

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

Advice Memorandum

DATE: April 27, 2010

TO : Martha Kinard, Regional Director
Region 16

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

SUBJECT: Atrium Windows and Doors - Texas 530-4090-3000
a Division of Atrium Companies, Inc. 530-4090-4000
formerly known as Atrium Aluminum 530-5400
Case 16-CA-26757

Atrium Windows and Doors - Texas
a Division of Atrium Companies, Inc.
formerly known as Atrium, HR
Case 16-CA-26764

Atrium Extruders
Case 16-CA-26758

The Region submitted these cases for advice as to whether the Employer violated Section 8(a)(1) and (5) by refusing to recognize the Southwest Regional Joint Board as its employees' collective-bargaining representative after the Joint Board disaffiliated from UNITE HERE and affiliated with Workers United. We conclude that UNITE HERE has been and continues as the unit employees' exclusive Section 9(a) representative and, therefore, the Employer did not violate the Act by refusing to recognize the Joint Board after the disaffiliation.

FACTS

The Parties' Bargaining History

Atrium Companies, Inc. (the Employer) originally operated four separate divisions with four separate bargaining units represented by the Amalgamated Clothing and Textile Workers Union (ACTWU), later part of UNITE (after the ACTWU merged with the International Ladies Garment Workers Union in 1995), and then UNITE HERE (after UNITE and HERE merged in 2004). Specifically, in May 1993, ACTWU was certified as the exclusive bargaining representative in two separate units of production and maintenance employees at H-R Windows Division and Skotty Aluminum Products Division (later renamed Atrium Aluminum), located in two separate plants across the street from one another in Irving, Texas. In August 1993, ACTWU was

certified to represent employees at the Employer's Extruders plant in Wylie, Texas. Then, sometime between 1998 and 2001, the Employer voluntarily recognized UNITE as the exclusive representative of a fourth bargaining unit, at Atrium Vinyl Products. The International organized each bargaining unit into a separate Local.

In 2003, Atrium Vinyl Products merged with Atrium Aluminum to become Atrium Windows and Doors, and the Vinyl Products employees moved to the Atrium Aluminum facility. In 2007, H-R Windows also merged with Atrium Windows and Doors. Currently, there are only two divisions and units at issue: Atrium Windows and Doors (Locals 2629, 2631/32) and Atrium Extruders (Local 2630).

ACTWU and later UNITE each had a three-tiered organizational structure, comprised of Locals, Regional Joint Boards, and the International. After the UNITE HERE merger, the UNITE Joint Boards were integrated into the combined UNITE HERE operation. The Regional Joint Boards served as intermediate bodies that organized, coordinated, and supervised the activities of their affiliated Locals. The Southwest Regional Joint Board (SWRJB or Joint Board) had jurisdiction over the Atrium Locals.

The Joint Board's Constitution states that all collective-bargaining agreements shall be executed in the name of the Joint Board, and that the Joint Board has exclusive authority to call a strike or terminate a strike. Consistent with this language, the parties' contracts in 1995 were in the name of "Amalgamated Clothing and Textile Workers Union, SWRJB, ACTWU, AFL-CIO" and in 1998 in the name of "Union of Needletrades, Industrial and Textile Employees, SWRJB, UNITE!, AFL-CIO." However, those agreements were negotiated and signed by International representatives. In 1995, Joan Suarez negotiated and executed the agreements as both International Vice-President and Joint Board Regional Manager; in 1998, International Vice-President Ernest Bennett executed the contracts, and Suarez was also listed on the signature page. In 2001, the Locals were added to the Union party's name, and Suarez signed the agreements again.

Then, in 2004 and 2007, the Joint Board's name was dropped and the Union party's name was changed to "UNITE HERE Local 2629/31/32" (Atrium Windows and Doors) and "UNITE HERE Local 2630" (Extruders) on both the cover page and in the articles of agreement. Those agreements were signed by Joint Board representatives in the name of UNITE HERE. Thus, in 2004, the signature page identified the Union party as UNITE HERE and was executed by Jean Hervey and Willy Gonzalez. Hervey succeeded Suarez as International Vice-President and Joint Board Regional

Manager. Gonzalez was hired by UNITE HERE's International Vice President Bennett and originally assigned to work on the International's Dallas organizing project, but then became the Joint Board's Texas Manager. As Texas Manager, Gonzalez was the lead negotiator of the most recent agreements, effective May 26, 2007 through May 25, 2010; the signature pages of those agreements designate UNITE HERE as the Union party and are signed by Gonzalez on its behalf.¹

Contract administration was conducted primarily by Joint Board staff. In particular, Gonzalez was responsible for overseeing the daily operations of business agents in the Employer's plants. The business agents met with the Employer on a weekly basis, handled issues as they arose in the facilities, and assisted in processing grievances. Gonzalez handled grievances at the third step and at arbitration and was responsible for filing any unfair labor practice charges. The Local officers, who are not salaried, also assisted with processing grievances at the first and second steps.

The parties' collective-bargaining agreements state that the Employer shall remit checked-off dues to "the properly designated official of the Union." A representative sampling of authorization cards name the Locals and authorize payment of dues to "the authorized Union representative." Prior to the spring of 2009, the Employer remitted dues to the Joint Board. The Joint Board then gave a portion of those dues back to the Locals, for approved expenditures and to reimburse the Local officers for any paid time lost during grievance processing. Beginning in 2000, the International increasingly provided financial support for the Joint Board staff. By 2009, UNITE HERE was paying the salaries of all the Joint Board staff, including Hervey, Gonzalez, and the business agents.

The Joint Board's Disaffiliation from UNITE HERE

On March 7, 2009,² the Joint Board Executive Board voted unanimously to disaffiliate from UNITE HERE. Later that day, a majority of the Joint Board delegates also voted in support of the disaffiliation and to authorize the Executive Board to form a new union and explore affiliation with the SEIU. That same day, Hervey sent a letter to the Employer's Senior Vice-President for Human Resources, Gus Agostinelli, requesting that he sign a proposed form

¹ The members of the employees' negotiating committees also executed the 2001, 2004, and 2007 contracts.

² All dates are in 2009 unless otherwise noted.

Memorandum of Agreement (MOA), which sought to strike any reference to UNITE HERE in the collective-bargaining agreement and to substitute the Joint Board as the exclusive bargaining representative. By letter dated March 10, the Employer declined to sign the MOA.

On March 10 and 11, at the Joint Board's direction, the Local officers circulated petitions in support of the disaffiliation. Forty out of the 99 members of Local 2629 signed the petition; and 65 of the 194 members of Local 2631/32 signed. Seventy-eight members of Local 2630, which is virtually the entire unit, signed the petition. There is evidence that at least some employees believed they were signing in support of a separation of UNITE and HERE.

On March 21, the Joint Board joined with several other former UNITE HERE Joint Boards to form Workers United. The following day, Workers United affiliated with the SEIU. Hervey, who had resigned her position with UNITE HERE but continues to serve as the Joint Board Regional Director, was elected a Workers United Vice-President. In late March and early April, most of the Joint Board staff resigned from UNITE HERE and became Workers United employees. Gonzalez, Reyna Ramos, and Augustine Diaz remained with UNITE HERE.

By letter dated March 27, Hervey wrote to the Employer on Workers United letterhead, asserting that the Joint Board remained the unit employees' Section 9(a) representative and that the same stewards and Joint Board representatives would continue to service the collective-bargaining agreement. Hervey also requested that the Employer continue to remit dues to the Joint Board and refrain from responding to anyone else who claimed to represent the unit employees. On April 2, the Employer sent a copy of Hervey's March 27 letter to UNITE HERE President John Wilhelm, asking for assurance that UNITE HERE agreed with Hervey's request that dues to remitted to the Joint Board. The Employer also sought assurance that it would be held harmless from any claims UNITE HERE might thereafter make to the dues, citing the "hold harmless" clause in the parties' union security provision.

Meanwhile, Gonzalez e-mailed Agostinelli on April 2, to inform the Employer that Diaz and Ramos had replaced Daisy Flores as the UNITE HERE representatives authorized to service the plants. The Employer has since denied access to Flores, who is now working for Workers United.

Through form letters dated May 13, an officer of each Local gave UNITE HERE notice that the Locals were disaffiliating. The Employer received a letter from Hervey dated May 20, stating that the members of Locals 2629,

2630, 2631, and 2632 had signed petitions and held votes to disaffiliate from UNITE HERE and continue their affiliation with the Joint Board. There is no evidence that Locals 2629 or 2631/32 conducted votes. Local 2630 held a vote attended by only three Local officers (President, Vice-President, and Treasurer), who all voted in favor of disaffiliation. In response to an e-mail inquiry, on May 26 Gonzalez told Agostinelli that the Locals had not disaffiliated and there had been no votes.

The officers of Locals 2629, 2630, and 2631/32 have not changed since the disaffiliation. There have also been no changes in the Locals' constitutions, bylaws, or procedures.

The Employer has not spoken to anyone from Workers United. Gonzalez has been Agostinelli's point of contact with the Union in grievance handling and contract negotiations since 2003, and he continues to deal with him. The Employer also has allowed Diaz to visit the plant and sit in the break room every Monday and Wednesday as the prior business agent had done. In addition, the Employer holds weekly meetings with Gonzales, Diaz, and the shop stewards. Local 2631/32 President Maria Mata, who has remained loyal to UNITE HERE, also attends these meetings. The Employer continues to abide by the collective-bargaining agreements, with the exception of the provision dealing with remittance of checked-off dues. The Employer filed a Motion for Interpleader in state court on April 29, requesting that the court hold deducted dues in escrow until the dispute between UNITE HERE and Workers United is resolved. That lawsuit was removed to federal court and consolidated with the Section 301 litigation between the Unions pending in the southern district of New York.

The Joint Board filed identical Section 8(a)(2) and (5) charges in these cases against Atrium Aluminum, Atrium Extruders, and Atrium Windows and Doors. The Joint Board alleges that the Employer has unlawfully refused to bargain with the certified bargaining representative by denying access to the designated union representative and failing to remit checked-off dues, and has unlawfully allowed access to and recognized individuals no longer authorized to represent the certified representative.

ACTION

We conclude that the Region should dismiss the instant charges, absent withdrawal, because the International -- UNITE HERE and its predecessors, ACTWU and UNITE -- has been and continues to be the exclusive collective-bargaining representative. Accordingly, the Employer had no duty to recognize and bargain with the Joint Board after

its disaffiliation from UNITE HERE and lawfully continued to treat UNITE HERE as its employees' bargaining representative.

Prior to the Disaffiliation, UNITE HERE Was the Exclusive Collective-Bargaining Representative.

An employer's obligation to bargain extends only to the statutory representative selected by a majority of the unit employees.³ While the Section 9(a) representative may delegate some authority to an agent to act on its behalf, it cannot delegate all its responsibilities to another union and demand that the employer bargain with that union.⁴ The Board has found an improper delegation of representation where the designated Section 9(a) representative "bow[s] out" of its duties and attempts a wholesale substitution of another union.⁵

At the same time, another union can acquire the status of a joint Section 9(a) representative based upon the parties' conduct.⁶ For example, in American Medical

³ See, e.g., Nevada Security Innovations, Ltd., 341 NLRB 953, 955 (2004).

⁴ Compare Nevada Security Innovations, Ltd., 341 NLRB at 953, fn.1, 95-56 (employer violated Section 8(a)(5) by refusing to bargain with certified representative, the International, where the International had merely delegated some of its duties to its Local); Mountain Valley Care & Rehabilitation Center, 346 NLRB 281, 282-83 (2006) (same); with Goad Co., 333 NLRB 677, fn.1, 679-80 (2001) (where Section 9(a) representative improperly sought to transfer all its representational responsibilities to its sister Local, the employer lawfully refused to bargain with the sister Local).

⁵ See Goad Co., 333 NLRB at 679-80 (agreement between Section 9(a) representative and its purported "agent" "stands the law of agency on its head" by absolving the principal of liability for its purported agent's actions and confirmed that the principal was "bowing out" of its representational duties); Sherwood Ford, Inc., 188 NLRB 131, 133-34 (1971) (resolution provided that Section 9(a) representative would carry out instructions of its purported agent, and "it was there that the switch became manifest, for the dog had now become the tail").

⁶ See, e.g., Mail Contractors of America, Inc., 346 NLRB 164, 167 (2005) ("weight of the evidence" arguably established that International and Local were recognized as joint representatives at first bargaining session, where contract language made both parties to the collective-

Response, the Board found that although the recognition agreement named only the International, the Local was a joint representative where the Local also was a party to the collective-bargaining agreement, the Local maintained and enforced that agreement, the dues authorization cards identified the Local as the bargaining representative, and both the Local and the International were going to participate in upcoming negotiations.⁷

Here, the International was certified and recognized as the exclusive bargaining representative and never "bowed out" of its representational role. The Joint Board therefore did not supplant the International as the Section 9(a) representative through a delegation of representational responsibilities. Moreover, at the time of the disaffiliation, the Joint Board was not acting as a joint representative with UNITE HERE.

Specifically, ACTWU was certified to represent three bargaining units in 1993. Sometime between 1998 and 2001, the Employer recognized UNITE, ACTWU's successor, as the representative of employees in a fourth unit. An International representative led contract negotiations and executed the agreements in 1994, 1998, and 2001. While these agreements named the Joint Board as a party, in 2004 the Joint Board's name was dropped from the agreements. In both 2004 and 2007, the contracts defined the Union party as the Locals on the cover page and in the Articles of Agreement and identified UNITE HERE as the party on the signature page. This was done with the Joint Board's knowledge; in fact, International Vice President and Joint Board Regional Manager Hervey and Joint Board Texas Manager Gonzalez negotiated and signed those agreements on behalf of UNITE HERE.

Therefore, to the extent that the Joint Board may have acted as a joint bargaining representative under the terms

bargaining agreement); Tree-Free Fiber Co., 328 NLRB 389, fn.4, 397-98 (1999) ("longstanding past practice" established International and its two Locals were joint collective-bargaining representatives where contract named two signatory Locals in recognition clause but was also executed by International, contractual grievance procedure provided for International's involvement, and International historically participated in contract negotiations).

⁷ 335 NLRB 1176, 1178-79 (2001) (Local and International both held liable as joint representatives for Section 8(b)(1)(A) and (2) violations based upon their extension of contract to employees improperly accreted into the bargaining unit).

of the 1994, 1997, and 2001 agreements,⁸ the Joint Board knowingly relinquished that status when Hervey and Gonzalez executed the 2004 agreement. The Joint Board had an opportunity to change the contract language in 2007 and did not do so.

Thus, we conclude that at the time of the Joint Board's disaffiliation, UNITE HERE was the sole Section 9(a) representative. The Joint Board assisted in the negotiation and administration of the Employer's collective-bargaining agreements on behalf of UNITE HERE, as its authorized agent.

There Was Substantial Continuity after the Joint Board Disaffiliated from UNITE HERE.

An employer's obligation to recognize and bargain with the incumbent union following a change in affiliation continues "unless the changes resulting from the merger or affiliation are so significant as to alter the identity of the bargaining representative."⁹ In determining whether there is "substantial continuity" in representation, the Board examines "the totality of the circumstances,"¹⁰ and considers a number of factors, including the union officials' responsibilities, membership rights and duties, the dues/fees structure, governing documents, the manner in which contract negotiations and administration are handled, and the representative's assets.¹¹

Applying those principles here, we conclude that UNITE HERE continues as the Section 9(a) representative. For the most part, officers and stewards have remained the same and continue to exercise the same functions as before. While the identity of the business agent assigned to service the Employer's units changed, the business agent's responsibilities have not. Moreover, UNITE HERE's reliance

⁸ See Mail Contractors of America, Inc., 346 NLRB at 167 (fact that contract language made International and Local both parties to the initial contract arguably established that they were recognized as joint representatives).

⁹ Raymond F. Kravis Center for the Performing Arts, 351 NLRB 143, 147 (2007), enfd. 550 F.3d 1183 (D.C. Cir. 2008).

¹⁰ Mike Basil Chevrolet, 331 NLRB 1044, 1044 (2000) (amending certification to reflect change in affiliation).

¹¹ See Western Commercial Transport, 288 NLRB 214, 217 (1988) (dismissing petition to amend certification where affiliation effected "dramatic change" in the bargaining representative).

upon Gonzalez's assistance in contract negotiations and administration has not changed. Dues have remained constant although they now will be collected by UNITE HERE rather than its agent. There is also no evidence that UNITE HERE's governing documents have changed. In these circumstances, we conclude that the UNITE HERE continues as the Section 9(a) representative.

Accordingly, the Employer lawfully refused to recognize the Joint Board and lawfully continued to deal with UNITE HERE as the Section 9(a) representative following the Joint Board's disaffiliation. Therefore, the Region should dismiss the instant charges, absent withdrawal.

B.J.K.