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

Advice Memorandum

DATE: February 26, 2003

TO: James J. McDermott, Regional Director
Byron B. Kohn, Regional Attorney
Region 31

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

SUBJECT: Crescent Bay Convalescent Hospital 332-2520-5000
31-CA-25999 347-4030-6725
530-5400

This Section 8(a)(5) case was submitted for advice on whether the Employer unlawfully withdrew recognition from either Service Employees International Union Local 434B and/or SEIU Local 399 where Local 399 had attempted to transfer jurisdiction to Local 434B. We conclude that the Employer had no obligation to recognize Local 434B because there is no evidence that it had majority support. Further, we conclude that the Employer is still under an obligation to recognize Local 399 because that local has not disclaimed interest.

FACTS

On December 1, 2000, Local 399 was certified as the exclusive bargaining representative of employees of Crescent Bay Convalescent Hospital ("the Employer"). In mid-2001, SEIU International transferred jurisdiction over convalescent homes in Southern California from Local 399 to Local 434B. Local 399, however, remained the certified bargaining representative of the Employer.

In December 2001, Carlene George, a Local 434B employee, took over negotiations with the Employer on behalf of Local 399. At this point, it is undisputed that George was an employee of Local 434B, which was acting as an agent of Local 399, the certified bargaining representative.

During a March 2002 negotiating session, George asked the Employer whether it would be willing to recognize Local 434B as the bargaining agent. The Employer's negotiator and attorney, Mark Robbins, suggested that the parties might be able to resolve several unfair labor practice charges and recognize Local 434B in one agreement. Robbins, George, and Local 399's attorney thus began negotiating the terms of a non-Board settlement.

Robbins states that during settlement negotiations with Union attorney Dana Martinez, Martinez mentioned that there had been some sort of election in December 2001 whereby the unit employees "supposedly voted to transfer bargaining rights to SEIU Local 434B." He claims that although he asked for it, Martinez refused to provide him with proof of the vote. Martinez confirms that Robbins did ask her if Local 434B had proof of majority status. She checked with a 434B representative, who told her that the employees had voted and that Local 434B did have majority support. She does not recall to whom she spoke at Local 434B. Based on this information, Martinez told Robbins that there had been an election and that Local 434B did have majority support. Local 434B, however, has been unable to find any evidence of this purported vote, despite the Region's repeated requests for such evidence.

The parties signed the settlement agreement on June 5, 2002. The agreement provided that, in consideration of Local 399's withdrawing the unfair labor practice charge, the Employer would recognize SEIU Local 434B as Local 399's successor upon the Employer's receipt of written notice from Local 399, in the form attached as Exhibit B to the agreement, that its representational rights have been transferred to Local 434B. The agreement further provided that such notice from Local 399 would constitute its disclaimer of any right or interest in representing the bargaining unit. The last sentence of Exhibit B, the unsigned form, stated that "[t]his notice shall also constitute Local 399's disclaimer of any right or interest in representing the bargaining unit."

The Employer claims it never received the disclaimer from Local 399. [*FOIA Exemptions 6, 7(C), and 7(D)*

.] Local 399 provided a copy of the disclaimer it purportedly sent to the Employer, which is nearly identical to Exhibit B. The actual disclaimer, however, added a phrase to the last sentence of the form disclaimer: "This notice shall also constitute Local 399's disclaimer of any right or interest in representing the bargaining unit subject to the implementation and terms of the settlement agreement referenced above." (emphasis added).

The parties only engaged in one negotiating session after the non-Board settlement. The Employer claims that since it never received Local 399's disclaimer, it believed

that during that session, it was still negotiating with George as an agent for Local 399.

After that negotiating session, the Employer withdrew recognition from one or both Unions, apparently based on an anti-Union petition.[1] On October 24, 2002, Local 434B filed a charge alleging that the Employer unlawfully withdrew recognition from "the Union." Local 434B and Local 399 later jointly amended the charge to allege the Employer unlawfully withdrew recognition from both locals.

ACTION

We conclude that the Employer did not have a duty to recognize Local 434B because that Union never had a majority showing. The Employer did, however, have a continuing duty to recognize Local 399 because that Union never disclaimed interest. Thus, the Region should issue a Section 8(a)(5) complaint alleging that the Employer's withdrawal of recognition from Local 399 was unlawful.

A. No Duty to Recognize Local 434B.

As a threshold matter, we agree with the Region that, [*FOIA Exemptions 6, 7(C), and 7(D)*] we must conclude that Local 399 sent and that the Employer received Local 399's disclaimer letter. We find, however, that regardless of whether the Employer received Local 399's disclaimer, the Employer still had no duty to recognize Local 434B.

This case raises the question of whether, after an international union transfers jurisdiction from one local to another, the employer has a duty to recognize the second local as the successor to the representational rights of the first union absent proof of majority support.[2] We conclude that the employer has no such duty. Since Local 434B failed to show majority support, the Employer had no duty to recognize it.

The Board has held that for an international to effectively transfer jurisdiction from one local to another, the consent of the employees must be sought and

---

[1] The Region has concluded that this anti-Union petition was tainted and cannot support a withdrawal of recognition.

[2] See Centra, Inc., 8-CA-27564, Advice Memorandum dated January 22, 1996 (posed identical question but did not need to decide it because of pending R petition).

obtained. In Hermet, Inc.,[3] the Board held that a company violated Section 8(a)(1),(2), and(3) and Local 545 violated Section 8(b)(1)(A) and (2) by entering into a collective bargaining agreement where the international had transferred jurisdiction from Local 455 to Local 545 without employee consent. The employees there had sent a petition to the international stating their preference to keep Local 455. The international nevertheless told employees that they would not be able to work unless they signed authorization cards for Local 545, at which point a majority of the employees signed the cards.[4] The Board found that the purported majority support for the transfer had been coerced and that the employer and the union had therefore violated the Act by entering into the collective bargaining agreement. The Board reasoned that to permit such transfers without the approval of employees would effectively waive the Section 7 rights of employees to select their own representatives.[5]

Similarly, the Board has refused to amend the certification to reflect a transfer from one local to another absent a showing that the employees consented to the transfer. In Carriage Oldsmobile Cadillac, Inc.,[6] the union internally agreed to transfer jurisdiction to a new local, but the employer would not agree to recognize the new local unless a majority of employees voted in favor of it. The union held a meeting attended by nine of the ten unit employees, where employees were told of the transfer and given cards to sign. The union officials told employees that the cards were so they could be transferred.[7] The officials did not tell employees that, by signing cards, they were signifying their choice of representative. The Board found that the requirements for amendment of certification were not met because employees were told that the decision to transfer had already been made.[8]

---

[3] 222 NLRB 29, 38-39 (1976).

[4] Id. at 34-35.

[5] Id. at 38.

[6] 210 NLRB 620 (1974).

[7] Id. at 620-21.

[8] Id. See also Yale Mfg. Co., 157 NLRB 597, 597-98 (1966) (amendment to certification not appropriate where employees were not permitted to participate in decision to transfer

On the other hand, in Associated General Contractors of America,[9] the Board held that Local 1080 did not violate Section 8(b)(1)(A) by accepting recognition and executing a contract with a group of employers where the international union had transferred representational status from Local 90 to Local 1080 without employee consent. There, however, the Board still agreed with the general principle that employee assent is generally required before such transfers: "[A]n employer, ordinarily, may not rely upon actions of an International union resulting in a jurisdictional realignment as between affiliated locals and may violate the Act by withdrawing recognition from one local and recognizing another in accordance with such a reorganization."[10] While the Board went on to hold that the local did not violate the Act by affecting the transfer, the Board expressly relied on the fact that the case involved the construction industry. In that industry, employees are not members of fixed and stable workforces and prehire agreements are lawful, despite the fact that majority support is not required. Thus, the Board reasoned, the transfer would result in little more than a shift in the source of labor.

Based on the above, we find that an employer cannot be compelled to recognize a union after a transfer of jurisdiction absent proof of majority support for the new union. Since Local 434B has failed to provide such proof, the Employer here had no duty to recognize it. While Associated General Contractors provides some support for the argument that proof of employee consent to a transfer is not required, we believe that that case is limited to its unique facts, arising in the construction industry.

---

representational rights from one local to another). Similarly, in merger/affiliation cases, the Board has held that where the merger or affiliation between unions results in a complete loss of identity of the historical union, a question of representation is raised that must be decided by secret ballot election. See Gas Service Co., 213 NLRB 932, 933 (1974); Independent Drug Store Owners, 211 NLRB 701, 701 (1979), affd. 528 F.2d 1225 (9th Cir. 1975); Gulf Oil Corp., 135 NLRB 184, 184 (1962).

[9] 182 NLRB 224 (1970).

[10] Id. at 225.

Accordingly, the Employer did not violate Section 8(a)(5) by failing to recognize Local 434B.[11]

B. Duty to Recognize Local 399.

While the Employer had no duty to recognize Local 434B, we find that the Employer did have a continuing duty to bargain with Local 399. The Employer argues that it had no duty to recognize Local 399 because it disclaimed interest. We disagree.

An employer is not obligated to bargain with a local union that has unequivocally disclaimed interest in representing bargaining unit employees and has attempted to transfer jurisdiction to another union.[12] Thus, in Sisters of Mercy Health, the Board found that a local union lost its representational rights where it had "unequivocally" disclaimed interest and did not engage in any action inconsistent with its disclaimer. The Board will not, however, lightly infer a union's disclaimer of interest, particularly where the union engages in acts inconsistent with the disclaimer. In Royal Iolani Apartment Owners,[13] the Board held that an employer was obligated to bargain with Local 5, despite its anticipatory announcement of a never completed transfer of representation. Distinguishing Sisters of Mercy Health, the Board reasoned that Local 5 did not act as if the transfer had been effectuated. It therefore did not turn over dues to the other local, it continued to process grievances, and it consulted with unit employees about the transfer. Further, the employer never

---

[11] We note that Local 399's variation of the last sentence of the disclaimer, adding the clause, "subject to the implementation and terms of the settlement agreement referenced above," does not render the entire disclaimer ineffective. It is evident from the settlement agreement that the disclaimer was in consideration for the Employer's recognition of Local 434B. Thus, the added language did not alter the meaning of the agreement or the disclaimer. Rather, Local 399 was attempting only to prevent the employer from using the disclaimer to withdraw recognition from Local 399 and then refusing to fulfill its part of the bargain by recognizing Local 434B.

[12] Sisters of Mercy Health, 277 NLRB 1353, 1353-54 (1985); Goad Company, 333 NLRB No. 82, slip op. at 4 (2001).

[13] 292 NLRB 107 (1988).

protested dealing with Local 5 as the employees' grievance representative.[14]

Here, Local 399 clearly did not disclaim interest in representing the Employer's employees. In its letter to the Employer purportedly disclaiming interest, Local 399 pointedly stated that it was disclaiming interest only "subject to the implementation and terms of the settlement agreement referenced above." Thus, Local 399 never unequivocally disclaimed interest but explicitly conditioned that disclaimer on the settlement agreement's implementation. Since the Employer never recognized Local 434B, the settlement agreement was never implemented. Thus, Local 399's conditional disclaimer never went into effect. Further, after sending the letter, Local 399 continued to represent the Employer's employees in collective bargaining and thus did not act consistent with its purported disclaimer of interest. Moreover, since the Employer claims that it never recognized Local 434B, the Employer continued to recognize Local 399 by bargaining with George at the last negotiating session. Because the evidence firmly establishes that Local 399 never disclaimed interest, the Employer was not privileged to withdraw recognition from Local 399 on this basis.[15]

The Region should issue a complaint alleging that the Employer's withdrawal of recognition from Local 399 was unlawful.

B.J.K.

---

[14] Id. at 107-08.

[15] It appears that there were other bases upon which the Employer withdrew recognition from Local 399, including an anti-Union petition. Because this issue was not submitted to Advice, we do not decide here whether the Employer's withdrawal of recognition based on the anti-union petition or any other reason was unlawful. We decide here only that the Employer was not privileged to withdraw recognition from Local 399 based on its purported disclaimer of interest.