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

Advice Memorandum

FOR DISTRIBUTION
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TO : Frederick Calatrello, Regional Director
Region 8

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

SUBJECT: DCM Manufacturing, Inc.
Case 8-CA-38419
and
Supertrapp Industries, Inc.
Case 8-CA-38420

The Region submitted these cases for advice as to whether the Chicago and Midwest Regional Joint Board was the 9(a) representative of the Employers' employees after the Joint Board disaffiliated from UNITE HERE and, if so, whether the Employers unlawfully refused to remit dues to the Joint Board. We conclude that, both before and after the disaffiliation, the Joint Board was the employees' 9(a) representative and that the Employers' refusal to remit dues to the Joint Board is unlawful because extrinsic evidence makes clear that the employees intended their dues to support the Joint Board as their bargaining representative.

FACTS

DCM Manufacturing, Inc. is engaged in the production and distribution of fans, blowers, heaters, and motors for the bus, truck, and automotive industries. Supertrapp Industries, Inc. is engaged in the production and distribution of after-market exhausts for motorcycles, ATVs and automobiles. The two Employers are separate entities, but are located in the same building separated only by a wall. UNITE!, Cleveland Joint Board was certified to represent bargaining units of DCM's production and maintenance employees on June 1, 1998, and Supertrapp's employees on April 12, 1999.

From the outset, the two bargaining units were serviced by Jim Sgro, the Director of the Cleveland Office

of the Chicago and Central States Joint Board.[1] The two units were covered by separate but identical collective-bargaining agreements. The first agreement ran from December 1999 through November 2002. It named Cleveland Joint Board UNITE as the union and was signed by Jim Sgro and R. Willis, on behalf of "the Union." Some of the dues authorization cards signed by employees in 1999 named ACTWU as the union. Most others signed in 1999, and all cards thereafter, named UNITE.[2] During this period, the Employers remitted all dues contributions to the Chicago and Central States Joint Board.

The parties negotiated successor agreements for the period of December 2002 through November 2005. Those agreements named the Cleveland Joint Board UNITE as the union and were signed by J. Garcia and Michael Vickers on behalf of "the Union."

Sometime in early 2004, the Chicago and Central States Joint Board merged with the Midwest and Regional Joint Board. The resulting entity was the Chicago and Midwest Regional Joint Board (hereafter "the Joint Board"). In July 2004, the HERE and UNITE international unions merged to form UNITE HERE. The resulting entity kept the three-level structure of the former UNITE organization consisting of the international organization, the regional joint boards, and the locals. During this period, the Employers began remitting dues contributions to this Joint Board.

Also sometime in 2004, Sergio Monterrubio took over servicing these Employers' units. He was joined that year and then followed by Dallas Sells. They were both employees of the Joint Board. In 2005, they negotiated the successor agreements for these units, covering the period from December 2005 through November 2008 (for Supertrapp) and 2010 (for DCM). These agreements named the Chicago and

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[1] It is not clear when or how the Cleveland Joint Board, the entity named on the two certifications, became known as the Chicago and Central States Joint Board.

[2] There is no explanation as to why some of the cards named ACTWU, though the UNITE international union resulted from an earlier merger of the ACTWU and ILGWU.

Midwest Regional Joint Board UNITE as the union and were signed by Monterrubio and Sells on behalf of "the Union."

Around this time, two unit employees, one from each employer, assisted the Joint Board representatives in the negotiations. Hilda Rosado served as the DCM shop steward and Elizabeth Gonzalez served as the Supertrapp steward and the president of Local 2686. The Local is comprised of only the Employers' two units and is affiliated with the Joint Board. There is no evidence regarding any function served by Local 2686.

The parties extended the recent Supertrapp contract when it expired in November 2008.

On March 21, 2009, the Chicago and Midwest Regional Joint Board disaffiliated from UNITE HERE. It became affiliated with Workers United the next day. Local 2686 also disaffiliated from UNITE HERE. As a result of the disaffiliation, representatives from UNITE HERE and the Joint Board, now affiliated with Workers United, have made competing claims on the Employers for representation of their respective units. The Employers have indicated that they would not deal with either union entity or remit dues until they resolved the dispute. In the meantime, the Employers have been deducting dues and holding them in escrow.

By letter dated April 2, UNITE HERE President John Wilhelm wrote the Employers that their collective bargaining relationships continued to be with UNITE HERE. Wilhelm asserted that the UNITE HERE Constitution prohibited the secession of the Joint Board and Local 2686, and that district court litigation was underway to resolve the disaffiliation dispute. In a subsequent letter dated July 14, UNITE HERE directed the Employers not to send dues to the Joint Board and suggested they be placed in escrow.

Dallas Sells continues to service the two units, and employees Rosado and Gonzalez continue in their positions. It appears that the Employers are not denying the Joint Board access to the facilities, as Dallas Sells performed a walk-through of the facilities in May or June of 2009. There has been no change in the Joint Board's executive board or dues structure. No grievances have arisen during this period.

ACTION

We conclude that a Section 8(a)(1) and (5) complaint should issue, absent settlement. The Joint Board was the Section 9(a) representative before its disaffiliation from UNITE HERE and continues to be the representative because of substantial continuity in representation. Thus, the Employers' failure to remit checked-off dues to the Joint Board violates Section 8(a)(1) and (5).

Initially, we agree with the Region that the Joint Board was the 9(a) representative prior to the 2009 disaffiliation. Since at least 1994, the Joint Board or one of its predecessors has been identified as the exclusive bargaining representative in the contract. Throughout the merger period -- 2004 through the disaffiliation in March 2009 -- representatives of the Joint Board handled the day-to-day contract administration, including grievance processing, and negotiated collective-bargaining agreements with the Employers. To the extent that Local 2686 had any function representing the unit employees, it was strictly as an agent of the Joint Board. Therefore, we conclude that at all relevant times prior to the 2009 disaffiliation, the Joint Board was the employees' exclusive bargaining representative.

We also agree with the Region that the Employers were obligated to recognize and bargain with the Joint Board following the disaffiliation. 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."[3] Here, there was substantial continuity in representation after the Joint Board disaffiliated from UNITE HERE. The officers, representatives, and shop stewards have remained the same. In addition, the constitution, dues structure, and jurisdiction of the Joint Board have not been altered. Moreover, the Joint Board continues to handle the day-to-day contract administration as it had before the disaffiliation. Thus, the Joint Board continues as the

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

Section 9(a) representative of the unit employees even though it is no longer affiliated with UNITE HERE.

Consistent with their bargaining obligation, the Employers also must remit dues to the Joint Board as required by the parties' collective-bargaining agreements. The Board has held that an employer violates Section 8(a)(1) and (5) if it fails to remit dues as required during the term of a collective-bargaining agreement.[4] Here, the Employers do not contest their obligation to remit the dues; rather, they are uncertain of which entity to remit them to since both the Joint Board and UNITE HERE assert a right to them.

To determine which entity was authorized to receive the dues, we must examine the checkoff authorization, which is a contract between an employee and his or her employer.[5] As such, we must interpret "the contract" to discern the parties' meaning. The checkoff authorization cards, on their face, authorize the Employers to deduct dues from the employees and remit them to both UNITE and ACTWU. This language creates an ambiguity because the cards require payment to two different unions. Moreover, in describing the duration of the authorization, both cards refer to expiration of that entity's contract with "my Employer." These terms are also ambiguous because, as shown above, there is no evidence that either UNITE alone, or ACTWU, has ever had a contract with these Employers; the Joint Board, or one of its predecessors, has been the signatory to and named in every contract executed since these units were certified. As there is conflicting language on the face of the cards rendering them ambiguous, we must examine extrinsic evidence to determine on which union's behalf the employees were authorizing deductions.[6]

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[4] See, e.g., Able Aluminum Co., 321 NLRB 1071, 1072 (1996) (employer violated Section 8(a)(1) and (5) by failing to remit dues during contract term).

[5] Electrical Workers IBEW Local 2088 (Lockheed Space Operations), 302 NLRB 322, 327 (1991).

[6] Des Moines Register and Tribune Co., 339 NRB 1035, 1037-38 (2003), rev. denied sub nom. Des Moines Mailers Local 358 v. NLRB, 381 F.3d 767 (8th Cir. 2004).

In interpreting a contract such as an authorization card, "the parties' actual intent underlying the contractual language in question is always paramount."[7] Intent is determined by examining "both the contract language itself and relevant extrinsic evidence, such as a past practice of the parties in regard to the effectuation or implementation of the contract provision in question . . . ."[8]

Here, the parties' collective-bargaining agreements state that the "Chicago and Midwest Regional Joint Board UNITE HERE" is the sole and exclusive bargaining representative of all the employees in the respective units and the agreement contains a checkoff provision that authorizes membership dues to be deducted and remitted to "the Union". The Chicago Midwest Regional Joint Board UNITE is named on the cover and signature pages and the agreements were negotiated and signed by Joint Board representatives. Further, the conclusion that the Joint Board is, and has been at all relevant times, the 9(a) representative of the Employers' bargaining unit employees, necessarily implies that any contractual reference to the exclusive bargaining representative by necessity denotes the Joint Board. It is therefore logical to infer that employees' checkoff authorizations necessarily meant to authorize the Employers to remit their dues to their exclusive representative, the Joint Board.

Furthermore, there is no contention that when the employees signed cards naming UNITE and ACTWU, they intended to direct the Employers to remit dues to both of those entities instead of the Joint Board. As such, it follows that there is no basis to conclude that employees who had signed those cards no longer intended to be represented by or have their dues deducted for the Joint Board after the 2009 disaffiliation.

The parties' past practice reinforces that interpretation of the dues authorization cards. For as

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[7] Kmart Corporation, 331 NLRB 362, 362 (2000), quoting Mining Specialists, 314 NLRB 268, 268 (1994).

[8] Mining Specialists, 314 NLRB at 269.

long as these employees have had a certified bargaining representative, the Employers have consistently remitted dues to the 9(a) representative, whether it was the Joint Board or one of its predecessors. They did this regardless of which entity was named on the cards and, in fact, they never transmitted any dues to UNITE or ACTWU. At no point prior to 2009 did UNITE HERE or the Employers claim that the Joint Board was not entitled to receive dues because the authorization cards did not specifically name it. This practices reinforces the conclusion that the employees' intent was to have their dues deducted for the Joint Board as the 9(a) representative. Therefore, since there is substantial continuity in representation, the Employers must continue to remit dues to the Joint Board.

Finally, we reject UNITE HERE's contention that the Region should defer these cases pending court litigation over the legality of the disaffiliation. Under the Act, the Board has exclusive jurisdiction to resolve representation questions and enforce resulting bargaining obligations following union mergers and changes in affiliation. In Raymond F. Kravis Center for the Performing Arts, the Board sought to preserve its statutory authority to resolve bargaining disputes, while recognizing the Congressional policy against Board interference in union decisionmaking.[9] Applying Seattle First, the Board acknowledged that it is charged specifically with resolving questions of representation and has no authority to require unions to follow any particular procedures in adopting organizational changes.[10]

UNITE HERE cites the Board's decision in Tawas Industries[11] to support its contention that the General Counsel should defer this case pending resolution of the district court litigation. In Tawas, the Board held that

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[9] Kravis, 351 NLRB at 145-146.

[10] Kravis, 351 NLRB at 146, citing NLRB v. Financial Institution Employees of America Local 1182 (Seattle-First), 475 U.S. 192, 204 (1986) (Board exceeded its authority by requiring that nonmember employees be allowed to vote on an affiliation).

[11] 336 NLRB 318 (2001).

an employer violated Section 8(a)(5) by refusing to bargain with an incumbent union that had affiliated with the UAW, and instead withdrew recognition during the contract term, relying on an employee petition opposing the affiliation. UNITE HERE reads Tawas to hold that an employer violates Section 8(a)(5) by recognizing a union that has not properly disaffiliated from an international under the governing constitution. Although the specific holding of that case does not support this argument, UNITE HERE relies on broad language in the decision suggesting that the bargaining obligation could only be determined by evaluating whether the union's internal disaffiliation procedures had been followed.

These cases are not governed by Tawas Industries. Unlike in Tawas, where the Board found that the employees' attempt to disaffiliate was ineffective because it was not the institutional decision of a labor organization,[12] the Joint Board's disaffiliation from UNITE HERE was accomplished through official institutional actions and not actions by individual members. Moreover, any contention that Tawas compels the Board to evaluate the lawfulness of the Joint Board's and Local 2686's disaffiliation under the Unions' governing documents would be contrary to both the Supreme Court's decision in Seattle-First and the Board's decision in Kravis. These cases establish that the Board should not evaluate internal union affiliation procedures, but instead should only consider whether there is substantial continuity, in determining an employer's obligation to bargain with a union after changes in affiliation.[13] And in any event, there is nothing in Tawas that suggests the General Counsel should defer questions concerning representation and an employer's attendant bargaining obligations pending court litigation over a union disaffiliation. Accordingly, there is no legal support for deferral of these cases pending an outcome of the federal court litigation between UNITE HERE and Workers United.

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[12] Id. at 319-20.

[13] See Kravis, 351 NLRB at 147. We note that the Board in Tawas relied on a pre-Kravis "due process" type of analysis, notwithstanding its statement that it found it unnecessary to fully address "due process." 336 NLRB at 319-20.

Further, deferral is not warranted to insure that the Employers do not face duplicative liability for dues payments in the event that UNITE HERE ultimately prevails in the pending lawsuit. If UNITE HERE subsequently has a valid claim to dues remitted by the Employers to the Joint Board, that claim would lie against the Joint Board, not the Employers. The district court is apparently cognizant of such an eventuality and, according to UNITE HERE's correspondence to the Employers, has instructed the Joint Boards to preserve assets.

Finally, deferral is inappropriate as a matter of public policy because it would deny representation to the unit employees pending a lengthy court battle between the International Unions. Deferral would also deny the employees' Section 9(a) representative the funds needed to fulfill its representational functions.

Accordingly, as the Joint Board remains the collective bargaining representative of the employees, the Region should, absent settlement, issue complaint in both these cases alleging that the Employers violated Section 8(a)(1) and (5) by failing to remit checked-off dues to the Joint Board.

/s/
B.J.K.