored the arbitration decision and continued the work stoppages; eventually, a coast arbitrator heard the dispute under the next level of the parties' grievance procedure. Before the coast arbitrator could issue a decision, however, PMA filed charges with the Board claiming that Local 10's work stoppages violated Section 8(b)(1)(B).¹ Local 10 argued before the arbitrator that PMA had violated Section 17.15 by filing charges with the Board before the parties had fully exhausted the grievance procedure. In a decision issued on March 24, 1980, the coast arbitrator agreed with the union and found that PMA had violated Section 17.15 by seeking a remedy from the Board before the coast arbitrator had issued a decision. The parties have not modified this arbitration decision through any subsequent negotiations.

B. The Union's Section 8(a)(5) and 8(a)(1) Charges

Section 8.34 of the CBA requires employees to self-report any intended work absences of thirty or more days:

Each registered longshoremen has the obligation to request a leave of absence if he intends to absent himself from work for a period of 30 days . . . A registered longshoremen who fails to work for 30 days, except when on approved leave, and

¹ See *Longshoremen's Local 10*, 254 NLRB 540, 542-43 (1981) (finding that the union violated Section 8(b)(1)(B) by engaging in work stoppages in order to restrain or coerce PMA's choice of bargaining representatives), *enforced*, 672 F.2d. 894 (D.C. Cir. 1981). The decision does not mention Section 17.15 or discuss whether the union was obligated to exhaust the grievance procedure.

whose facts and reasons for such absence are not acceptable to the Joint Port Labor Relations Committee, may be deregistered.²

In November 2016, PMA filed complaints against approximately 250 employees who allegedly violated CBA Section 8.34 by failing to report to work the month before. The employees were notified and, according to the Union, many of them reported that they had been injured on the job. By February 2017,³ the parties had met on several occasions and resolved the vast majority of the complaints. On April 14, the parties held an area meeting pursuant to the next level of the grievance process to attempt to resolve the approximately 11 remaining complaints. The Union attempted but had been unable to locate these remaining employees. At the area meeting, the Union presented a written request for information asking:

- 1) If any of the [11 employees at issue] have sustained an injury while working as a Longshoreman at any of the PMA member companies;
- 2) If any of the [11 employees at issue] have requested or filled out a LS1,⁴ provided to them by any PMA member companies;
- 3) If any of the [11 employees at issue] have been paid any workers compensation benefits from 4/1/12 to current from an injury while working at any of the PMA member companies; and
- 4) If any of the [11 employees at issue] have workers compensation claims filed from 4/1/12 to current that is being controverted by any of the PMA member companies.

In early May, PMA contacted the area arbitration panel to schedule a hearing regarding the remaining complaints. The Union complained that arbitration was premature because PMA had not responded to the Union's request for information

² The Union believes that an employee's workplace injury could potentially excuse the employee's failure to work for thirty days and thus be an acceptable absence under this section.

³ All subsequent dates are 2017 unless otherwise noted.

⁴ An LS1 is a Department of Labor (DOL) form designed for longshore employers to report employees' workplace injuries. According to the Union, member companies provide these forms to employees when they sustain a workplace injury. The first page of the form is completed by the employer and includes information such as the employee's name, date of injury, a description of how the accident or illness occurred, and the name of a physician or medical facility authorized to provide medical services. The second page of the form includes instructions for a physician and directs the physician to describe the history of the injury, diagnosis, and a recommendation for any workplace limitation.

and, therefore, the parties had not fully investigated the complaints as required by the CBA. Nonetheless, a hearing was scheduled for May 31.

On May 16, the Union filed a charge alleging that PMA violated Section 8(a)(5) by refusing to respond to the Union's request for relevant information. Ten days later, PMA responded in writing to the Union's April 14 request, refusing to provide any of the requested information because: (1) it had little information about workplace injuries and would need to request the information from the 14 member companies, which it had not yet done; (2) pursuant to state law, it could not provide the Union with employee medical information without written authorization from the affected employees; and (3) even were the employees to provide written authorizations, the scope of the Union's request exceeded the relevant time frame and number of employees still at issue. In response, the Union asserted that state law did not prevent PMA from providing the requested information, but it nevertheless offered to narrow its request and discuss information redaction to protect any privacy concern.

On May 31, the parties participated in the arbitration hearing regarding the Section 8.34 complaints. The Union argued that the matter was not ripe for arbitration because PMA had refused to respond to the Union's request for information. PMA argued that the Union's information request was not relevant to the arbitration and the Union was attempting to delay the grievance process. PMA also argued that Section 8.34 required employees to provide relevant medical documentation that would excuse them from work but that the employees—who had failed to respond to multiple inquiries from the Union and PMA—had not done so.

On June 15, while the arbitration decision was pending, PMA filed a new grievance alleging that the Union had violated CBA Section 17.15 by filing its Section 8(a)(5) charge to seek a remedy from the Board before exhausting the grievance procedure.

On July 26, the arbitration panel ruled in favor of PMA on its first grievance, involving the Section 8.34 complaints. The panel held that PMA member-employers have a "reasonable obligation to review whatever medical information has been supplied to them" but are not obligated "to obtain personal medical information without the employee's consent." The panel also agreed with PMA that Section 8.34 obligates employees to "provide acceptable facts and reasons ... that would excuse their absence" and decided that the employee's personal responsibility to provide documentation "cannot be shifted to the Union or the Employer because of the individual's failure to respond."

To date, PMA has not provided the information requested by the Union on April 14. PMA has continued to enforce Section 8.34 by filing additional complaints against

employees; the Union has made further requests for information regarding whether those employees have sustained on-the-job injuries.

ACTION

First, we conclude that PMA violated Section 8(a)(5) by refusing to provide the information because the Union did not request any confidential medical information and, even if PMA had a legitimate confidentiality concern as to the requested information, it failed to seek an accommodation with the Union. Second, we conclude that PMA violated Section 8(a)(1) by filing and maintaining a grievance with the illegal objective of interfering with the Union's statutory right to petition the Board to remedy PMA's refusal to provide relevant information.

A. PMA has failed to establish a legitimate and substantial confidentiality interest

A collective-bargaining representative is entitled to information relevant and necessary to carry out its statutory duties and responsibilities, including policing a collective-bargaining agreement.⁵ When an employer asserts that information requested by a bargaining representative is confidential, the Board balances the union's need for the relevant information against any legitimate and substantial confidentiality interests asserted by the employer.⁶ The employer has the burden to establish that it has a confidentiality interest and that this interest outweighs the union's need for the information.⁷

Furthermore, even if an employer establishes a confidentiality interest, it may not simply refuse to furnish the requested information but must seek an accommodation with the union that will effectuate the union's interest in obtaining the information.⁸ In *Olean General Hospital*, a hospital employer refused to provide a

⁵ See, e.g., *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 303 (1979); *NLRB v. Acme Indus. Co.*, 385 U.S. 432, 435-38 (1967); *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 151-53 (1956).

⁶ *A-1 Door & Building Solutions*, 356 NLRB 499, 500-501 (2011).

⁷ *A-1 Door*, 356 NLRB at 501 (citing *Jacksonville Area Assn. for Retarded Citizens*, 316 NLRB 338, 340 (1995)).

⁸ See *A-1 Door*, 356 NLRB at 501; *Olean General Hospital*, 363 NLRB No. 62, slip op. at 6 (Dec. 11, 2015); *Interstate Food Processing*, 283 NLRB 303, 306 (1987) ("employer must supply the information or adequately explain why it is unable to comply") (citations omitted).

bargaining representative with a patient care survey relevant to the parties' contract negotiations.⁹ The Board found that the hospital had established a legitimate and substantial confidentiality interest because state law prohibited the employer's disclosure of patient care surveys.¹⁰ Nonetheless, the Board found that the employer violated Section 8(a)(5) by failing to notify the union of its confidentiality interest in a timely manner and seeking to accommodate its confidentiality interest with the union's information request.¹¹

The Employer asserts that the requested information implicates employee confidentiality concerns based on California's Confidentiality of Medical Information Act (the CMIA), which provides that health care providers and employers have certain obligations to protect patient medical information. The law defines "medical information" as:

[A]ny individually identifiable information, in electronic or physical form, in possession of or derived from a provider of health care, health care service plan, pharmaceutical company, or contractor regarding a patient's medical history, mental or physical condition, or treatment.¹²

Regarding the duties of employers, the CMIA states that:

No employer shall use, disclose, or knowingly permit its employees or agents to use or disclose medical information which the employer possesses pertaining to its employees without the patient having first signed an authorization ... permitting such use or disclosure, except as follows:

- 1) The information may be disclosed if the disclosure is compelled by judicial or administrative process or by any other specific provision of law.
- 2) That part of the information which is relevant in a lawsuit, arbitration, grievance, or other claim or challenge to which the

⁹ 363 NLRB No. 62, slip op. at 5-6.

¹⁰ *Id.*, slip op. at 6.

¹¹ *Id.*, slip op. at 6-7.

¹² Cal. Civ. Code § 56.05(j) (West 1981).

employer and employee are parties and in which the patient has placed in issue his or her medical history, mental or physical condition, or treatment may be used or disclosed in connection with that proceeding....¹³

As stated by the California Supreme Court, the CMIA “is intended to protect the confidentiality of individually identifiable medical information obtained from a patient by a health care provider....”¹⁴ Under the CMIA, employers must safeguard medical information that is “derived from a provider of health care ... regarding a patient’s medical history ... or treatment.”¹⁵ Thus, “medical information” is essentially a term of art that pertains only to documents generated by a health professional. The CMIA does not apply to any other records or information in an employer’s possession, including those created by the employer itself.¹⁶

We conclude that PMA violated Section 8(a)(5) by refusing to provide the Union with the requested relevant information because PMA has failed to demonstrate a legitimate and substantial confidentiality interest under state or federal regulations, or under general confidentiality principles.¹⁷ First, PMA has not established that it is prohibited by the CMIA from sharing the requested information with the Union

¹³ Cal. Civ. Code § 56.20(c)-(c)(2) (West 1981).

¹⁴ *Brown v. Mortensen*, 51 Cal. 4th 1052, 1070 (Cal. 2011) (citations omitted).

¹⁵ Cal. Civ. Code § 56.05(j) (emphasis added).

¹⁶ *See generally, Erhart v. Bofl Holdings*, 15-cv-02287-BAS-NLS, 2017 WL 4005434, **12-13 (S.D. Cal. 2017) (plaintiff could not state a plausible claim under the CMIA against employer who told coworkers that plaintiff’s “whistleblowing allegations were not credible because of his ‘psychiatric medical leave’” where plaintiff failed to allege that employer received any “medical information,” i.e., records, from a health care provider).

¹⁷ Because the Union believes that an employee’s workplace injury could be an acceptable absence under the contract, the Region has determined that the Union’s information request was relevant to its role in policing the contract and defending bargaining unit members under the Board’s liberal discovery-type standard. *See, e.g., NLRB v. Acme Indus. Co.*, 385 U.S. 432, 435-38 (1967). Indeed, had PMA disclosed to the Union whether any of the employees facing Section 8.34 charges had suffered workplaces injuries, the parties could have most likely resolved the complaints before proceeding to arbitration, as they had for over 200 other employees in the same time period.

absent written authorization from the affected employees. The Union did not request that PMA or member companies divulge “medical information” as defined by California law, i.e., medical records “derived from” employees’ health care providers. Indeed, the Union did not ask for any documents. Rather, the Union simply asked whether any of the remaining employees had sustained injuries at work, received workers’ compensation, or completed LS1 forms or workers compensation claims—information that PMA or member companies would have created themselves in the normal course of business and thus outside of the CMIA disclosure prohibition.¹⁸ Because none of the Union’s inquiries asked PMA to provide “medical information,” i.e., records of medical history, treatment, or other medical information from a health care provider, PMA has failed to demonstrate a legitimate and substantial confidentiality interest under the CMIA.¹⁹

Second, PMA has failed to demonstrate a legitimate and substantial confidentiality interest based on federal occupational safety and health regulations. Although PMA cites an OSHA rule preventing disclosure of confidential health information of employees “exposed to toxic substances or harmful physical agents,” it has not claimed that any of the 11 employees are covered by that regulation.²⁰ Even if the employees were covered by that OSHA regulation, the Union has not asked for “medical records” created or maintained by a health care provider as defined by the rule.²¹ Finally, PMA’s assertion that the rule prevents PMA’s disclosure of the full

¹⁸ *Cf. Recording and Reporting Occupational Injuries and Illnesses*, 29 C.F.R. § 1904.0 (2017) (purpose of Occupational Safety and Health Administration (OSHA) rule is to require employers to record and report work-related fatalities, injuries, and illnesses). PMA admitted in its May 26 response—six weeks after the Union’s request and only days before the arbitration hearing—that it never asked the member companies to check their records for responsive information.

¹⁹ Moreover, the CMIA permits disclosure if “compelled by judicial or administrative process or by any specific provision of law,” Cal. Civ. Code § 56.20 (c)(1), and the Union’s statutory right to the information and its need to defend unit members in connection with employer complaints outweighs any confidentiality interest PMA may demonstrate under the CMIA. *See Olean*, 363 NLRB No. 62, slip op. at 7-8 (finding that union’s need for information outweighed employer’s interest based on state confidentiality policy, which contemplated that certain documents may have to be disclosed under other provisions of law).

²⁰ *Occupational Safety and Health Standards, Toxic and Hazardous Substances*, 29 C.F.R. § 1910.1020(b)(1), § 1910.1020(e)(2)(ii)(B) (2011).

²¹ 29 C.F.R. § 1910.1020(c)(6)(i). PMA also ignores that the regulation’s stated purpose is to “provide employees and their designated representatives a right of

contents of any DOL LS1 forms is nonresponsive to the Union's request because the Union did not ask for the full contents of LS1 reports but only whether the affected employees "requested or filled out" such reports.²² Notably, PMA overlooks OSHA regulations that *require* employers to provide records of workplace injury and illnesses to collective-bargaining representatives.²³

Third, although the Employer might argue that some employee medical information is confidential even absent the CMIA or OSHA rule, the Union did not ask for any medical records or documentary evidence but only whether any of the remaining 11 employees sustained a workplace injury during the relevant timeframe.

Finally, even had PMA or its members established a legitimate and substantial confidentiality interest, PMA failed to so notify the Union in a timely manner and bargain over an accommodation that would address both parties' interests.²⁴ Indeed, PMA waited six weeks to respond to the Union's information request and then stated that it would only provide the information if the Union secured written authorization from the affected employees, while also refusing to provide the requested information under any circumstance before the upcoming arbitration hearing. PMA was well aware that the employees had failed to respond to correspondence from PMA or the Union, thereby making it impossible for the Union to obtain the employees' written authorizations. Had PMA sought to accommodate the Union's request, it could have clarified whether the Union was seeking "medical information" as defined by the CMIA or OSHA rule and/or could have proposed an accommodation that would have

access to relevant exposure and medical records," § 1910.1020(a), and that for purposes of access to employee exposure records, "a recognized or certified collective bargaining agent shall be treated automatically as a designated representative without regard to written employee authorization," § 1910.1020(c)(3).

²² *Occupational Safety and Health Standards, Toxic and Hazardous Substances*, 29 C.F.R. § 1910.1020(e)(2)(ii)(B) (2011).

²³ For example, a rule entitled *Other OSHA Injury and Illness Recordkeeping Requirements, Employee Involvement*, requires that employers provide "authorized collective-bargaining agent[s]" with records of workplace injuries and illnesses, including employees' names, absent specific "privacy concern cases" such as mental illness and sexual assault. 29 C.F.R. § 1904.35(b)(2)-(b)(2)(iv) (2017). PMA could have simply followed the requirements of Section 1904.35 and disclosed employee names and dates of injuries in order to satisfy the majority of the Union's request.

²⁴ See *A-1 Door*, 356 NLRB at 501; *Olean General Hospital*, 363 NLRB No. 62, slip op. at 6; *Interstate Food Processing*, 283 NLRB at 306.

provided the Union with the information it needed without violating employees' confidentiality interests.²⁵

B. The Union did not waive its statutory right to use the Board's processes to enforce its statutory right to relevant information

It is well settled that unions, in their role as collective-bargaining representatives, are empowered to waive certain Section 7 rights of their members.²⁶ In *Metropolitan Edison Company 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.’”²⁷ In other words, a union’s waiver of statutory rights must be “clear and unmistakable.”²⁸ Such a waiver will be found only if there is clear and unequivocal contractual language or bargaining history evidence indicating that the particular matter at issue was fully discussed and consciously explored during negotiations, and that the union intentionally yielded its right to bargain.²⁹ Contractual language providing that the

²⁵ Cf. *Northern Indiana Public Service Company*, 347 NLRB 210, 214 (2006) (where union requested copies of manager’s notes of interviews with employees who were assured confidentiality, Board found employer adequately accommodated union’s need by providing names of employees interviewed and other information requested); *GTE California Inc.*, 324 NLRB 424, 426-27 (1997) (where complaint by unlisted telephone customer resulted in termination of employee and employer established a legitimate confidentiality interest in customer's contact information under state law, employer accommodated union’s need for the information by calling customer and allowing union to interview customer over phone).

²⁶ See, e.g., *Lear Sigler, Inc.*, 293 NLRB 446, 447 (1989).

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

²⁸ *Metropolitan Edison*, 460 U.S. at 708; *Provena*, 350 NLRB at 812; 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).

²⁹ See *Provena*, 350 NLRB at 810–15; *Trojan Yacht*, 319 NLRB 741, 742 (1995); *American Diamond Tool*, 306 NLRB 570, 570 (1992); *Johnson-Bateman*, 295 NLRB 180, 184–87 (1989).

parties' grievance-arbitration process is the sole remedy for a contractual violation does not operate as a waiver of the statutory right to file a charge with the Board.³⁰

Applying those principles here, PMA has not shown that the Union clearly and unmistakably waived its right to seek a remedy from the Board in support of its statutory right to relevant information necessary to its role as the employees' representative. First, the CBA's grievance provision does not explicitly preclude the parties from coming to the Board. Thus, while Section 17.15 states that the grievance procedure "shall be the exclusive remedy with respect to any dispute involving this Agreement until the grievance procedure has been exhausted," it does not expressly preclude the parties from seeking Board remedies in support of their statutory rights or regarding disputes outside of the CBA.³¹ The Union's right to this information is a statutory, not contractual right; neither Section 8.34—the work requirement clause in the underlying grievance—nor any other CBA provision, addresses the Union's right to information. Indeed, PMA argued in the arbitration hearing involving its Section 8.34 complaints that the Union's information request was irrelevant to the contractual dispute.

Nor is there relevant bargaining history or a past practice to support PMA's position that the Union waived its right to seek redress from the Board to enforce its statutory right to the relevant information. PMA points to the 1980 coast arbitration decision, which found that PMA violated CBA Section 17.15 by seeking a remedy with the Board before fully exhausting the parties' grievance procedure. The 1980 arbitration decision, however, does not parallel the current dispute. In that decision, the coast arbitrator found that PMA violated the CBA because it sought a remedy from the Board in a contractual dispute between PMA and a local union that was currently before an arbitrator. The arbitrator found that PMA had sought a Board

³⁰ See *Sawbrook Steel Castings Co.*, 173 NLRB 381, 381 n.2 (1968) (parties' grievance arbitration procedure that was "sole and exclusive remedy" for contractual breaches did not foreclose union from asserting statutory right to relevant information).

³¹ See *Sawbrook Steel Castings Co.*, 173 NLRB at 381 n.2, 383 (where parties' grievance procedure provided for arbitration as the "sole and exclusive remedy," contract provision was "immaterial" to union's assertion of its statutory right to relevant data as bargaining representative); see also *General Motors Corp.*, 257 NLRB 1068, 1068 n.2, 1072-73 (1981) (finding employer's refusal to provide union with studies affecting production standards unlawful and declining to defer to party's grievance procedure right of union to information where prior arbitration decisions had limited union's contractual right to related information; reiterating that Board will not defer to arbitration proceedings where parties assert a statutory right to information), *enforced*, 700 F.2d 1083 (6th Cir. 1983).

remedy to protest the union's failure to observe the area arbitration award, rather than continuing to seek relief under the parties' grievance procedure. Here, by contrast, the Union asks the Board to vindicate the Union's statutory right to relevant information, not to displace the arbitrator's contractual remedy or answer the contractual issue. As PMA itself argued before the arbitrator, the Union's right to the information is a separate question—not addressed by the parties' contract—from whether the employees violated Section 8.34.

C. PMA's grievance has the illegal objective of seeking to limit the Union's ability to come to the Board and violates Section 8(a)(1)

Finally, PMA'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 or grievance from being enjoined as an unfair labor practice, even if the lawsuit or grievance was motivated by an intent to retaliate against employees for exercising their rights under the Act.³² However, under footnote 5 of *Bill Johnson's*, the Board may enjoin a lawsuit or grievance as an unfair labor practice if the suit has an "objective that is illegal under federal law," as such actions enjoy no First Amendment protection regardless of merit.³³ A grievance or lawsuit has an illegal objective "if it is aimed at achieving a result incompatible with the objectives of the Act."³⁴ 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

³² 461 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., *Food & Commercial Workers Local 540 (Pilgrim's Pride)*, 334 NLRB 852, 854-57 (2001) (union did not violate Section 8(b)(1)(A) and (2) when it grieved and filed a lawsuit to compel arbitration regarding employer's refusal to honor prior dues check-off for rehired employees because union presented an arguably meritorious claim under the parties' contract).

³³ 461 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*").

³⁴ *Manno Electric, Inc.*, 321 NLRB 278, 278 n. 5, 297-98 (1996) (finding portions of lawsuit aimed at employees providing affidavits to the Board had unlawful objective), *enforced mem.*, 127 F.3d 34 (5th Cir. 1997).

valid contract clause that, if successful, would have converted the clause into a de facto “hot cargo” provision in violation of Section 8(e).³⁵

In the instant case, PMA’s grievance has an illegal object and thus is not entitled to First Amendment protection under *Bill Johnson’s*. The sole purpose of PMA’s June 15th grievance is to prevent the Union from petitioning the Board. Such a grievance is unlawful where it is clear that the Union did not waive its right to seek redress from the Board for violations of its statutory right to relevant information. As in *Long Elevator*, PMA’s grievance seeks an interpretation of CBA Section 17.15 that would unlawfully restrict the Union’s statutory right to petition the Board, thus effectively transforming that facially lawful grievance-exhaustion provision into one that is incompatible with the objectives of the Act.³⁶ Therefore, we conclude that PMA’s grievance has an illegal objective and violates Section 8(a)(1).

Accordingly, the Region should issue complaint, absent settlement, alleging that PMA violated Section 8(a)(5) by refusing to provide the Union with relevant information and Section 8(a)(1) by filing and maintaining a grievance that has an illegal objective.

/s/

J.L.S.

ADV.21-CA-198968.Response.PMA (b)(6), (b)(7)

³⁵ *Elevator Constructors (Long Elevator)*, 289 NLRB 1095, 1095 (1988), *enforced*, 902 F.2d 1297 (8th Cir. 1990).

³⁶ *See also Allied Trades Council (Duane Reed, Inc.)*, 342 NLRB 1010, 1012 (2004) (finding union had illegal objective where it attempted to arbitrate unit determination issue that would directly conflict with the bargaining unit found appropriate in the Regional Director’s Decision and Direction of Election); *Teamsters Local 776 (Rite Aid)*, 305 NLRB 832, 834-35 (1991) (finding 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).