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

Advice Memorandum

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TO: Dorothy L. Moore-Duncan, Regional Director
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Region 4

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

SUBJECT: C.A. Spalding Co. 530-4090-3000
Case 4-CA-30345 530-8081-6900

This Section 8(a)(5) case was submitted for advice as to whether the Employer unlawfully refused to bargain for a new contract with the Union after it affiliated with another labor organization.

Briefly, the C.A. Spalding Company Employees Association (the Union) has represented a unit of 40-50 employees of the Employer for years. The parties' last collective bargaining agreement was to expire by its terms on June 30, 2001. In early February, Union president Grauber called a meeting to discuss affiliating with a larger labor organization. That 90-minute discussion of affiliation, attended by 20-25 employees, ended with a vote to hold a second meeting at which a representative of Teamsters Local 169 (Local 169) could address possible affiliation. That second meeting was preceded by the Union attorney and Local 169 drafting a tentative affiliation agreement providing for, inter alia, a phase in of Local 169 dues, a designation of the Union officers as a unit shop committee to negotiate a successor agreement with the assistance of a Local 169 representative, and a provision that any agreement or strike be approved by a majority of unit employees. About 25-30 employees attended the two-hour second meeting, which concluded with an announcement that a vote would be scheduled to determine whether Union members wished to affiliate with Local 169. Notices were posted on plant bulletin boards at least 7 days before each of the two meetings and the affiliation vote.

The vote, held in a large room at a community club, was overseen by three election monitors chosen by Grauber. Employees signed in, were given paper ballots to mark anyplace in the room, and then deposited the ballots in a closed box. After the voting hours, the Union attorney and three election opponents entered the room where the

monitors opened the box and counted the ballots. The vote was 28-18 in favor of affiliation.[1]

We agree with the Region that the Employer violated Section 8(a)(5) by refusing to meet and bargain for a successor contract after the Union affiliated with Local 169.

In NLRB v. Financial Institution Employees of America (Seattle-First National Bank), 475 U.S. 192 (1986)(Seattle-First), the Supreme Court held that the Board exceeded its authority by maintaining a rule requiring that all unit employees, including those who were not union members, be given the opportunity to vote in an affiliation election. While the Court noted that it was not passing on the propriety of the Board's due process requirement,[2] it also indicated that in the absence of changes in the representative "sufficiently dramatic" to raise a question concerning representation, the Board lacked authority to interfere at all with a union's decision to affiliate.[3]

On a number of occasions since Seattle-First, the Board has stated that it was unnecessary to decide whether the lack of "due process" raised a "question concerning representation" (QCR), the issue left open by the Supreme Court.[4] Thus, in Western Commercial Transport, 288 NLRB

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[1] After the Employer rejected several requests by the Union to commence negotiations for a new contract, the Union presented the Employer with a request signed by 40 unit employees that the Employer "begin negotiations with the C.A. Spalding Employee Association and its affiliate Teamsters Local 169."

[2] 475 U.S. at 199, n.6.

[3] 475 U.S. at 206.

[4] See for example Sullivan Brothers Printers, Inc., 317 NLRB 561, 562 n.2 (1995), enf'd 99 F.3d 1217 (1st Cir. 1996) (because "due process" requirements were met, "we find it unnecessary to determine whether, in view of the Supreme Court's opinion in Seattle-First, the Board lacks authority to impose due process requirements"); Paragon Paint & Varnish Corp., 317 NLRB 747, 748 (1995), enf'd 155 LRRM 2576 (D.C. Cir. 1996); May Department Stores Co., 289 NLRB 661, 665 n.16 (1988), enf'd 897 F.2d 221 (7th Cir. 1990); Hammond Publishers, Inc., 286 NLRB 49, 50 n. 8 (1987) (since both factors were met, did not have to reach the

214, 217 (1988), a post-Seattle-First amendment of certification case arising out of a merger which the Board characterized as an affiliation,[5] the Board significantly moved in the direction of abandoning the due process requirement altogether. The Board held that once a QCR is raised because of a lack of continuity, "an affiliation vote cannot be used as a substitute for a representation proceeding before the Board," overruling Quemetco, 226 NLRB 1398 (1976), to the extent that it held that an amendment to certification can be granted despite a lack of evidence of continuity of representative, where the employees had unanimously voted to affiliate. 288 NLRB at 217, 218, n.13. Thus, the expression of employee sentiment is no longer paramount and, in reality, after Western Commercial Transport the underlying rationale for employee member voting and due process no longer exists. Arguably, the Board should no longer consider due process but only whether there is substantial continuity in the bargaining representative.[6] However, we do not need to reach that question here since there was both continuity and due process.

The Employer has not met its burden of establishing that there is no substantial continuity between the Union before and after its affiliation with Local 169. Thus, the Employer's "continuity" arguments that the Union's bylaws do not explicitly authorize affiliation, that those bylaws require a 2/3 vote to change the dues structure, and that Local 169's bylaws do not provide for shop committees, would not be sufficient to demonstrate no substantial continuity and are, in fact, more like "due process" arguments.[7]

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issue not reached in Seattle-First of "whether both continuity of representation and due process must be satisfied in all affiliation cases").

[5] In Seattle-First the Supreme Court noted that the same standards are used in examining affiliations in the context of both petitions to amend certifications and in cases involving an employer's refusal to bargain, 475 U.S. at 200, n.8.

[6] Such an argument made to the Board in Avante at Boca Raton, Cases 12-CA-18860 et al., Advice Memorandum dated December 18, 1998, was not passed upon. Avante at Boca Raton, 334 NLRB No. 56 (2001).

[7] See, e.g., F.W. Woolworth Co., 305 NLRB 775, 779 (1991).

We further agree that the Employer has failed to carry its burden of proof that the affiliation vote was accomplished without adequate procedural safeguards. As the Region notes, the Board has never required that an affiliation vote be conducted in the same manner as a Board election.[8] Generally, the Board has required that due process safeguards include "notice of the election to all members, an adequate opportunity for members to discuss the election, and reasonable precautions to maintain ballot secrecy."[9] The important considerations are whether there was sufficient opportunity for discussion prior to the vote[10] and whether the election was conducted in an orderly fashion and in an atmosphere free from restraint or coercion.[11] The Board will interject itself in internal union affairs, such as affiliation decisions, "only in the most limited of circumstances."[12]

We agree that the Employer's three specific challenges to the voting procedure do not meet its burden of proof of showing a lack of adequate due process. Allowing several laid-off employees to vote was within the Union's right to internally determine who could vote on affiliation.[13] The selection of the election monitors by Grauber is similarly an internal Union affair, and the Employer has provided no evidence of improper behavior by the monitors. Lastly, the Employer asserts that Grauber, who was downstairs in the community hall along with three affiliation opponents, electioneered employees as they arrived to vote for

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[8] See, e.g., Insulfab Plastics, Inc., 274 NLRB 817, 822 (1985), enfd. 789 F.2d 961 (1st Cir. 1986); Aurelia Osborn Fox Memorial Hospital, 247 NLRB 356 (1980); Bear Archery, 223 NLRB 1169, 1171 (1976), enf. denied 587 F.2d 812 (6th Cir. 1977).

[9] Seattle-First, 475 U.S. at 199, citing Newspapers, Inc., 210 NLRB 8, 9 (1974), enfd. 515 F.2d 334 (5th Cir. 1975).

[10] State Bank of India, 262 NLRB 1108 (1982).

[11] Bear Archery, above, at 1171.

[12] Sullivan Bros. Printers, 317 at 562.

[13] Seattle-First National Bank, above (union could deny nonmembers the right to vote on affiliation).

affiliation. While Grauber denies electioneering, and while such conduct may be objectionable in the context of a Board election, we agree that any such conduct was insufficient to invalidate the affiliation election.

Again, in these circumstances, it is unnecessary to decide whether the "due process" prong survives after Seattle-First National Bank where there is substantial continuity of the affiliated representative.

B.J.K