

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

DATE: May 16, 2000

TO: Sandra Dunbar, Regional Director
Region 3

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

SUBJECT: Deposit Telephone Company, Inc.
Case 3-CA-22391

530-4090-6000

530-5400

This Section 8(a)(5) case was submitted for advice as to whether the Employer is obligated to bargain with Local 83 as the merged successor to recently-certified Local 1125, where the Employer questions the merger's lack of due process and the substantial continuity of the representative.

FACTS

Deposit Telephone Company, Inc. (the Employer) provides local and long distance telephone and related communications services. On September 3, 1999, the Regional Director certified International Brotherhood of Electrical Workers, Local Union 1125 (Local 1125) as the collective bargaining representative of a unit of the Employer's customer service technicians and maintenance employees employed at the Employer's facility in Deposit, New York.¹

By letter dated September 15, 1999, the Employer notified Local 1125 that it believed that the certification was improper and that it intended to refuse to bargain in order to obtain review of the Board's decision. On March 7, 2000, International Brotherhood of Electrical Workers, Local 83 (Local 83) filed this charge alleging that the Employer has failed and refused to recognize and bargain with it as the representative of the unit employees. The

¹In Deposit Telephone Co., 328 NLRB No. 151 (1999), the Board reversed the Acting Regional Director's Decision and Direction of Election in a wall-to-wall unit and directed an election in the petitioned-for-unit. The petition had been on file since May 20, 1997.

Employer maintains that when it received a copy of the charge it realized that it was filed by Local 83 rather than Local 1125, the certified representative. The Employer maintains that the merger lacked minimum standards of due process because unit employees were not informed or consulted about the impending merger. The Employer also maintains that there is a lack of continuity between Local 83 and Local 1125. The Employer thus argues that it does not have an obligation to bargain with Local 83.

In early 1997, the business managers of eight IBEW locals, including Local 1125, had decided to merge and form a single local. The proposed merger was frequently discussed at union meetings at the several locals. In 1998 the locals requested that the IBEW approve the merger. On September 1, 1999, the IBEW approved the merger and created Local 83. The merger was approved without any vote by the members of the affected locals. On October 17, 1999, the IBEW approved the bylaws for Local 83. Thereafter elections were held and the former president/business manager of Local 1125 was elected to the same position in Local 83. No other officials of the former Local 1125 were elected to positions in Local 83. Local 83 established eight separate units within the local. Each unit is coextensive with the former locals that merged to make up Local 83. Each unit is headed by the same elected officers from the former locals, elected by the members of each respective unit. The Region's investigation also revealed the following: the bylaws are substantially the same; union dues increased from \$25.83 to \$35.33 per month; the initiation fee increased from \$10 to \$20; Local 1125 had 600 members while Local 83 has 1700 members; and the affected members continue to develop their own proposals for negotiations. The Employer was not formally notified of the merger by Local 83, Local 1125 or by the IBEW.

ACTION

We agree with the Region that complaint should issue, absent settlement, alleging that the Employer violated Section 8(a)(5) and (1) by failing and refusing to recognize Local 83 as the collective bargaining representative of its unit employees, for the reasons set forth below.

Under existing Board law, an employer seeking to avoid a bargaining obligation on the grounds that a merged or affiliated union no longer is the representative of the unit has the burden of establishing both that the merger or affiliation was accomplished without minimal due process or that the merger or affiliation resulted in the loss of

continuous representation.² In recent cases, we have taken the position that in union merger and affiliation situations, the Board should no longer consider due process and consider only whether there is substantial continuity in the bargaining representative.³ In those cases, we are arguing that if there is substantial continuity, there is no question concerning representation and the Board need not examine whether minimal due process was satisfied.

We agree with the Region's determination that the Employer has not met its burden of establishing that there is no substantial continuity between Local 1125 and Local 83.⁴ We especially note that the change in the instant case involves a merger of sister locals and that the Board has noted that these mergers "have less inherent potential for significant change than other types of changes."⁵

² CPS Chemical Co., 324 NLRB 1018 (1997); May Dep't Stores Co., 289 NLRB 661 (1988), enfd. 897 F.2d 221 (7th Cir. 1990).

³ Avante at Boca Raton, Case 12-CA-18860 et al., Advice Memorandum dated December 18, 1998 (case pending before the Board on exceptions to JD-(ATL)-75-98); E.I. Dupont, Case 33-CA-13201, Advice Memorandum dated February 23, 2000; and Allied Mechanical Services, Case 7-CA-40907 et al., Advice Memorandum dated March 31, 2000 (case pending before the Board on exceptions to JD-14-00).

⁴ We note that while the Employer was never formally notified of the merger of Local 1125 into Local 83, the Employer nevertheless refused to bargain in an effort to "test" Local 1125's certification only 12 days after certification, before Local 83, which was still in the process of being formed, had a meaningful opportunity to request bargaining. In these circumstances the Employer, which is now on notice of the merger, should not now be privileged to completely refuse to bargain, where there has apparently been no attempt to seek clarification from Local 83 over the facts of the merger. See generally RTP Co., 323 NLRB 15, 20, 22 and n. 16 (1997) (employer asserted that it was "confused" about identity of representative after affiliation); Insulfab Plastics, 274 NLRB 817, 823-24 (1985), enfd. 789 F.2d 961 (1st Cir. 1986).

⁵ Sullivan Bros. Printers, 317 NLRB 561, 563 (1995), enfd. 99 F.3d 1217 (1st Cir. 1996).

The Employer argues that the merger lacked due process because the unit employees were not notified of the merger and did not get an opportunity to vote. We recognize that the Board has found adequate due process where newly-represented employees, such as the employees here, have not been able to vote on union mergers or affiliations because they were not members of the union until they were covered by a collective-bargaining agreement. However, in all of those cases there was minimal due process in that the rest of the union membership either voted on the merger or affiliation directly⁶ or through elected delegates.⁷ In contrast here, the merger was completed without any vote from the eligible members or their duly elected delegates. Thus, we conclude that under extant Board law, the merger in the instant case would not satisfy minimal standards of due process.

However, consistent with our position in Avante, E.I. Dupont, and Allied Mechanical, supra, the Region should argue that since there is substantial continuity between Local 1125 and Local 83, the lack of due process is not relevant. Allied Mechanical is particularly instructive because the merger in that case, like the merger in this case, was implemented with the approval of union officials only and without any vote by the membership.

B.J.K.

⁶ George Lithograph, 305 NLRB 1090 (1992).

⁷ Potters Medical Center, Inc., 289 NLRB 201 (1988).