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

Advice Memorandum

DATE: May 28, 2002

TO : Veronica I. Clements, Acting Regional Director
Bruce I. Friend, Assistant to Regional Director
Region 32

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice
530-5875

SUBJECT: Associated Third Party Administrators
Case 32-CA-19311-1

This case was submitted for advice as to whether the Employer unlawfully negotiated individual collective bargaining agreements with two of five local unions that engaged in joint multiunion bargaining over their respective bargaining units. We conclude that the Employer violated Section 8(a)(5) when it negotiated separate agreements with the two unions, because the unions failed to timely withdraw from multiunion bargaining under the criteria set forth in Retail Associates, 120 NLRB 388 (1958).

FACTS

Associated Third Party Administrators manages pension, benefit and health plans for various organizations throughout the United States. Five OPEIU local unions, Locals 2, 3, 11, 29 and 537, represent the Company's clerical, technical and professional employees at four locations throughout the country. Each Local has its own officers and stewards and each local processes and arbitrated its own grievances under the previous collective-bargaining agreement with the Company.

The Unions have bargained jointly for the last few collective-bargaining agreements, the most recent of which expired in 2001. A representative from each Local separately signed the last contract. The contract provided for different wage rates, as well as health and welfare and pension contributions for employees at the various facilities. However, all employees are subject to the same provisions covering sick leave, vacation, holidays, work week, and grievance and arbitration procedure.

Local 29 business representative Gamble served as chief spokesperson for a self-described "coalition" of the five Unions during negotiations for a new contract. At the first session on July 10, 2001, Gamble told the Employer's

negotiator that, as in the past, contract ratification is dependent on ratification by all five members of the coalition. Gamble specified that rejection by any Union constitutes rejection by them all.[1] Although the Employer's bargaining representative states that Gamble described the coalition's ratification procedure for prior years, he denies that Gamble specifically stated that the coalition intended to maintain the procedure this year. In 1995, Local 29 had rejected a contract offer, requiring all the Unions to return to the table for further negotiations. And in 1998, Local 537 failed to ratify the agreement because of a ballot problem, which stalled application of the contract for all Unions until the problem was resolved.

The parties bargained for the next several months, until on October 30, the Employer presented the coalition with its "best offer." In separate votes, the membership of Locals 2, 29 and 537 rejected the offer, while the memberships of Local 3 and 11 voted to accept. On November 15, the Employer advised the coalition that it intended to sign separate collective-bargaining agreements with Locals 3 and 11. The Employer has since signed a contract with Local 11, while a written agreement with Local 3 has been delayed pending the resolution of a jurisdictional dispute between that Union and Local 29.[2]

ACTION

We conclude that the Unions engaged in joint, multiunion bargaining with the Employer in 2001, thereby subjecting them to Retail Associates rules governing withdrawal from group negotiation. Because Locals 3 and 11 failed to withdraw from joint bargaining in a timely manner (that is, prior to the start of negotiations), and in the absence of "unusual circumstances," the Employer violated Section 8(a)(5) by negotiating separate contracts with them.

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[1] Local 2's representative corroborated Gamble's statements. However a representative of Local 3 (one of the two Unions that negotiated separate agreements with the Company) stated that the coalition has never used the ratification procedure described by Gamble for the current, or past, negotiations.

[2] The Region intends to issue complaint, absent settlement, alleging that the Employer unilaterally implemented its final proposal against the other three Unions in the absence of good-faith impasse.

Initially, we conclude that the Unions, operating as a "coalition," were negotiating with the Employer as members of a consensual, multiunion bargaining group. Parties engage in joint bargaining where they have "unequivocally manifested an intent to be bound by the results of the group negotiation."[3] The Unions' conduct at the 2001 negotiations, as well as in prior years, establish that they unequivocally intended to be bound by group action. The Unions designated a chief spokesman, Gamble, to represent them at the table. The parties bargained for a single contract containing many identical provisions covering employees represented by all the Unions. Moreover, until Locals 3 and 11 attempted to withdraw, there is no evidence that any Union acted inconsistently with its intent to abide by group bargaining. Gamble's depiction of the Unions' method of ratification, requiring unanimous consent by all five Unions, further indicates their unequivocal intent to be bound by group bargaining. Finally, the parties had manifested the same intent in previous years when all parties to negotiations were required to return to the table after one Union rejected a proposal and again when contract application to all Unions was delayed pending a dispute with one Local.

Although the evidence establishes that the coalition members engaged in joint multiunion bargaining, it does not indicate that they have agreed to merge their units. Thus, there is no "unmistakable evidence that the parties mutually agreed to extinguish the separateness of the previously recognized or certified units."[4] Each Union negotiates separate wage rates and pension and health and welfare contributions for its membership; independently grieves and arbitrates grievances; keeps separate offices and selects separate stewards; and shares few community of interest factors with sister locals, such as common supervision or employee interchange.[5] Since locals retain

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[3] Detroit Newspapers, 326 NLRB 700, 702 (1998), rev'd on other grounds 216 F.3d 109 (D.C. Cir. 2000).

[4] Duval Corporation, 234 NLRB 160, 161 (1978).

[5] See Duval, supra (no mutual intent to merge units where separate recognition was extended to a union in a separate unit, and recognition clause never changed to include all plant employees); Metropolitan Life Insurance Company, 172 NLRB 1257, 1258 (1968) (uniform contract terms and pooled ratification voting do not constitute clear mutual intent to merge separate units given separate contracts drafted

their separate identity despite bargaining as a coalition, they have the ability to negotiate individual contracts with the Company under certain well-established principles. Thus, the rules governing withdrawal from group bargaining determine the lawfulness of the Company's actions.

Because joint multiunion bargaining is consensual in nature, the rules first enunciated in Retail Associates, Inc. permit members of the group to withdraw from joint bargaining provided that notice is given prior to the commencement of negotiations for a new contract.[6] However, once negotiations have commenced, withdrawal is not permitted unless there is "mutual consent" of both the employer and the members of the multiunion group or unless "unusual circumstances" exist.[7]

The Board has extended Retail Associates rules, first applied to multiemployer unit withdrawals, to joint bargaining for separately represented units. In Boston Edison Co.,[8] the parties engaged in both separate negotiations for individual collective-bargaining agreements with three unions, as well as joint bargaining with the unions for a single pension agreement. The Board held that this hybrid, two-stage bargaining did not create a multiunion unit for pension issues, and consequently that the three units retained their separate existences.[9]

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for each unit and recognition clauses referred to multiple units, not single unit).

[6] 120 NLRB 388 (1958). See Detroit Newspapers, 326 NLRB at 702 (Retail Associates rules apply to withdrawal from multiunion, as well as multiemployer, bargaining arrangements).

[7] 120 NLRB at 395; Charles D. Bonanno Linen Service, Inc., 243 NLRB 1093 (1979), enfd. 630 F.2d 25 (1st Cir. 1980), affd. 454 U.S. 404 (1980). "Unusual circumstances" exist only where extreme financial pressures threatens the existence of a member of the group as a viable enterprise or where a bargaining unit has become substantially fragmented through lawful withdrawals from the multiemployer or multiunion association. Bonanno, 243 NLRB at 1093. Neither consideration applies here.

[8] 290 NLRB 549 (1988).

[9] Id. at 553.

Nonetheless, the Board evaluated a union's withdrawal from joint bargaining under Retail Associates, and held that the employer's refusal to negotiate separately with one of the unions over the pension plan violated Section 8(a)(5) only after determining that the union's withdrawal had been timely and unequivocal.[10]

Here, Local 3 and 11's attempt to withdraw from multiunion bargaining four months after negotiations had begun was not timely. Their attempt to withdraw from joint bargaining during the middle, rather than prior to the start, of negotiations violates the Board's Retail Associates requirements and thus has no effect on the Employer's obligation to bargain with the coalition on a multiunion basis. As the Boston Edison decision makes clear, the Employer is obligated to continue group bargaining absent a timely withdrawal of a member, even though the Unions have not merged into a single bargaining unit. Therefore, the Employer violated Section 8(a)(5) by negotiating separate contracts with Locals 3 and 11.

Accordingly, the Region should issue a Section 8(a)(5) complaint, absent settlement, seeking among other things, the rescission of any signed contracts with Local 11 and 3.

B.J.K.

[10] See also Consolidated Papers, Inc., 220 NLRB 1281, 1283 (1975)(Retail Associates criteria applied to withdrawal from group "convenience" bargaining by separate bargaining units).