

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

DATE: February 23, 2000

TO: Glenn A. Zipp, Regional Director
Region 33

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

SUBJECT: E.I. DuPont DeNemours 530-4090-3000
Case 33-CA-13201 530-8081-6900

This Section 8(a)(5) case was submitted for advice as to whether the Employer unlawfully refused to recognize the affiliation of a union representing some of its employees with another labor organization, on the basis of an asserted lack of due process in the affiliation.

FACTS

The Transparent Film Workers (TFW) has represented a unit of approximately 270 employees at the Employer's Clinton, Iowa plant for at least 20 years. Several employees have stated that in the early 1990s TFW was affiliated for approximately one year with the International Brotherhood of DuPont Workers (IBDW). Those employees have characterized that affiliation as being only for "informational" purposes. The employee (Jones) who was president of the TFW at that time asserts that, after an initial vote where employees expressed their interest in affiliation with IBDW, a ballot gave employees the choice between "full" and "informational" affiliation with IBDW.¹ The IBDW constitution, however, does not provide for different types of affiliations of local unions with IBDW, only for "affiliation" through a local union applying for affiliation.² The constitution does provide for a class of membership of "informational associate," defined as:³

¹ [FOIA Exemption 7(D) .]

² Article XVI (1). A copy of the IBDW constitution is in the file.

a person who is represented by a labor organization not otherwise affiliated with this International, the purpose of which organization is, among other things, collective bargaining. The sole and exclusive purpose of an Informational Associate is to provide a vehicle for the free and open exchange of information among all labor organizations that represent DuPont workers.

TFW holds monthly board of directors meetings, which also serve as general membership meetings since members are invited. Typically, only a small minority of the some 240 TFW members attend. At the March 1999⁴ meeting, several members presented a petition which was signed by 130 members and stated that "we propose that at the next general election that the [IBDW] be placed on the ballot for full affiliation." The minutes of the March meeting were posted at the plant, as they are each month, and refer to the petition "for the issue of placing the decision of whether to join" IBDW being "tabled until next meeting as per our Bylaws and will be entertained more then, as well as share more information with the members as this is brought forward." The minutes of the April meeting state that discussion on "the issue of affiliating with IBDW was held," and that the IBDW constitution, bylaws, and some newsletters were available for members to review so that the members "can make a decision on affiliation one way or the other come election time in June." An election of TFW officers was scheduled for June. The minutes of the May meeting set forth the times and date for TFW officer elections in June, and stated: "12 hour shift schedule, and Ballot on joining the International Brotherhood of DuPont Workers' national Union will also be voted on at this time." Notices with those dates, times and issues were also posted in the plant approximately 3 weeks before the elections. There were letters mailed and/or posted by Employer management, the IBDW, and by pro-affiliation employees concerning the perceived advantages and disadvantages of affiliation.

³ Article II (2.3).

⁴ All dates are in 1999.

The vote for the June ballot question, "Affiliation with the [IBDW] _____ yes _____ no", was 101 no and 99 yes. At the July TFW meeting, members complained about procedural irregularities in the voting as a whole. The posted minutes of the July meeting state that a revote on all questions was "generally agreed upon" and scheduled for September. The minutes also state that the TFW board of directors "would like to remind its members that if you have an issue that you would like to discuss or any other concern that you may have that you present this issue at a regular monthly meeting." That same statement was included in the posted minutes of the August TFW meeting.

The same issues (election of officers, scheduling, and affiliation, with an identically worded ballot) were voted upon again in September, after notices of the revote and sample ballots were posted in the plant. The September vote on affiliation was 110 yes, 102 no. The minutes of the October TFW meeting state:

After much discussion, the UNION membership has elected to affiliate with the International Brotherhood of DuPont Workers Union. There was a vote of members present at the meeting for full affiliate and to raise the dues for next year to \$50.00 to account for the per capita that goes to the International. The outcome of this vote was 13 for 3 against and 1 abstention.

On November 8 TFW wrote to the Employer plant manager to inform the Employer that the membership had voted to affiliate with IBDW, and to request that the Employer recognize the affiliation. By letter dated November 30, the plant manager declined to recognize TFW as an affiliate of IBDW, stating that he had reservations that the September vote was an informed vote, based on feedback that employees were misinformed about whether the vote was to "fully affiliate." The Employer went on to state that it would continue to recognize and bargain with TFW as the bargaining representative.

The Employer has provided a copy of a file note memorializing a September 10 discussion between the plant manager and two TFW directors/employees, Jones and Judd,

stating that the manager told them his discussions with TFW officers had indicated that "their position is that this is a vote to express interest in affiliation." The manager wrote that both officers said that the wording on the ballot had caused some confusion and that the vote was an expression of interest, with full affiliation requiring further action. In nonaffidavit oral statements, Jones confirmed the plant manager's recitation of the conversation, and said he told the plant manager there would need to be a second vote on full or informational affiliation, as there had been some years before. Judd could not remember what was said. The Region states that Judd has said that he believed the vote was for full affiliation. Jones said that at the October TFW meeting he told those present that they needed to have a second vote to determine if the affiliation was full or informational, as had been done before and should be done again. Jones said someone at the meeting made a motion to "bring it to a vote," resulting in the 13-3-1 vote reflected in the minutes of the meeting.

At a December 13 TFW-management meeting, the Union stated its disappointment that the Employer refused to recognize the affiliation. [FOIA Exemption 7(D),] the plant manager said he continued to get people coming up to him confused about the nature of the affiliation. [FOIA Exemption 7(D),] Jones stated that the TFW board of directors hadn't had anybody come to them with questions or stating their confusion. When the plant manager stated that Jones was one of the people, Jones said that it was no secret he never wanted the IBDW.

ACTION

We conclude that a Section 8(a)(5) complaint should issue, absent settlement, alleging that the Employer unlawfully refused to recognize the affiliation of TFW with IBDW. This conclusion is based on the Employer's failure to carry its burden of proof that the affiliation vote was accomplished without adequate procedural safeguards,⁵ as well as on the theory that where there is substantial continuity between the bargaining representative before and

⁵ See CPS Chemical Co., 324 NLRB 1018, n.7 (1997) and cases cited therein, *enfd.* 160 F.3d 150 (3^d Cir. 1998).

after an affiliation,⁶ it is not necessary for the Board to examine whether the affected union members/employees were afforded due process regarding the affiliation.⁷

The Board will interject itself in internal union affairs, such as affiliation decisions, "only in the most limited of circumstances."⁸ The Employer here contends that the affiliation vote was invalid not because of procedural irregularities, but because there was asserted confusion over whether TFW members voted for "informational" or "full" affiliation. The IBDW constitution does not allow for "informational" affiliation of local unions, as opposed to "informational associate" membership of individual local union members. Therefore, the exact nature of the asserted "informational affiliation" of TFW with IBDW in the early 1990s is unclear. Nevertheless, the March petition presented to TFW at an open, regular monthly meeting and signed by a majority of the unit employee membership asked that a vote on "full affiliation" be scheduled. While the Employer, and some opponents of affiliation, later asserted that there was confusion as to whether the June and September votes were only to express general interest in affiliation of some kind with IBDW, we believe that the petition served as an expression of interest in affiliation within the normal meaning of the word.

Any possible confusion as to whether there were different types of affiliation for an entire local union arose due to people's memories of what had happened in the early 1990s, and not what happened in 1999. Thus, neither the meeting notices, election notices nor the ballots support the view that the members were voting only to express a general interest in some type of affiliation,

⁶ The Region states that continuity of the representative was not raised as an issue and, in fact, there were no changes in the structure or procedures of TFW other than a dues increase for the new per capita tax.

⁷ The basis for that position is set forth in the December 18, 1998 Advice Memorandum in Avante at Boca Raton, Inc., Cases 12-CA-18860 et al.

⁸ Sullivan Bros. Printers, 317 NLRB 561, 562 (1995), enfd. 99 F.3d 1217 (1st Cir. 1996).

especially a lesser type of affiliation than the one provided for in the IBDW constitution that was available for members to read. On the contrary, all of the notices and ballots indicate that employees were voting on "affiliation." In other circumstances, the Board has not required notice in explicit detail to all member/employees of what exactly is going to be voted on in affiliation situations.⁹

While TFW director Jones contends that at the October TFW meeting he asserted that there needed to be a second vote on "full" affiliation, there was, at least at that meeting, a second vote approving "full" affiliation. If there was actual confusion about what the members had approved in September, confusion which Jones apparently denied at a December TFW-Employer meeting, that October vote served to clear up any confusion. Any employees who were confused after the September vote could have attended that regular October meeting to seek clarification, as they had been repeatedly invited to attend the monthly meetings if they had issues or concerns.¹⁰ In these circumstances, we conclude that the Employer has not carried its burden of showing that the affiliation vote was conducted with less than adequate due process safeguards.

In the alternative, we would argue the theory presented in our memorandum in Avante at Boca Raton, supra, that the Board should adopt a rule that where there is substantial continuity between the bargaining representative before and after an affiliation or merger,

⁹ See generally Gasland, Inc., 230 NLRB 1132, 1133 and n.4 (1977) (while employees who attended meetings were specifically told they were voting on affiliation, the notices of the meetings did not refer to affiliation but referred to a "very important meeting" and "an important election meeting").

¹⁰ See generally House of the Good Samaritan, 248 NLRB 539, 544 (1980) (no denial of due process when local union members present at regular meeting elected delegates to a state convention where "permanent" affiliation was approved after a period of "temporary" affiliation, which had been rejected by local union membership, and where there was no new local vote on permanent affiliation).

it is not necessary for the Board to examine whether the affected union members/employees were afforded due process regarding the affiliation or merger. Here, since there is no issue of substantial continuity between the pre- and post-affiliation TFW, it is unnecessary to determine whether there was due process.

B.J.K