

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

Advice Memorandum

DATE: May 12, 2008

TO : Rosemary Pye, Regional Director
Region 1

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

SUBJECT: Boston College
Case 1-CA-44456

530-6033-4220
530-6033-4240

This case was submitted for advice as to whether the Employer violated Section 8(a)(5) of the Act when it refused to bargain with the Union representing a unit of its guards because one of the Union's designated bargaining representatives is a business agent of another union that represents non-guards.¹

We agree with the Region that the Employer unlawfully refused to bargain, because the two unions are not directly or indirectly affiliated where the individual objected to by the Employer was acting solely as a bargaining representative of the Union.

FACTS

Boston College Police Association (the Union) represents a unit consisting of the campus patrolmen/police officers employed by Boston College (the Employer). The parties' current collective-bargaining agreement expires May 31, 2008.

In January 2007, the Union's bargaining unit members voted unanimously to affiliate with another union, Teamsters Local 25. After that vote, but prior to any actual affiliation of the two unions, Teamsters Local 25 requested recognition from the Employer for the unit represented by the Union. In February 2007, the Employer refused to recognize Teamsters Local 25, stating its view that the police officers are "guards" within the meaning of Section 9(b)(3) of the Act, and, as such, should not be represented by an organization that admits to membership employees other than guards.

Ever since that Employer refusal, the Union has made no further efforts to affiliate with the Teamsters, and has

¹ This case was also submitted as to whether injunctive relief is warranted pursuant to Section 10(j) of the Act. The propriety of injunctive relief will be addressed in a separate memorandum.

neither transmitted dues to the Teamsters nor received any money from the Teamsters. The Union has handled all of its own contract administration and grievance processing without any assistance from Teamsters representatives.

At the end of 2007, the Employer asked the Union to open negotiations early for a successor agreement to the current collective-bargaining agreement. The parties agreed to begin bargaining on January 31, 2008.²

In preparation for the negotiations, and at the recommendation of an official of another campus police officer union, the Union asked Teamsters Local 25 Business Agent Thomas Mari if he would help the Union in its negotiations with the Employer. Mari agreed to help the Union at no cost to the Union, on his own time, with no promise of any future affiliation.³ The President of Teamsters Local 25 gave him permission to participate in the Union's negotiations as long as it did not interfere with his work for Teamsters Local 25.

On January 31, the Union's Executive Board, the Union's attorney, and Mari came to the first bargaining session on behalf of the Union. When Robert Lewis, the Employer's Associate Vice President for Human Relations, saw Mari, he said that the Employer had not recognized the Teamsters. The Union's attorney stated that Mari was not there on behalf of the Teamsters, and that the group had asked him to come on their behalf because of his experience in negotiations. Lewis said that the Employer would not negotiate if Mari was there and left the bargaining session.

The Union's attorney then threatened filing an unfair labor practice charge if the Employer continued to refuse to bargain with Mari present. On February 6, the Employer reiterated that it would not negotiate with the Union as long as Mari was present at the negotiations and that Mari's presence at negotiations was an attempt by the Union to make an end-run around the Employer's lawful refusal to recognize Teamsters Local 25. The parties have not met since then, and there are no negotiations scheduled.

The contract proposal that the Union's bargaining committee prepared before negotiations does not provide for

² All dates hereinafter are in 2008, unless otherwise noted.

³ Mari is a salaried employee who does not have a set hourly schedule with Teamsters Local 25; instead, he works whenever needed in order to effectively perform his duties.

recognition of Teamsters Local 25. In fact, it contains no mention whatsoever of Teamsters Local 25.

The Region's investigation revealed that, for some period prior to February 2008, the Union President's e-mail signature stated: "Union President/Boston College Police/Teamsters Local 25." The Union President has asserted, without contradiction, that he added the reference to Teamsters Local 25 during the early 2007 conduct regarding a possible affiliation, and had merely neglected to remove it. He removed the reference to Teamsters Local 25 from his e-mail signature on or about February 6, as soon as it was brought to his attention by the Employer's Chief of Police.

ACTION

We agree with the Region that the Employer unlawfully refused to bargain, because the Union is not directly or indirectly affiliated with Teamsters Local 25 as Mari was acting solely as a bargaining representative of the Union.

The Act provides that employees have the right to bargain collectively through representatives of their own choosing. Consistent with this right, it is well-established that each party to a collective-bargaining relationship has the duty to deal with the other parties' chosen representatives.⁴ There are only a few limited exceptions to this general rule,⁵ e.g., where a bargaining representative has a clear conflict of interest,⁶ or where a

⁴ See, e.g., Fitzsimons Manufacturing Co., 251 NLRB 375, 379 (1980), enfd. sub nom. Auto Workers (UAW) v. NLRB, 670 F.2d 663 (6th Cir. 1982).

⁵ See General Electric v. NLRB, 412 F.2d 512, 517 (2d Cir. 1969) (exceptions are "rare and confined to situations so infected with ill will, usually personal, or conflict of interest as to make good faith bargaining impractical").

⁶ See, e.g., Bausch & Lomb Optical Co., 108 NLRB 1555, 1561 (1954) (employer privileged to refuse to bargain with union that established and operated a company in direct competition with the employer); Alanis Airport Services, 316 NLRB 1233, 1233-1234 (1995) (no disqualifying conflict of interest where union-member-owned company was not yet in competition with the employer); Pony Express Courier Corp., 297 NLRB 171, 172-173 (1989) (employer privileged to refuse to bargain where the union's business agent was a consultant to customers and a competitor of the employer); CBS, Inc., 226 NLRB 537, 539 (1976), enfd. 557 F.2d 995 (2d Cir. 1977) (employer privileged to refuse to bargain where

particular representative's presence at the bargaining table makes collective bargaining impossible or futile.⁷ In such cases, an employer has a "heavy burden" in demonstrating that a union representative's presence presents a disabling conflict of interest or would in some other way frustrate good faith bargaining.⁸

In particular, the Board has held that the mere inclusion of union representatives from outside the bargaining unit does not constitute an exceptional circumstance privileging an employer's refusal to bargain.⁹ Moreover, a speculative fear of future harm to the employer is an insufficient defense for refusing to bargain with certain representatives on a negotiating committee.¹⁰

a union official attending bargaining sessions only represented competitors' employees and there was a likelihood that trade secrets would thereby be revealed to the competitors).

⁷ See, e.g., Fitzsimons Manufacturing Co., 251 NLRB at 379 (employer could lawfully refuse to meet with union official who had physically assaulted an employer official in an earlier meeting); Sahara Datsun, 278 NLRB 1044, 1046-1047 (1986), enfd. 811 F.2d 1317 (9th Cir. 1987) (employer privileged to refuse to bargain with union official who had published unsubstantiated disparaging personal allegations against the employer's owners).

⁸ Milwhite Co., 290 NLRB 1150, 1151 (1988), quoting Procter & Gamble Mfg. Co. v. NLRB, 658 F.2d 968, 976-77 (4th Cir. 1981). See also Harley Davidson Motor Co., 214 NLRB 433, 437 (1974) (a "considerable burden" rests on the party seeking to justify a refusal bargain because of the presence of undesired persons in negotiations), quoting General Electric v. NLRB, 412 F.2d at 517.

⁹ Milwhite Co., 290 NLRB at 1151.

¹⁰ General Electric Co., 173 NLRB 253, 255 (1968) (outside advisors were officials of unions that represented other units of employer's employees). See also Minnesota Mining and Manufacturing Co., 173 NLRB 275, 278 (1968), enfd. 415 F.2d 174 (8th Cir. 1969) ("whatever may be the Company's fears, and howsoever accurate its prognostication and its discernment of the Union's ultimate aims, the Company here and now is under a duty to bargain with the Union, and this encompasses a duty to bargain with whatever representatives the Union chooses to send. The mere possibility of future abuse [which indeed the Union disclaims], is no justification for an anticipatory refusal to bargain").

In addition to the limited general exceptions to a union's right to choose its own bargaining representatives discussed above, the Board has also suggested that an employer is privileged to refuse to bargain with a union representing guard employees when it has affiliated, directly or indirectly, with a union that admits to membership non-guard employees.¹¹ A union so affiliated cannot be certified to represent the guard employees under Section 9(b)(3) of the Act.¹²

The touchstone for a finding of indirect affiliation is whether "the extent and duration of [the guard union's] dependence upon [the nonguard union] indicates a lack of freedom and independence in formulating its own policies and deciding its own course of action."¹³ For example, the Board has indicated that it would find indirect affiliation under Section 9(b)(3) where the business manager of a non-guard union participated in the organization of the guard union and thereafter formulated the guard union's bargaining proposals and represented them in negotiations (sometimes without even first discussing proposals with other representatives), all while acting in his official capacity for the nonguard union.¹⁴

In the instant case, while we recognize that Mari's involvement in negotiations may have raised legitimate Employer concerns about the independence of the Union, we agree with the Region that the evidence does not establish a direct or indirect affiliation that would privilege the Employer's refusal to bargain with the Union. First, it is

¹¹ See Brinks, Inc. of Florida, 283 NLRB 711, 711 fn. 2 (1987), enf. denied 843 F.2d 448 (11th Cir. 1988) (although the Board found an unlawful refusal to bargain, it noted that, if evidence of the guard union's affiliation with a nonguard union were proffered, "the Respondent's obligation to bargain with it concerning its guards may again be called into question").

¹² See, e.g., Mack Manufacturing Corp., 107 NLRB 209, 212 (1954); International Harvester Co., Wis. Steel Works, 145 NLRB 1747, 1749-1751 (1964); Stewart-Warner Corp., 273 NLRB 1736, 1737 (1985); Brinks, Inc., 274 NLRB 970, 970-971 (1985).

¹³ Lee Adjustment Center, 325 NLRB 375, 376 (1998), quoting Wells Fargo Guard Services, 236 NLRB 1196, 1197 (1978) and Magnavox Co., 97 NLRB 1111, 1113 (1952).

¹⁴ Lee Adjustment Center, 325 NLRB at 375, 376, 379.

clear that the two unions were not directly affiliated.¹⁵ Thus, after the Employer's February 2007 refusal to recognize Teamsters Local 25, the Union made no further efforts to affiliate with the Teamsters, has neither transmitted dues to the Teamsters nor received any money from the Teamsters, and has continued to handle all of its own contract administration and grievance processing without any assistance from Teamsters representatives. Moreover, the Union recognition clause in its opening proposal does not provide for recognition of Teamsters Local 25; indeed, it contains no mention whatsoever of Teamsters Local 25. Finally, to the extent the Employer was concerned about future Union efforts to affiliate with Teamsters Local 25, the Board has made clear that an employer's apprehension regarding potential union bargaining demands does not privilege a refusal to bargain.¹⁶

As for lack of an indirect affiliation between the two unions, we particularly note that the Union's assurances that Mari was at the table solely as a representative of the Union, and not in any official Teamsters capacity, are supported by the evidence concerning the surrounding circumstances. Thus, after the Union asked Mari if he would help the Union in negotiations, he agreed to help the Union on his own time, with no promise of any future affiliation, and with the permission of the President of Teamsters Local 25 that he could participate in the Union's negotiations only as long as it did not interfere with his work for the Teamsters union. In addition, there is no indication that his involvement in negotiations at the request of the Union, rather than on his own initiative or that of the Teamsters, was intended to provide anything more than assistance and expertise as an experienced collective bargaining representative of guard employees. In this regard, we also note that the Union's proposal was formulated by the entire bargaining committee, not solely Mari. Given this evidence, we cannot say that Mari's mere involvement and presence in negotiations was sufficient to

¹⁵ We agree with the Region that, while it may have been unfortunate that the Union's President neglected to remove the reference to Teamsters Local 25 from his e-mail signature, this is not sufficient to demonstrate any affiliation between the two unions.

¹⁶ See, e.g., Harley Davidson Motor Co., 214 NLRB at 437-438 (employer's refusal to bargain because it feared that the union was attempting to force it to engage in coalition bargaining was "premature" and unlawful, given a union disclaimer and the lack of evidence of such an intent).

indicate that the Union lacks freedom and independence in formulating its own policies and deciding its own course of action. Therefore, we find no direct or indirect affiliation between the Union and Teamsters Local 25. Since the Employer has not demonstrated any other basis for refusing to bargain, it has not met its burden of establishing that it was privileged to refuse to bargain with the Union.

This is not to say that the Employer's concerns regarding a possible affiliation between these unions were unreasonable or that the Employer was required to accept at face value the Union's claims of no affiliation, even though its concerns were based on more than mere suspicion. Rather, the Employer had a right to seek information from the Union as to its status vis-à-vis Teamsters Local 25. Any Union failure to provide such information could have violated Section 8(b)(3).¹⁷ However, the Employer did not request information regarding this relationship or otherwise seek to test that Union's independence; it simply refused to bargain, notwithstanding the Union's assurances that Mari was present in negotiations as an individual, not in his official Teamsters capacity, and that Mari represented only the Union at the bargaining table.

Accordingly, the Region should issue complaint, absent settlement, alleging that the Employer violated Section 8(a)(5) of the Act.

B.J.K.

¹⁷ See SEIU Local 715 (Stanford Hospitals & Clinics/Lucile Packard Children's Hospital), Case 32-CB-6237, Advice Memorandum dated January 24, 2008 ([FOIA Exemption 5