

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

Advice Memorandum

DATE: April 19, 2018

TO: David Cohen, Regional Director
Region 12

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

SUBJECT: International Brotherhood of
Electrical Workers, Systems Counsel U-8
(Duke Energy Florida, LLC)
Case 12-CB-200784

536-2564
548-2075
548-4060
554-1467-1200
596-0860

This case was submitted for advice as to whether the International Brotherhood of Electrical Workers, System Counsel U-8 (the “Union”) violated Sections 8(b)(1)(A), (2), and (3) of the Act by filing a grievance and demanding arbitration in order to force Duke Energy Florida, LLC (the “Employer”) to recognize and bargain with the Union and apply a collective-bargaining agreement to employees at a newly-acquired facility, pursuant to the contract’s after-acquired-facility clause but absent evidence of majority support.

We conclude that the Union violated Sections 8(b)(1)(A) and (3) because the Union’s grievance and demand for arbitration have no colorable basis, in that the Union did not argue that the employees at the newly-acquired facility are an accretion to the state-wide unit and the Union acknowledged that it does not yet have majority support at the newly-acquired facility. However, we conclude that the Union did not violate Section 8(b)(2) because a union-security clause is not at issue.

FACTS

The Employer operates multiple power plants in Florida. The Union, which is comprised of five locals, represents approximately 1,500 of the Employer’s employees. The Union and Employer are parties to three contracts: the “Hines Agreement,” which covers employees working at the Hines production facility; the “Citrus Combined Cycle Station” agreement, which covers employees working at the facility of the same name; and the “Main Contract” agreement, which covers a state-wide unit of Duke Energy employees throughout Florida, including power facilities in Bartow, Anclote, Crystal River, Intercession City, Gainesville, and Suwanee.

Article 1, Section 1(A) of the Main Contract (“MOA”) includes the following after-acquired-facility clause:

The Union agrees that, upon request by the [Employer], it will bargain in good faith to establish separate labor agreements for new, recommissioned, or purchased generation facilities, owned or operated by the [Employer]. The [Employer] agrees that in the absence of such a request, the existing contract will apply.

The Employer exercised its right to establish a separate labor agreement for both the Hines production facility and the Citrus Combined Cycle Station in or about 1995 and 2015, respectively. In each instance, however, the facilities were constructed by the Employer and staffed with existing unit members.

In early January 2017,¹ the Employer purchased the Osprey Energy Center electric generator facility located in Auburndale, Florida, from Calpine Corporation. The Employer hired and retained all of the former Calpine production employees at the Osprey plant in “craft” positions (i.e., jobs roughly corresponding to bargaining-unit jobs). There are about twenty to thirty employees at the Osprey plant, none of whom were represented by a union during their prior employment with Calpine. The Employer did not inform the Union about its acquisition of the Osprey plant, apply the MOA to the Osprey employees, or recognize the Union as the exclusive collective-bargaining representative of the Osprey employees.

On or about February 2, the Union filed a grievance alleging that the Employer violated the MOA by failing to both apply the MOA to the production employees at the Osprey plant and recognize the Union as the exclusive bargaining representative of those employees. The grievance specifically alleged the following:

Grievance or Job Protest Basis

The [Employer] has failed to comply with the memorandum of agreement in its entirety and violated article 1 section 1(A) of the contract when it failed to administer the main memorandum of agreement (contract) and the working agreement to the employees of the Osprey Energy Center. Based upon news releases published Duke Energy purchased the Osprey facility on January 3rd, 2017. The [Employer] never provided notice to the Union of that fact.

¹ All remaining dates are in 2017 unless otherwise indicated.

Requested Resolution

Immediately administer the main memorandum of agreement and working agreement between the parties to the Osprey Energy Center employees. Schedule a meeting with the Union within 14 days to begin administering the MOA to the Osprey Energy Center employees at the site.

The Union's Business Manager states that the Employer completely ignored the Union and did not communicate with the Union regarding the purchase. [REDACTED] assumed that because the Employer had not insisted on a separate contract for the Osprey plant, the employees were covered by the Master Contract and a part of the state-wide unit.

On or about February 9, 2017, in response to the grievance, the Employer's Labor Relations Director told Business Manager that, absent proof of majority status, the Union's demand for recognition was premature, and that it would be unlawful for the Employer to accede to the Union's demands. Labor Relations Director further stated that it would be unlawful for the Union to assume the role as bargaining representative for the Osprey plant employees. At the same time, the Employer advised the Union that should the Union establish in the future that it represents a majority of the Osprey employees, the Employer would exercise its option pursuant to Article 1, Section 1(A) of the MOA to negotiate a separate collective-bargaining agreement covering the Osprey employees in a separate unit.

On February 22, 2017, Labor Relations Director and Business Manager held a Step 3 meeting concerning the Union's grievance. Business Manager argued that because the Employer had not notified the Union about the purchase of the Osprey plant, and did not elect to establish a separate agreement for the employees at the Osprey facility until February 9, the Employer had waived its right to claim that the Osprey employees belong in a separate unit and, therefore, the Union already represented the Osprey employees. On March 3, 2017, the Employer denied the Step 3 grievance and added that the grievance is not arbitrable because it has an unlawful objective under the NLRA.

On May 30, 2017, the Union demanded that the grievance proceed to arbitration and requested that the Employer submit a request to FMCS for an arbitrator panel. The Employer refused to proceed to arbitration or to submit a request for a panel of arbitrators, and filed the instant charge. The Union and Employer have had no further communications regarding the grievance or arbitration. More recently, both parties submitted position statements. Although it appears possible that the Osprey employees perform similar work to the unit employees who work at other Employer facilities, the Union does not argue that the Osprey employees constitute an accretion

to the state-wide bargaining unit such that majority status among the Osprey employees would not be required. Similarly, the Union neither presents evidence of, nor claims to have, majority support of the Osprey employees, but maintains that issuing a complaint would be premature and that it can still obtain majority support amongst the employees at the Osprey location. The Employer argues that the Union's grievance has an unlawful object in violation of the Act because the Union does not represent a majority of the affected employees. The Employer also contends that the Union waived its right to argue that the Osprey employees constitute an accretion to the state-wide unit because the MOA grants the Employer the discretion to treat employees at a newly-acquired facility as a separate bargaining unit.

ACTION

We conclude that the Union violated Sections 8(b)(1)(A) and (3) because the Union's grievance and demand for arbitration have no colorable basis, in that the Union did not argue that the Osprey employees are an accretion to the state-wide unit and the Union acknowledged that it does not yet have majority support among the Osprey employees. However, we conclude that the Union did not violate Section 8(b)(2) because a union-security clause is not at issue.

In *Bill Johnson's Restaurants, Inc. v. NLRB*,² the Supreme Court clarified that while First Amendment concerns restrict the Board's ability to intervene in state claims, such limitations do not apply to claims that have "an objective that is illegal under federal law."³ The Board extended the Court's restrictive approach to grievances because preserving access to the grievance machinery closely parallels the First Amendment concerns cited in *Bill Johnson's*, and national labor policy encourages resolution of labor disputes through mutually agreed upon grievance-arbitration mechanisms for the sake of industrial stability.⁴ In addition to accounting

² 461 U.S. 731 (1983).

³ *Id.* at 737 n.5, 741-44.

⁴ *Food & Commercial Workers Local 540 (Pilgrim's Pride)*, 334 NLRB 852, 855 (2001) (stating that "Federal labor policy strongly favors the use of the grievance-arbitration process," and finding that union's mere submission to grievance arbitration of an arguably meritorious claim concerning meaning of dues-checkoff authorization is not unlawful); *Longshoremen ILWU Local 7 (Georgia Pacific)*, 291 NLRB 89, 92-93 (1988) (declining to adjudicate ULP charge regarding union's arguably meritorious grievance regarding disputed work assignments before 10(k) award issued because such a conclusion "is in harmony with the basic policies of the Act and is supported by decisions of the Supreme Court"), *review denied*, 892 F.2d 130 (D.C. Cir. 1989).

for these principles, practical considerations provide that so long as a grievance does not pursue an illegal objective on its face, the Board's involvement would be premature because it is speculative to assume that a grievance will result in a conclusion that contravenes the Act.⁵ As such, the Board has consistently permitted parties to resolve such conflicts through grievance and arbitration so long as the issue was not previously decided by the Board⁶ and the grievance was comprised of an arguably meritorious claim.⁷

⁵ See *Carey v. Westinghouse Elec. Corp.*, 375 U.S. 261, 269-70 & n.7 (1964) (emphasizing that both contractual and representational disputes can be resolved through grievance-arbitration mechanism; Board retains ultimate authority over representation questions, but Act does not preclude Board from considering arbitration award in deciding question concerning representation); *Stage Employees IATSE Local 695 (Vidtronics Co.)*, 269 NLRB 133, 133, 141 (1984) (Board must ultimately decide questions of accretion, but it is speculative to presume that arbitration of dispute concerning application of contract to unrepresented employees would necessarily address accretion issue or would result in an unlawful application of contract and, therefore, finding grievance unlawful would be premature; indeed, arbitration "could, in fact, be helpful to the Board in deciding the accretion issue, although it may not necessarily be required to defer to it"). Cf. *Elevator Constructors (Long Elevator)*, 289 NLRB 1095, 1095 (1988) (concluding that union's grievance violated Act because grievance predicated on reading of CBA that would have converted it into hot cargo provision and unlawfully impacted neutral employers), *enforced*, 902 F.2d 1297 (8th Cir. 1990).

⁶ *Local 340, New York New Jersey Regional Joint Board*, 365 NLRB No. 61, slip op. at 3-4 (Apr. 13, 2017) (finding that union's attempt to enforce arbitrator's award in face of Board's subsequent and superior unit clarification decision was, in effect, an unlawful attempt to apply CBA to nonunit employees and change existing unit's scope); *Georgia Pacific*, 291 NLRB at 92-93 (concluding that work-assignment grievance filed before Board's 10(k) determination issued did not violate the Act; however, grievance filed *after* Board's decision "lacked a reasonable basis and reflected an improper motivation to undermine the Board's 10(k) award").

⁷ *Electrical Workers IBEW Local 532 (Brink Construction)*, 291 NLRB 437, 439 (1988) (grievance and Section 301(a) lawsuit contending that employer remained bound by CBA pursuant to automatic renewal provision was reasonably based and had lawful object of seeking resolution of the issue, even though suit lacked merit); *Teamsters Local 483 (Ida Cal)*, 289 NLRB 924, 925 (1988) (grievance-arbitration procedures and Section 301 lawsuit attempting to compel representation of owner-operators lawful; contention that owner-operators were statutory employees was reasonable, considering that Board uses multi-factor test to determine employee status and, in

For example, in *Vidtronics*, the Board dismissed a complaint alleging that a union had violated Sections 8(b)(1)(A), (2), and (3) by invoking arbitration in an attempt to extend its contract to employees of a newly-created division who, in the General Counsel's view, were not an accretion to the existing unit.⁸ In the absence of a previous Board determination, the Board reasoned that even though the parties' dispute involved both contractual and representational questions, proceeding to find a violation before an arbitral award had issued would be "premature" inasmuch as it was speculative whether the arbitrator's award would comment on the accretion issue at all, never mind decide it in a manner repugnant to the Act, e.g., extending the contract to employees the union did not lawfully represent.⁹ In so doing, the Board emphasized that the respondent union was not attempting to implement an arbitral award but rather that it was merely seeking a determination of its rights under the contract.¹⁰

On the other hand, the Board has indicated that such deference should not extend to a union's grievance and/or request for arbitration seeking recognition and application of a collective-bargaining agreement when the union's demand is not supported by a plausible legal claim. In *Local 340, New York New Jersey Regional Joint Board*, the Board found that a union's lawsuit to enforce an arbitral award granting a union representational rights over an employer's newly acquired group of employees based on an after-acquired store clause was unlawful because, inter alia, the union's claim had "no lawful basis" under Board precedent.¹¹ Such a claim must, at a minimum, seek to establish the applicability of one of two legal justifications—i.e., accretion or majority support—to have any merit.¹² Because the union presented

many cases, the owner-operators were former employees engaged in nearly identical work); *Hotel & Restaurant Employees Local 274 (Warwick Caterers)*, 282 NLRB 939, 940-41 (1987) (concluding that union's grievance seeking to extend CBA to unit of employees under accretion theory did not violate Section 8(b)(1)(A), where union's argument was reasonable and Board had not yet determined the accretion issue).

⁸ *Vidtronics*, 269 NLRB at 133.

⁹ *Id.*

¹⁰ *Id.*

¹¹ 365 NLRB No. 61, slip op. at 3.

¹² *Id.* (noting that an after-acquired store clause does not automatically grant representational rights to the union). See generally *Houston Div. of Kroger Co.*, 219 NLRB 388, 389 (1975) (finding that after-acquired store clause, which requires an

no evidence of majority support and the Board had previously determined that there was no accretion, the union's lawsuit violated the Act.¹³

Here, we conclude that the Union's grievance and pursuit of arbitration violated Section 8(b)(1)(A) and (3) because the grievance is not based on a colorable contract claim consistent with Board law. Unlike the unions in *Vidtronics* and *Warwick Caterers*, whose grievances were based on reasonable legal conclusions, the Union in this case has not even presented an argument that would permit the Employer to lawfully recognize the Union as the collective-bargaining representative of the Osprey plant employees.¹⁴ The Union processed its grievance through three steps and demanded arbitration despite never claiming that accretion principles apply, and it has explicitly acknowledged that it cannot demonstrate majority support at this time. Thus, the Union is effectively forcing the Employer to expend time and money in the grievance-arbitration process without proffering the requisite legal foundation needed to substantiate its representation of the Osprey employees under the Act.¹⁵ Therefore, a Section 8(b)(1)(A) and (3) complaint should issue, absent settlement.

The Section 8(b)(2) allegation, however, should be dismissed, absent withdrawal, because the contract at issue has no union-security provision. Thus, application of the contract to the employees at issue in this case would not implicate the Union causing or attempting to cause the Employer to unlawfully discriminate in regard to hire or

employer to recognize a union as bargaining representative of employees at newly-acquired store, is valid even if it does not condition recognition upon showing of majority support, because Board "will impose such a condition as a matter of law").

¹³ 365 NLRB No. 61, slip op. at 3-4.

¹⁴ Cf. *Warwick Caterers*, 282 NLRB at 940 (rejecting the union's accretion argument); *Vidtronics*, 269 NLRB at 141 (acknowledging that the union's grievance was based, at least in part, on an accretion argument).

¹⁵ *Local 340, New York New Jersey Regional Joint Board*, 365 NLRB No. 61, slip op. at 3-4 (finding union's lawsuit to enforce arbitration award granting union representational rights and applying contract based on after-acquired store clause violated the Act because union presented no evidence of majority support at newly-acquired store, and Board had previously found no accretion; as there was "no lawful basis" for applying the after-acquired store clause, the arbitral award "contravened Board precedent").

tenure of employment based on union membership.

/s/
J.L.S.

ADV.12-CB-200784.Response.DukeEnergyFlorida b) (6), (b) (7)