

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

# Advice Memorandum

DATE: September 28,

2001

TO : Celeste Mattina, Regional Director  
Karen P. Fernbach, Regional Attorney  
Elbert F. Tellem, Assistant to Regional Director  
Region 2

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

SUBJECT: Allied Trade Council  
(Duane Reade, Inc.)  
Case 2-CB-18248-1

220-2525-4000  
220-2525-6050  
420-7318  
420-8400  
530-3067-1500  
536-2507  
536-2522  
536-2572-2500

This case was submitted for advice on whether Allied Trades Council ("ATC") violated Section 8(b)(1)(A) and (2) by filing a grievance seeking to require the Employer to apply through accretion the terms of an existing collective-bargaining agreement to newly opened stores. The Region also seeks advice as to whether Section 10(j) injunction proceedings are warranted.

## **FACTS**

### **Historical Bargaining Relationships**

ATC and the Employer have a 40-year collective bargaining relationship. The most recent collective-bargaining agreement between ATC and the Employer runs from September 1, 1998, to August 31, 2001. The contract does not include clauses specifically referring to after-acquired stores or a geographical description of the unit. The recognition clause, with unit description, states:

The Employer recognizes the Union [ATC] as the sole collective bargaining agent for the bargaining unit consisting of all employees in its employ, excluding part-time employees, as defined below, Assistant Managers hired after September 1, 1998, executives, office employees, supervisors, warehouse employees, drivers and guards. Whenever the word "employees" is used in this Agreement, it shall be deemed to refer to

all employees except for those specifically excluded above, regardless of whether or not they are members of the Union.

The clause also includes language providing for Union membership after thirty days.

The arbitration clause states:

It is the intent of the parties hereto that all disputes between them both within and outside of the Agreement, shall be submitted to arbitration and that no defense to prevent the holding of the arbitration shall be permitted.

In the past, when the Employer opened new stores, or opened stores it had purchased, the Employer voluntarily recognized ATC as the employees' representative upon ATC's demonstration of majority support. Between July 1998 and May 1999, the Employer recognized ATC at 16 former Love's Drug Stores, and in about December 1999 or January 2000, recognized ATC at 8 former Ark and Ricky's Drug Stores.

The Employer departed from the above practice in September 1998, with no ATC opposition. Upon purchase of certain Rock Bottom stores, the Employer recognized the incumbent union, New York's Health and Human Service Union 1199/SEIU, at about 20 stores, and incumbent UNITE Local 340A at 2 stores. In 14 other former Rock Bottom stores which had no incumbent unions, the Employer recognized ATC upon proof of majority support.

Beginning in about February 2000, the Employer ceased voluntarily recognizing ATC after ATC had requested recognition based on cards obtained from a majority of the employees.<sup>1</sup>

The Employer and Local 340A also have a collective bargaining relationship that covers more than 40 stores. A collective-bargaining agreement, effective from April 1, 1999 to September 21, 2002, recognizes Local 340A for a unit of clerks, pharmacy clerks, and cashiers at two stores, one at 436 86th Street, Brooklyn, New York, and one at 42-58 Main Street, Flushing, New York. When the Employer recognized Local 340A as the employees' representative at additional stores, the Employer applied

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<sup>1</sup> In Cases 2-CA-33725 and 2-CA-33727, which are pending investigation, ATC alleges that Duane Reade's failure to recognize it after ATC established majority support at five new stores violates the Act.

the existing contract to the new stores, with each store treated as a separate unit. The Employer granted this recognition pursuant to Appendix A to the contract, which listed the additional locations at which it recognized 340A as the representative. Appendix A specifically provided that: "It is further understood that the Employer will recognize the Union and this list of locations will be updated when the Union is able to sign the majority of workers in any of the company's unorganized stores."

On April 5, 2001, following a stipulated election agreement among the Employer, ATC and Local 340A, an election was held among employees at one store, located at 777 Sixth Avenue, New York City. ATC won the election and Local 340A's election objections are pending.

On about April 18, 2001, the Employer and Local 340A entered into a successor collective-bargaining agreement effective from April 1, 2001 to March 31, 2004. The new contract contains terms and conditions that allegedly are superior to those in the existing contract. Local 340A has advertised the new contract to employees to support its organizing efforts at Duane Reade stores which ATC asserts are within its bargaining units.<sup>2</sup>

### **Current Representation Case Proceedings**

During the open period of ATC's current contract with the Employer, Local 340A filed an RC petition in Region 2 for an election in an overall unit at 140 ATC-represented stores, and other RC petitions in Regions 2, 22, and 29 for elections at 23 separate ATC-represented stores. Between April 30 and June 12, 2001, the Region conducted a hearing on all of the election petitions filed by Local 340A. The record closed on June 12, 2001.

On August 3, 2001, the Regional Director for Region 2 issued her Decision and Direction of Election (DD&E) in the RC cases. The DD&E determined that an appropriate unit for the election is the historical multi-location unit of employees employed in the 142 Employer stores covered by the ATC contract. The decision rejected ATC's contention that seven Employer stores represented by Local 340A should be included in the unit.

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<sup>2</sup> On April 30, 2001, ATC filed charges against Duane Reade and Local 340A (2-CA-33726-1 and 2-CB-18341-1), alleging that the parties entered into the new agreement to unlawfully assist Local 340A in its organizing efforts. Those charges are under investigation.

**The Instant Charge (Case 2-CB-18248-1)**

On December 7, 2000, ATC filed a request for arbitration to include within the bargaining unit "all employees (other than contractually excluded employees) employed by the Employer in stores opened on or after February 1, 2000, and by failing to provide such employees with the terms and conditions of employment contained in the collective-bargaining agreement." ATC asserts that new stores should be accreted into ATC's bargaining unit.

ATC asserts that the grievance was filed in good faith and is reasonably based. ATC relies on the Employer's deviation from a 40-year practice of "accreting" new stores upon demonstrating majority status into its chain-wide bargaining unit, as Duane Reade expanded from a single store to a chain with more than 100 stores. ATC claims the Employer disrupted that relationship when, in February 2000, it began to refuse to accrete new stores into the overall ATC bargaining unit, but instead began to collude with Local 340A to establish it as the employees' bargaining representative at newly opened stores. ATC claims that the "accretion" practice was in accord with Board precedent, in that a community of interests existed among employees of newly opened stores and existing stores as shown by interchange of employees, centralized administration and labor relations. Despite ATC having demonstrated majority status in the past prior to recognition, ATC is now arguing in its grievance that it need not demonstrate majority status.

The Employer argued that single location units are appropriate because individual store managers have extensive authority and control over store operations. Store managers have authority to discipline, to discharge, to resolve first level employee grievances, to schedule employees, assign work and assign job duties. Thus, the Employer contends that accretion to an overall unit would not be appropriate.

The arbitration has been postponed pending the outcome of the election. ATC has not withdrawn the grievance, however, as it asserts that the question of how to interpret the recognition clause will not be answered by the election. ATC asserts that it needs the arbitrator to decide how to interpret the recognition clause and past practice for future negotiations, as well as the stores at which the Employer failed to apply the contract since 2000.

**ACTION**

We conclude that ATC violated Section 8(b)(1)(A) and (2) by pursuing its grievance in arbitration based on the argument that the Employer must apply the ATC collective-bargaining agreement to its newly opened or newly acquired stores without ATC demonstrating majority status, and to include these stores in the ATC overall unit. By using arbitration to accrete employees into the unit, ATC is pursuing an unlawful object within the meaning of footnote 5 of Bill Johnson's,<sup>3</sup> because it seeks a result incompatible with Board law.

When a "[u]nion's arbitration demands are contrary to its statutory collective-bargaining obligations, the Union's arbitration demands have an objective that is illegal under federal law."<sup>4</sup> When a grievance is filed for an unlawful objective, Bill Johnson's does not apply.<sup>5</sup> We conclude that the Union's grievance has an unlawful object to the extent that it seeks recognition as the representative of employees in stores where it admits it does not have majority status. Thus, if the arbitrator decides the grievance in favor of ATC on that basis, the decision would be contrary to Board law.<sup>6</sup>

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<sup>3</sup> Bill Johnson's Restaurants v. NLRB, 461 U.S. 731, 737 n.5 (1983).

<sup>4</sup> Chicago Truck Drivers (Signal Delivery), 279 NLRB 904, 906-907 (1986) (union's insistence on the arbitration of grievances seeking to merge three historically separate bargaining units violated Section 8(b)(1)(A) and 8(b)(3) of the Act since the proposed merger would have introduced multifacility and multiemployer bargaining); Teamsters Local 705 (Emery Air Freight), 278 NLRB 1301, 1304 (1986), enf. denied and remanded in part, 820 F.2d 448 (D.C. Cir. 1987) (filing of grievance for unlawful secondary objective absent any evidence indicating primary employer had right to control separate entity). See Elevator Constructors (Long Elevator), 289 NLRB 1095 (1988), interpreting footnote 5 of Bill Johnson's to find an illegal objective where the union's construction of its contract in arbitration would necessarily result in a Section 8(e) violation.

<sup>5</sup> See Signal Delivery, above; Teamsters Local 705 (Emery Air Freight), above; Elevator Constructors (Long Elevator), above.

<sup>6</sup> See Safeway Stores, Inc., 276 NLRB 944, n.2, 951 (1985) (an agreement to apply a contract to employees at new facilities, per an after-acquired stores clause, violated Section 8(b)(1)(A) where the employees were not an

A new employee group will be accreted to an existing collective bargaining unit, obligating the employer to bargain with respect to the employees in the new group without an election, only if the new employees share an "overwhelming community of interest with the preexisting unit to which they are accreted" and if the new employee group cannot itself constitute a separate appropriate unit.<sup>7</sup> The Board follows a restrictive policy in finding accretion because it forecloses the employees' basic right to select their bargaining representative.<sup>8</sup>

Here, there are no facts to support the Union's ability to rebut the presumption of the appropriateness of single facility units.<sup>9</sup> First, the evidence shows that any new store purchased by the Employer and represented by a different incumbent, i.e. 1199/SEIU or Local 340A, exists as a separate unit. ATC never asserted that those stores were an accretion to its unit. Second, ATC agreed to and won an election in a single store unit. Finally, there is no evidence that the individual stores share an overwhelming community of interest such that they cannot exist as single units. Since both the Employer and ATC clearly treated each new facility as a separate bargaining unit, and those individual units were presumptively appropriate, the Board will not apply its restrictive accretion policy to them.

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accretion to the represented unit); Signal Delivery, 279 NLRB at 906-907.

<sup>7</sup> Safeway Stores, 256 NLRB 918 (1981), cited with approval in Compact Video Services, 284 NLRB 117, 119-20 (1987); Save Mart of Modesto, 293 NLRB 1190, 1191 (1989). Accord: Gitano Distribution Center, 308 NLRB 1172, 1174 (1992); Passavant Health Center, 313 NLRB 1216, 1218 (1994).

<sup>8</sup> Towne Ford Sales, 270 NLRB 311 (1984), enfd. *sub nom.* Machinists District Lodge 190 v. NLRB, 759 F.2d 1477 (9th Cir. 1985). See Melbet Jewelry Co., 180 NLRB 107, 109-110 (1969); United States Steel Corp., 280 NLRB 837, 842 (1986).

<sup>9</sup> Melbet Jewelry, above at 109 (newly opened retail store is an appropriate single store unit and not an accretion to preexisting unit of two stores); Super Valu Stores, 177 NLRB 899, 900 (1969) (same).

Our conclusion is supported by the Board's recent decision in Kidder.<sup>10</sup> In that case, the Board held that a union violated 8(b)(1)(A) and (2) by pursuing an arbitration demanding that the employer interpret the parties' contractual superseniority clause in a manner which would give the union president superseniority for job classification and wage protection rather than just for layoff and recall. The Board reasoned that although the superseniority clause was valid on its face, if the union's interpretation prevailed, it would force the employer to violate Section 8(a)(3). Therefore, the union's submission of the grievance to arbitration violated the Act. Here, as in Kidder, the contractual recognition and arbitration clauses upon which the Union relies are facially lawful. However, the accretion argument urged by the Union before the arbitrator would transform those facially lawful clauses to clauses requiring accretion in circumstances where it would be contrary to Board law.

Accordingly, we conclude that a Section 8(b)(1)(A) and (2) complaint should issue, absent settlement, alleging that ATC is unlawfully maintaining its grievance seeking to accrete employees at newly acquired stores without ATC having to prove majority status.<sup>11</sup>

B.J.K.

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<sup>10</sup> Electronic Workers Local 221 (Kidder, Inc.), 333 NLRB No. 138, slip op. at 4 (2001) (citing, among others, Long Elevator, above).

<sup>11</sup> [FOIA Exemption 5