

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

Advice Memorandum

DATE: December 22, 2005

TO : Alan Reichard, Regional Director
Region 32

FROM : Barry J. Kearney, Associate General Counsel 177-3975
Division of Advice 177-3987
339-2531

SUBJECT: Foster Poultry Farms 530-4090-
3000
Case 32-CA-22292 530-5400
530-8081-6900

This case was submitted for advice on whether the Employer unlawfully withdrew recognition from the Union after a recent union affiliation. We conclude that the Employer's withdrawal of recognition violated Section 8(a)(5).¹

This case involves the Employer's recent withdrawal of recognition from the League of Independent Workers of the San Joaquin Valley, a/w International Association of Machinists and Aerospace Workers, District Lodge 190, AFL-CIO (the Union). As background, in November, 2004, the League of Independent Workers of the San Joaquin Valley, Local 2004 (Local 2004) was certified to represent a unit of the Employer's approximately 2400 chicken processing employees. Local 2004 and the Employer began negotiations for an initial contract in mid-December, 2004. The parties met for approximately 13 negotiating sessions, and on May 9, 2005,² mutually declared impasse.

On August 14, Local 2004 conducted a general membership meeting to discuss the possibility of affiliating with a larger more established union. At that meeting, the employees authorized their representatives to investigate affiliation. Local 2004 representatives, including Local 2004 President Ralph Meraz, spoke with four international unions regarding possible affiliation. On August 18, Local 2004 met with James Beno, the directing business representative of the Machinists Automotive Trades District Lodge 190 (the District Lodge), which is part of

¹ The Region's Request for authorization to seek Section 10(j) injunctive relief will be addressed in a separate memorandum.

² All dates hereafter are in 2005.

the International Association of Machinists and Aerospace Workers, AFL-CIO (IAM). In late August, Local 2004 representatives selected the IAM as their first choice for affiliation.

On September 11, Local 2004 conducted another membership meeting to present their selection and discuss the terms under which they proposed to affiliate with the IAM. Immediately following the meeting, the employees voted by secret ballot and a majority of those voting authorized the affiliation. Immediately after the count, Local 2004 and IAM representatives signed an affiliation agreement. Following the affiliation, Local 2004 changed its name to that of the Union.

On September 20, the Union, acting through James Beno, sent a letter notifying the Employer of the affiliation and requesting the resumption of labor negotiations. The Employer responded by letter dated September 20, declining to engage in negotiations based upon its belief that the affiliation was not legally appropriate.

We agree with the Region that a Section 8(a)(5) complaint should issue, absent settlement, alleging that the Employer was obligated to recognize and bargain with the Union. The Region should argue that the affiliation vote was conducted with adequate procedural safeguards and resulted in substantial continuity of representation. The Region should also argue, consistent with the General Counsel's Motion for Reconsideration and Brief in Support in Allied Mechanical Services, Inc., Cases 7-CA-40907 and 7-CA-41390, that due process is an irrelevant consideration and the Board should consider only whether there is continuity between the two entities.

First, for the reasons set forth in its memorandum, we agree with the Region that the affiliation decision was conducted with adequate due process. The leaders of Local 2004 provided employees with adequate notice and an opportunity to discuss and ask questions about the affiliation. All unit employees were entitled to vote and Local 2004 took reasonable precautions to maintain ballot secrecy.

Second, we agree with the Region that the affiliation process did not result in changes that were sufficiently dramatic to alter the identity of Local 2004 such that an entirely different union has been substituted as the

employees' representative.³ In determining whether there has been substantial continuity, the Board views the "totality of circumstances" and considers several factors, including: continued leadership responsibility by existing union officials, perpetuation of membership rights and duties, eligibility for membership, qualifications to hold office, oversight of executive council activity, the dues/fees structure, authority to change provisions in its governing documents, frequency of membership meetings, continuation of the manner in which contracts are negotiated, and preservation of prior union's physical facilities, books and assets.⁴

For the reasons set forth by the Region, the changes brought about by this affiliation were not so dramatic as to alter the identity of the representative. Most importantly, the employees continue to be represented by the former Local 2004 officers Meraz and Zesati, who continue to be involved in every aspect of their representation, including contract negotiation, grievance handling, and membership meetings. Employees continue to have their own representatives on the Union's executive and negotiating committee and will have the same voice in collective-bargaining negotiations as they did prior to the affiliation. While the Union's structure will conform to the IAM structure and is subject to general oversight by the IAM President, it will continue to operate under the same, or very similar, terms as those set forth in Local 2004's Constitution and Bylaws. Finally, under the terms of the affiliation agreement, the Union has retained all of Local 2004's assets and property, and the Union continues to maintain Local 2004's office/trailer located just outside of the Employer's plant, which serves as the office for Meraz and Zesati.

Finally, despite our conclusion that this affiliation was conducted with adequate due process safeguards, the Region should also argue to the Board that continuity between the two entities is sufficient to maintain in force the Employer's bargaining obligation and due process is irrelevant. As explained more fully in the General Counsel's Motion for Reconsideration in Allied Mechanical,

³ See Western Commercial Transport, 288 NLRB 214, 217-218 (1988).

⁴ See Mike Basil Chevrolet, Inc., 331 NLRB 1044, 1045-1046 (2000); Western Commercial Transport, 288 NLRB at 217.

under the framework established in Seattle-First,⁵ an employer is obligated to continue recognizing and bargaining with a representative that has merged or affiliated with another union.⁶ Traditionally, the Board has stated that generally it would relieve an employer of that bargaining obligation only if the employer proved that the merger or affiliation was accomplished without minimal due process, and/or that it resulted in a discontinuity of representation between the old and new bargaining representatives.⁷ Although most union mergers/affiliations result in some degree of change to the union's organizational structure, the Board will intervene in such "internal union matters" only where it finds that the merger/affiliation raises a question concerning representation (QCR).⁸ The existence of a QCR is therefore a prerequisite for Board intervention in union merger/affiliation matters. Consistent with this approach, the Board will interject itself, "only in the most limited of circumstances involving such internal changes."⁹

By definition, a QCR exists after a merger/affiliation only where there has been a change in representation, "sufficiently dramatic to alter the union's identity."¹⁰

⁵ NLRB v. Financial Institution Employees of America (Seattle-First National Bank), 475 U.S. 192 (1986).

⁶ See Minn-Dak Farmers Coop., 311 NLRB 942, 944 (1993), enfd. 32 F.3d 390 (8th Cir. 1994).

⁷ See, e.g., Mike Basil Chevrolet, 331 NLRB at 1045; CPS Chemical Co., 324 NLRB 1018, 1019-25 & n.7 (1997), enfd. 160 F.3d 150 (3d Cir. 1998); Western Commercial Transport, 288 NLRB at 217.

⁸ Sullivan Bros. Printers, 317 NLRB 561, 562 (1995), enfd. 99 F.3d 1217 (1st Cir. 1996); Minn-Dak Farmers Coop., 311 NLRB at 945. Cf. Western Commercial Transport, 288 NLRB at 217, 218 ("[t]he Board's role in affiliation cases is to determine whether the affiliation raises a question concerning representation [O]nce 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....").

⁹ Sullivan Bros. Printers, 317 NLRB at 562.

¹⁰ May Department Stores Co., 289 NLRB 661, 665 (1988), enfd. 897 F.2d 221 (7th Cir.), cert. denied 498 U.S. 895 (1990) (emphasis and citations omitted).

Because the due process prong of the Board's test has no impact on the identity of the employees' representative, an alleged lack of due process cannot alone raise a QCR.¹¹ As such, an alleged lack of due process is irrelevant to the existence of a QCR and to the Board's analysis.

In sum, the Region should issue complaint, absent settlement, and argue that the Employer's withdrawal of recognition violated Section 8(a)(5) because the affiliation was conducted with adequate due process and resulted in substantial continuity in representation.

[FOIA Exemption 5

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B. J. K.

¹¹ Cf. Seattle-First, 475 U.S. at 205-206 ("[w]e repeat, dissatisfaction with the decisions union members make may be tested by a Board-conducted representation election only if it is unclear whether the reorganized union retains majority support").