

**Western Commercial Transport, Inc. and Southeast Tank Lines Employees Union International Association of Machinists District Lodge 776.**  
Case 16-AC-50

March 25, 1988

**DECISION AND ORDER**

BY CHAIRMAN STEPHENS AND MEMBERS  
JOHANSEN, BABSON, AND CRACRAFT

On October 22, 1974, the Southwest Tank Lines Employees Union, Division 1 (STLEU) was certified by the Board as the exclusive bargaining representative of the employees of the Employer in the stipulated unit.<sup>1</sup> On November 2, 1983, the Co-Petitioners, STLEU and the International Association of Machinists, District Lodge 776 (District Lodge 776 or IAM) filed the instant request to amend the certification to designate District Lodge 776 as the representative of the Employer's employees in the following unit:

**Including:** All drivers and maintenance employees employed by the Employer at its terminals located in Fort Worth, Grand Saline, Sherman, Houston, Hereford, Dallas and Beaumont, Texas; Spencer and Enid, Oklahoma; and West Memphis, Arkansas.

**EXCLUDING:** All other employees including terminal employees employed by the Employer at its Jacksonville, Illinois terminal, office clerical employees, inside and outside salesmen, watchmen, guards, dispatchers, and supervisors as defined in the Act.<sup>2</sup>

The Employer opposes granting the amendment for the reasons explained below.

A hearing was held December 2, 1983, at Fort Worth, Texas, before Hearing Officer Larry D. Smith. Pursuant to Section 102.67 of the Board's Rules and Regulations, the Regional Director for Region 16 transferred the case to the Board for decision. The Employer filed a brief with the Board.

The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.

On the entire record in the this case, the Board finds STLEU and the Employer have had a collec-

<sup>1</sup> The unit stipulated by the parties to be appropriate in Case 16-RC-6700 includes

All drivers and maintenance and cleaning employees employed by the Employer in Fort Worth, Grand Saline, Sherman, Houston, Hereford, Dallas and Beaumont, Texas; Oklahoma City and Enid, Oklahoma; and Kansas City, Missouri EXCLUDED. All other employees, including truckdrivers and other employees employed at the Employer's Jacksonville, Illinois terminal, office clerical, inside and outside salesmen, watchmen, guards and supervisors as defined in the Act.

<sup>2</sup> At the hearing the petitioned-for unit was amended to delete West Memphis, Arkansas, and substitute Memphis, Tennessee

tive-bargaining relationship since about 1971 when the Employer voluntarily recognized STLEU as the representative of certain of its employees. On October 22, 1974, STLEU was certified as the exclusive representative of the employees in the unit described above following a Board-conducted election.

During the spring of 1983,<sup>3</sup> the executive committee of the STLEU decided that the deteriorating financial condition of the Union—resulting from accumulating arbitration expenses and a declining membership—warranted its exploring the possibility of affiliating with a larger, more financially healthy labor organization. Following discussions between STLEU President Riley Sloan, Vice President Les Pierson, and District Lodge Organizer Tommy C. Daves, the executive committee of STLEU decided to pursue an affiliation with District Lodge 776. During July and August Sloan, Pierson, and Daves held meetings at 7 of the 10 facilities included within the unit. They spoke to employees about STLEU's financial condition and how affiliation with District Lodge 776 could help its condition. They also explained that if they voted to affiliate District Lodge 776 would place them under one of the local lodges within the district and that the local would take over the enforcement of the existing collective-bargaining agreement between the Employer and STLEU. By letter dated September 8 mailed to all unit employees, Sloan reiterated the reasons he supported affiliation; urged them to vote in favor of affiliating with District Lodge 776; and explained the procedure that would be used in carrying out the mail-ballot election. On September 19 ballots with return envelopes and a letter detailing the election process were mailed to all unit employees. The letter explained that ballots must be received by October 5 and that the tally would be compiled on October 6 by a local clergyman. Employees were invited to attend and observe the counting of the ballots.

Of approximately 136 unit employees, 85 voted on the affiliation issue. The tally was 71 in favor of affiliating with District Lodge 776, 13 against, and 1 challenged ballot.<sup>4</sup>

By letter dated October 7, District Lodge 776 President Pat Lane notified the Employer's president Dana King of the election and of the vote in favor of affiliating with District Lodge 776. He requested the Employer to abide by the current labor agreement and expressed the desire to work together in a congenial manner. He further advised the

<sup>3</sup> All dates refer to 1983 unless otherwise indicated.

<sup>4</sup> The single ballot not counted was received in an envelope bearing no return address rendering verification of the eligibility of the voter impossible.

Employer that District Lodge Organizer Daves had been assigned as the labor representative in charge of implementing the contract.

The Employer's attorney responded by letter dated October 12. The Employer declined to recognize District Lodge 776 as the collective-bargaining representative of its employees until such time as a Board-supervised election was conducted. It stated that to achieve this end the Employer had filed a representation petition with the Board in Case 16-RM-641.

On November 2, the Co-Petitioners filed the instant petition to amend certification.

The Employer asserts that an amendment of certification is improper in the circumstances of this case for several reasons. It states (1) that there is a question regarding the appropriateness of the unit sought to be represented, (2) that STLEU is defunct, (3) that the employees' action in "withdrawing" from STLEU and seeking its "decertification" establishes that a question concerning representation exists, (4) that the affiliation of STLEU with District Lodge 776 constitutes a substantial change in the identity of the representing entity, and (5) that the manner in which the affiliation vote was conducted did not meet minimum standards of due process.

First, we find the Employer's contention that the bargaining unit is not appropriate is without merit. The Employer and STLEU agreed on the appropriateness of the existing unit and have been bargaining collectively concerning the unit since 1971.<sup>5</sup> Any difficulties cited by the Employer brought about by the geographic separation among the terminals comprising the unit or by the diversity of the employees' functions and status at those terminals apparently existed throughout the bargaining relationship. The record does not show that at any time subsequent to the initial certification there has been a substantial modification of the Employer's operation that would affect the continued viability of the certified unit. Accordingly, we reject the Employer's argument that the multifacility unit no longer is appropriate for bargaining.

The Employer next contends that STLEU is a defunct organization because of its financial insolvency and that the Employer has received no response to letters or telephone calls to STLEU in recent months. Its position on the defunctness issue, however, is explained only as part of its claim that,

owing to the substantial issues raised concerning the viability of the AC petition, its collective-bargaining agreement with the defunct STLEU should not be a bar to the processing of its RM petition. It further argues that the processing of the pending RM petition will afford employees the opportunity to express freely their choice whether they desire representation by District Lodge 776.

Inasmuch as the Employer's position on defunctness is related to the processing of the RM petition, an issue not before us for consideration, that argument is irrelevant to this proceeding. In any event, although the evidence is clear that seriously adverse financial conditions led the STLEU executive committee to explore out the possibility of affiliating with a more financially sound organization, the record does not establish that STLEU had ceased functioning as a labor organization representing the unit employees for whom it had been certified. There is no probative evidence that STLEU had ceased performing its representational duties or that it had ignored its responsibilities under the collective-bargaining agreement. "A bargaining representative is considered defunct and its contract is not a bar only if it is unable or unwilling to represent the employees." *Yates Industries*, 264 NLRB 1237, 1249 (1982).

The Employer's next argument is that the STLEU unit employees no longer wish to be represented by that Union and that the evidence of their wishes in this regard creates a question concerning representation. The Employer points to STLEU's low membership (45 out of approximately 136 unit employees) as well as evidence, rejected at the hearing, of pervasive disaffection from STLEU as documented by letters from employees wishing to resign their membership, and a petition expressing support for decertification proceedings.

We find that the size of the membership within the unit is not an accurate reflection of whether employees wish to continue to be represented by a union. *Petroleum Contractors*, 250 NLRB 604, 607 (1980); *Golden State Habilitation Convalescent Center*, 224 NLRB 1619 (1976); and *Orion Corp.*, 210 NLRB 633 (1974). Moreover, we find that this evidence, as well as that excluded by the hearing officer, is not cognizable as evidence showing loss of majority support during the term of the collective-bargaining agreement. *Burger Pits, Inc.*, 273 NLRB 1001, 1002 fn. 16 (1984). Accordingly, we find no merit in the Employer's argument against granting the amendment of certification on this ground.

The Employer's major argument concerns the continuity of representation entity, i.e., the Employer contends that an amendment of certification

<sup>5</sup> The Employer voluntarily recognized STLEU as the representative of the employees in 1971. There was a Board-conducted representation election in 1974 in which the parties agreed that a substantially similar unit to the one now in issue was appropriate. The unit description has changed over the years as a result of the closing of certain facilities and the opening of others. The applicable bargaining agreement provides that the unit description will adapt to reflect company changes of this type.

is improper in these circumstances because the representation afforded the unit employees has changed substantially. The Employer points to numerous differences between the two organizations, which it contends will fundamentally alter the representation of the unit.

STLEU is a small, independent entity whose entire membership is restricted to employees of this Employer. Through its constitution and bylaws, complete autonomy is retained by its membership.<sup>6</sup> These governing documents include the following procedural provisions: nomination of officers to be by petition of 25 members; direct election of officers to be by secret-mail ballot; proposals to amend the constitution and bylaws to be made by petition of 25 members and approval of such proposals to be by majority vote; executive council policy decisions to be subject to review by referendum of the membership; each terminal within the unit to elect a representative to serve on the executive board; the executive committee (elected from among executive board members) to represent the Union in contract negotiations; and a ratification vote of the membership to approve collective-bargaining agreements.

By contrast, District Lodge 776 represents 8500 employees and is signatory to 18 collective-bargaining agreements with various employers from a nine-county area throughout north central Texas. District Lodge 776 is the parent body for 10 local lodges, one of which would likely be designated as the direct representative body for the affiliated STLEU unit.<sup>7</sup> Local lodges affiliated with District Lodge 776 are represented within the District Lodge by an elected delegate, at the ratio of one delegate per 500 members. Day-to-day representation matters are handled by full-time, professional business agents, who are elected by a vote of all the District Lodge delegates. Eligibility to serve as business agent is restricted to members in good standing for 2 years. Nominees for the office of president or secretary-treasurer of the District Lodge must be members in good standing for 1 year. Amendments to the bylaws of District Lodge 776 may be proposed by District Lodge delegates during two designated periods per year and are subject to the majority approval of the membership. However, after membership approval, these amendments must be submitted to the IAM's presi-

dent for final approval and designation of an effective date. The dues structure is set forth in the IAM constitution, as are the initiation and reinstatement fee schedules. If a local lodge desires strike action (as determined by a membership vote at a meeting)<sup>8</sup> no strike can be undertaken until the local gains the consent of either the International's Grand Lodge executive committee or the International president.

The agreement between STLEU and District Lodge 776 provides for the following actions: District Lodge 776 would take over enforcement of the terms of the existing collective-bargaining agreement between the Employer and STLEU; District Lodge 776 would assume liability for certain debts owed by STLEU in exchange for STLEU's treasury; dues would remain at the level established under the STLEU bylaws until the end of the year, whereupon they would be adjusted (reduced by \$2.50 per month) to reflect the dues rate of the IAM local lodge into which the unit would be placed; day-to-day contract administration would be handled by District Lodge Organizer Daves; unit employees would elect a chief steward who would work in conjunction with the District lodge business representative on the initial steps of grievances; unit employees would elect two employee representatives to work with the business representative in comprising a contract negotiating committee; and employees would vote on contract ratification.

The record establishes that the incumbent STLEU officers would not be able to retain their positions<sup>9</sup> and that they do not plan to continue playing any role in union affairs after the affiliation takes place. The current officers' duties relating to day-to-day contract administration, as noted above, would be taken over by a full-time District Lodge staff member who has had no previous connection or working experience with either the Employer or the unit employees.

In addition, it is notable that the dues collected by STLEU currently remain entirely within its control—both in terms of the amounts assessed and the manner in which expenditures are made. On the other hand, dues paid following IAM affiliation are set by the International's schedules and are

<sup>6</sup> Although STLEU is affiliated with the National Federation of Independent Unions, this affiliation did not affect STLEU's local autonomy.

<sup>7</sup> Inasmuch as District Lodge 776, not a local lodge, is the Co-Petitioner here, the organizational structure of these local lodges is irrelevant to this proceeding, except as it impacts on the organization of District Lodge 776. In this regard, we note that there is no evidence to show that any such final decision has been implemented. We further note that there is no indication that unit employees would have any influence over the selection of the local lodge which may be selected to represent them.

<sup>8</sup> Where the local lodge includes members from more than one collective-bargaining unit, the record is unclear whether only members in the affected unit may vote on the strike issue.

<sup>9</sup> It appears from the affiliation agreement and the IAM constitution that the only positions open to the STLEU officers immediately following the affiliation would be that of chief steward for the unit, or that of a unit representative for creating a negotiating committee. Given the proportional representation of delegates (500 members per delegate), it appears that the Employer's 136 employees would not be able to control the selection of any District Lodge delegate.

shared among the local, the district, and the International, thereby placing these moneys beyond the direct control of the unit membership.

In sum, the record is clear that the existing bargaining representative will, as a result of affiliation, undergo substantial changes in size, organizational structure, and administration. These changes will be reflected in its relationships with its members and the unit it represents.

Most significantly, the union members themselves will realize a weakening of their own impact within the Union. That is, nearly complete autonomy of the membership that exists within STLEU will be diminished to reflect the formal hierarchical structure of the IAM. Moreover, given the size of the STLEU unit (136 employees, not all of whom are members) vis-a-vis the overall membership in District Lodge 776 (representing 8500 employees—the record does not establish actual membership totals), the unit employees' power to direct and control the activities of the Co-Petitioner Union will be all but extinguished.

The Board's role in affiliation cases is to determine whether the affiliation raises a question concerning representation. The Board's traditional practice in such cases has been to examine whether an affiliation election was conducted with appropriate safeguards and whether there was a substantial change in the identity of the representative entity. See, e.g., *Hamilton Tool Co.*, 190 NLRB 571 (1971); *Gulf Oil Corp.*, 135 NLRB 184 (1962). Under our traditional test, if either due process or continuity of representative is lacking, the Board refused to grant an amendment of certification, instead leaving the matter for resolution through a Board-conducted election. Concededly, however, the Board has not been fully consistent in the weight it has given to the due process and continuity of representative elements of its analysis. Compare *Gulf Oil Corp.*, above (Board refused to amend certification, notwithstanding majority vote in favor of affiliation, because there was no showing of continuity of representative), with *Quemetco, Inc.*, 226 NLRB 1398 (1976) (Board found affiliation effective on basis of unanimous employee vote, notwithstanding evidence of lack of continuity of representative).

In determining whether a "question concerning representation" exists because of lack of continuity, the Board is not directly inquiring into whether there is majority support for the labor organization after the changes at issue, but rather is seeking to determine whether the changes are so great that a new organization has come into being—one that should be required to establish its status as a bargaining representative through the same means that any labor organization is required to use in the first

instance. The continuity requirement thus ensures that no one can substitute an entirely different representative in disregard of the established mechanisms for making such a change. See *NLRB v. Insulfab Plastics, Inc.*, 789 F.2d 961, 967 (1st Cir. 1986) (discussion of *Bernard Gloekler North East Co.*), 540 F.2d 553 (3d Cir. 1978). See also *General Box Co.*, 82 NLRB 678 (1949) (a statutory "question concerning representation" can exist even where no doubt is asserted concerning employee support for the labor organization in question). Factors mentioned in decisions dealing with the question of continuity of representative have included the following: continued leadership responsibilities by the existing union officials; the perpetuation of membership rights and duties, such as eligibility for membership, qualification to hold office, oversight of executive council activity, the dues/fees structure, authority to change provisions in the governing documents, the frequency of membership meetings, the continuation of the manner in which contract negotiations, administration, and grievance processing are effectuated; and the preservation of the certified union's physical facilities, books, and assets.<sup>10</sup>

The Supreme Court's decision in *NLRB v. Financial Institution Employees Local 1182*, 475 U.S. 192 (1986), provides valuable guidance for the instant case. Although the narrow holding in *Financial Institution Employees* applies solely to the question of whether nonmember employees must be afforded the opportunity to vote on their bargaining representative's decision to affiliate with another union, the Court undertook to discuss the focus of the Board's general inquiry in affiliation cases.

The Court reiterated that the long-understood role of the Board regarding union affiliations is to determine whether the "affiliation raises a question of representation and, if so, conducting an election to decide whether the certified union still is the choice of majority of the unit."<sup>11</sup> The Court stated that changed circumstances, such as organizational and structural changes derived from the affiliation, may alter the relationship between the union and the employees it represents; and this, in turn, may raise the question of whether the affiliated union enjoys continued majority support. The Court further stated:

[I]n these situations, the affiliation implicates the employees' right to select a bargaining rep-

<sup>10</sup> See, e.g., *J. Ray McDermott & Co. v. NLRB*, 571 F.2d 850 (5th Cir. 1978); *U.S. Steel Corp. v. NLRB*, 457 F.2d 660 (3d Cir. 1972), *Climax Molybdenum Co.*, 146 NLRB 508 (1964). See generally *Union Affiliations and Collective Bargaining*, 128 U. Pa. L. Rev. 430 at 445 (1979), and cases cited therein.

<sup>11</sup> *NLRB v. Financial Institution Employees Local 1182*, 475 U.S. at 202.

representative, and to protect the employees' interest, the situation may require that the Board exercise its authority to conduct a representation election. 29 U.S.C. § 159(c)(1).<sup>12</sup>

Thus, once a question concerning representation is raised as a result of dramatic changes in the bargaining representative, an affiliation vote cannot be used as a substitute for a representation proceeding before the Board to bring in a totally new bargain representative. The Court noted that not every affiliation creates a new organization nor results in the dissolution of an existing organization and that many purely internal organizational and structural changes may operate to alter a union's identity, such as changes in the constitution or bylaws, reorganization of financial obligations, etc. However, "[i]f these changes are *sufficiently dramatic* to alter the union's identity, affiliation may raise a question of representation, and the Board may then conduct a representation election. Otherwise, the statute gives the Board no authority to interfere in the union's affairs." (Emphasis added.)<sup>13</sup>

Thus, although the Court declined to pass on the continuity of representative issue specifically, see 475 U.S. at 200 fn. 7, it is clear from the above-quoted passages that the Court did not intend to preclude the Board from inquiring into continuity of representative when there have been dramatic changes in the organization or structure of a bargaining representative. Further, in light of the above, we believe that our dissenting colleague gives insufficient weight to the Court's views on continuity of representative.

Accordingly, applying the Supreme Court's standard to the facts of this case, we find that the affiliation of STLEU with District Lodge 776 will effect a sufficiently "dramatic" change in the identity of the bargaining representative to raise a question concerning representation, and this renders an amendment of certification inappropriate. As fully set forth above, the scope of the changes that will be effected as a result of affiliation will be pervasive. STLEU's autonomy will disappear, to be replaced entirely by District Lodge 776's control. The individuals who previously had led their fellow members and represented the unit to the Employer will be unable to have any major role in the direction of their organization and will be replaced by District Lodge 776 employees who have

had no previous connection with the unit. The rights of the membership will be substantially diminished, and their numbers will represent but a small fraction of the new union's body. In sum, the fundamental character of the representing organization will be altered as a result of the affiliation. We find that these circumstances constitute dramatic changes that raise a question of representation. Accordingly, we will dismiss the petition to amend certification.<sup>14</sup>

#### ORDER

The petition to amend certification is dismissed.

MEMBER JOHANSEN dissenting.

I disagree with my colleagues' finding that the affiliation in this proceeding raises a question concerning representation. To the contrary, I find that the Supreme Court's decision in *NLRB v. Financial Institution Employees Local 1182*, 475 U.S. 192 (1986), requires a finding that the Employer's employees' affiliation with the International Association of Machinists, District Lodge 776 (IAM or District Lodge 776) was valid, and that the request for an amendment of certification should be granted.

This case involves a willful decision by the Employer's employees to transform their small, independent union, the Southwest Tank Lines Employees Union (STLEU), into an affiliate of a large international labor organization. The employees decided to affiliate with the IAM because they believed the IAM's resources would provide much-needed help with STLEU's deteriorating financial condition.

My colleagues conclude that the resulting fundamental change in the employees' bargaining representative presents a question concerning representation that must be resolved by a Board-conducted election. I disagree.

Under the Act, the Board is authorized to conduct a representation election in a case such as this only if the affiliation raises a question concerning representation. In *Financial Institution Employees Local 1182*, the Supreme Court stated that in determining whether an affiliation raises a representation question, the certified union's relationship with employees it represents must be examined. When that relationship has been substantially changed by the affiliation to make it unclear whether a majority of employees continue to support the reorganized union, a question concerning representation is raised. 475 U.S. at 202-203.

<sup>12</sup> *Ibid*

<sup>13</sup> *Ibid* at 206. In view of the Court's statements regarding the nature of the inquiry into the continuity of representative in affiliation cases, we overrule *Quemetco, Inc*, *supra*, to the extent that it holds that an amendment of certification may be granted notwithstanding evidence showing the absence of continuity of representative. That decision is inconsistent with the weight of Board precedent in this area.

<sup>14</sup> In view of our disposition of the petition, we find it unnecessary to reach the Employer's further arguments regarding the alleged lack of due process in the affiliation procedure

The facts of this case clearly demonstrate that District Lodge 776 retains the majority support of the Employer's employees. Prior to the affiliation vote, IAM and STLEU officials conducted meetings at which the proposed affiliation was explained to and discussed with employees. Also, by letter dated September 8 and mailed to all unit employees, STLEU stated its reasons for urging the affiliation and explained the procedure<sup>1</sup> to be used for the affiliation vote. Thereafter, in an election accompanied by adequate standards of due process,<sup>2</sup> a clear majority of the unit employees voted to affiliate with the IAM.<sup>3</sup> The change in the bar-

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<sup>1</sup> The election was conducted by mail ballot.

<sup>2</sup> The aforementioned meetings and the mailing gave all employees notice of the affiliation vote, and the mail-ballot election was conducted in a manner that ensured secrecy of the voting choice.

<sup>3</sup> Of approximately 136 unit employees, 85 voted in the affiliation election. Seventy-one voted in favor of affiliation with District Lodge 776, 13 against, and 1 challenged ballot.

gaining representative brought about by the affiliation was intended and desired by the employees. At no time thereafter have the employees sought to decertify or repudiate the IAM.

In light of *Financial Institution Employees Local 1182*, I find no basis for concluding that the affiliation with the IAM raises a question concerning representation. My colleagues' finding to the contrary runs counter to the Act's policies of promoting stable bargaining relationships and prohibiting unwarranted interference in internal union affairs. It also infringes upon the employees' freedom to select a bargaining representative of their choice. The Joint-Petitioners' request for an amendment of the certification should be granted.