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

Advice Memorandum

DATE: August 15, 2008

TO: Joseph A. Barker, Regional Director
Region 13

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

SUBJECT: Teamsters Local 743
Case 13-CA-44525 and 13-CA-44598

530-8045-2900
530-8045-5700
712-5028-7570-3600
712-5042-6783-7000
712-5070-8000

In this Section 8(a)(5) case the Executive Board of the Employer Union Local recognized and negotiated a contract with the Chicago Newspaper Guild (Guild) after an election in which incumbent officers were defeated; when the newly elected officers took over, they repudiated the bargaining agreement and withdrew recognition. This case was submitted for advice as to whether the Employer's repudiation of the bargaining relationship was lawful because the Employer's outgoing officers did not possess either actual or apparent authority when they granted recognition and entered into the agreement.

We conclude the outgoing officers did not possess actual authority to recognize and enter into the agreement with the Guild because the International Union's Constitution and the Employer Local's bylaws limit outgoing officers' authority to engage in such acts during the "lame duck" period between the date of the election and the new officers' assumption of office. [*FOIA Exemptions* 2 and 5

.][1]

FACTS

A. Constitution and Bylaw Provisions Relevant to Election of the Employer's Officers

[1] [*FOIA Exemptions* 2 and 5

.]

Teamsters Local 743 (Employer) is a labor organization with approximately 12,000 members in the Chicago vicinity. The Teamsters International Constitution and the Local Bylaws provide that installation of newly-elected officers takes place at the first regularly scheduled meeting following an election and that the newly elected officers officially assume their new positions on the following January 1.[2] At the International Convention in the summer of 2006, delegates voted to amend the International Constitution to limit the authority of outgoing officers during the period between a Local Union election and new officers' assumption of office. Among other things, they approved Article XXII, Section 2(b) of the International Constitution, to provide that for recognition of a labor organization by an outgoing Executive Board to be effective or for the outgoing Board's agreement on a labor contract to take effect, it must be ratified by the officers-elect:

> [I]f the Local Union employees form a union following the Local Union election, or a new collective bargaining agreement covering such employees is negotiated after the Local Union election, the newly-organized unit shall not be recognized, or the new collective bargaining agreement shall not be entered into on behalf of the Local Union, until such action is approved by the officers-elect.

The Employer contends that an impetus for this amendment was a dispute regarding the formation of a staff union by employees of Teamsters Local 705, another Chicago Local, during a "lame duck" period. According to the Employer, the Local 705 controversy had been a hot topic of discussion at meetings of the Chicago Teamsters Joint Council which Employer business agents attended. And, Local 705 proposed the amendment.

The Employer asserts that several Local 743 business agents attended this convention and that, in addition, one of the Local 743 delegates, who became a business agent before the organizing campaign at issue here, voted on this amendment to the Constitution.

---

[2] See International Constitution Article XXII, Section 4(c), and Local Bylaws Section 17(E)(4) and Section 6.

In January 2007, the Employer's Bylaws were amended to provide for a virtually identical provision, in conformance with the International Constitution.[3]

Business Agents deny that they knew of these changes. The Employer contends that they must have been aware of them, given their attendance at the Convention, their attendance at Local membership meetings and Executive Board meetings in December 2006 and January 2007 when the Bylaws amendment was discussed and approved, their close working relationship to the officers[4] and their frequent reference to these documents in their normal duties.

B. The 2007 Election of Local Officers; Organization by the Staff Employees; Recognition of the Guild and Negotiation of a Labor Contract

A disputed election for officers on the Employer's Executive Board held in December 2004 was the subject of a Department of Labor (DOL) district court complaint.[5] Pursuant to a Stipulation of Settlement and Order, the parties agreed that DOL would supervise the Employer's next regularly scheduled election of officers, set for October 2007. That election was conducted in October, 2007, after a hotly contested campaign, supervised by DOL. The Election Supervisor declared the election results on November 2, 2007: the "New Leadership Slate" defeated the incumbent "Unity Slate" resulting in a change of Employer

---

[3] Local Union 743 Bylaws, Section 14(A) (Revised January, 2007) provide in pertinent part:

> [I]f the Local Union employees form a union following the Local Union officer election, or a new collective bargaining agreement covering such employees is negotiated after the Local Union officer election, the newly organized unit shall not be voluntarily recognized, or the new collective bargaining agreement shall not be entered into on behalf of the Local Union, until such action is approved by the officers-elect.

[4] The Employer asserts that not only did the business agents' work responsibilities bring them into frequent contact with the officers, their offices were physically close to those of the officers.

[5] See Chao v. Local 743 Teamsters, 500 F.Supp. 2d 855 (N.D. Ill. 2007).

officers.[6] Pursuant to the Constitution, installation of officers should have occurred on November 5, 2007. However, the outgoing officers refused to comply with these procedures and the newly elected officers were not installed on November 5. The following day, the DOL filed a Motion to Compel compliance.[7]

Three weeks later, on November 28, 2007, an employee on the Employer's support staff contacted the Guild's Executive Director Minkkinen and stated that the Employer's employees were interested in having a union. Minkkinen contacted the Employer's incumbent officers to set up a meeting at the Employer's premises with the Employer's business agents and support staff. On December 3, 2007, Minkkinen met with 15 of the 16 prospective bargaining unit employees and obtained authorization cards from a clear majority. At that time, outgoing Employer Vice President Jose Galvan told Minkkinen about the DOL's involvement in the recent election and the fact that he and the other officers were about to be replaced by newly-elected officers.

Later that day, Minkkinen wrote to outgoing President Lopez asking that the Employer voluntarily recognize the Guild for the business agents and support staff employees. By letter also dated December 3, 2007, the Employer's outgoing Executive Board of Officers voluntarily recognized the Guild.

On December 4, 2007, Minkkinen notified the Region of the voluntary recognition and requested that Dana notices be provided to the Employer for posting.[8] Dana notices were posted at the Employer's facility around December 12, 2007. There is no evidence indicating whether or not the newly-elected officers observed or were aware of the Dana notices.

---

[6] [*FOIA Exemptions* 6 and 7(C)

.]

[7] The DOL argued that one of the reasons it sought immediate installation of the newly elected officers was to prevent expenditures by the outgoing officers in contravention of the International's Constitution, Article XXII, Section 4.

[8] See Dana Corp., 351 NLRB No. 28 (2007).

Between December 4 and December 14, 2007, the Guild's negotiating team, which included two of the Employer's business agents, worked on a first contract proposal. During these preparations, Minkkinen indicated that "time was of the essence" and that there wasn't much time to prepare their contract proposal.

The Guild contract proposal eventually submitted to the Employer contained wage increases of 4%, 3% and 3% for three years, and a provision barring layoffs and reclassifications or mergers of any bargaining unit positions during the contract term. The Guild proposal also required just-cause for discipline and discharge and contained a grievance provision permitting a discharged employee to remain on the job, with pay, until the grievance was resolved. On December 17, 2007, the Employer accepted the Guild's proposal and the parties executed the bargaining agreement, effective through December 31, 2010.

C. The New Officers Take Over

On December 18, 2007, one day after the parties executed the agreement, the district court issued an Order granting the DOL's Motion to Compel, requiring that the newly-elected officers be installed no later than December 20, 2007. The newly-elected officers were installed by the court's deadline, and assumed their official duties on January 1, 2008.

The newly elected administration gained admittance to the Employer's offices on December 31, where its attorney discovered the Employer-Guild bargaining agreement. The new administration asserts that this was the first time they had knowledge of that agreement. The new administration's attorney called Minkkinen the next day, accused the Guild of working in collusion with the outgoing officers, and stated that the International Constitution prohibited the outgoing officers from granting recognition and entering into an agreement without the approval of the officers-elect. Minkkinen denied any knowledge of this constitutional prohibition and asked for a copy of the constitution.

The two business agents who were on the Guild's negotiating team assert that they were neither aware of the Constitutional amendment limiting the Executive Board's power nor in a position to be aware of it because their duties had not required them to use or refer to the

Constitution.[9] The outgoing Secretary-Treasurer admitted that he was aware of the new provision but asserts that he did not disclose it to the Guild at any time.

On January 10, 2008, Minkkinen received a letter from the Employer stating that the Employer's recognition of and bargaining agreement with the Guild were invalid, citing the constitutional provision. On that day, an RD petition circulated by an administrative assistant hired by the officers-elect, signed by a majority of the unit employees, was filed with the Region. Also on that day, the Employer discharged four unit employees resulting in the Guild's filing grievances. On January 23, the Employer informed the Guild that the newly elected officers did not approve of the Employer-Guild bargaining agreement, and that the Guild had no authority to file grievances on behalf of the discharged employees.

ACTION

The outgoing officers did not possess actual authority to recognize and enter into an agreement with the Guild. Further investigation is necessary to determine whether the Guild could reasonably believe the outgoing officers possessed apparent authority to do so because of their status as duly constituted Employer officers or whether the Guild knew or reasonably should have known that the outgoing officers were acting without authority. [*FOIA Exemptions* 2 and 5

.][10]

[9] Concerning knowledge of the Employer's Bylaws by the business agents who negotiated on behalf of the Guild, Counsel for the Guild represents that one of these business agents never used nor read the Bylaws, and that the other used and referred to the Bylaws, but in their pre-2007 version.

[10] The Employer also argued that the Guild's representative status is barred by LMRDA Section 501(a) because that section, which requires union agents to refrain from dealing with their union as an adverse party, bars union business agents from seeking union representation vis a vis their union-employer. The Employer has cited no authority for the proposition that business agents do not have this

The Board applies common law principles of agency to determine when an individual possesses actual or apparent authority to act for an employer; the burden of proving an agency relationship is on the party asserting its existence.[11]

A. Outgoing Officers Did Not Have Actual Authority

The Restatement 3rd of Agency defines agency as the fiduciary relationship that arises when one person (principal) manifests assent to another person (agent) that the agent shall act on the principal's behalf subject to that principal's control, and the agent manifests assent or otherwise consents to so act.[12] The Board thus has stated that agency via actual authority is created when an agent is given power to act on his principal's behalf by the principal's manifestation to him, which may be either express or implied.[13]

The Employer's outgoing officers possessed the actual authority of their positions until the incoming officers assumed their duties on January 1, 2008. However, that actual authority did not include final authority to recognize and enter into a bargaining agreement with the Guild. The International Constitution and Employer Bylaws clearly and expressly limit the actual authority of all outgoing officers in this regard: voluntary recognition and a bargaining agreement occurring post election must be approved by the officers-elect.

It appears that the Employer's officers-elect first learned about the Guild's recognition and bargaining agreement when they assumed office. Regardless, the Guild has not shown that the officers-elect had any communications with the outgoing officers, much less shown that the officers-elect communicated to the outgoing

_____
Section 7 right, and we have uncovered none. Compare Finnegan v. Leu, 456 U.S. 431 (1982).

[11] See, e.g., Pan-Osten Co., 336 NLRB 306, 306 (2001); Sunset Line & Twine Co., 79 NLRB 1487, 1509 (1948).

[12] Restatement 3d, Agency § 1 (2006).

[13] CWA Local 9431 (Pacific Bell), 304 NLRB 446, note 4 (1991); Fisher Stove Works, 235 NLRB 1032, 1041-1042 (1978).

officers any approval of the recognition of and agreement with the Guild.[14] The outgoing officers thus did not have actual authority to recognize and enter into an agreement with the Guild.

B. Further Investigation Is Necessary to Determine Whether the Outgoing Officers Had Apparent Authority

Relying on common law principles, the Board has recognized that an agent can have "apparent authority" to act when a principal's "manifestation . . . to a third party . . . supplies a reasonable basis for the latter to believe that the principal has authorized the alleged agent to do the acts in question."[15] The principal must either intend that another believe the agent is authorized to act for him, or should realize that a third party is likely to believe that the agent is authorized based on the principal's conduct.[16]

An employing entity is bound by a recognition granted by "those of its officials who are in charge of the day-to-day operations of its facility and who possess actual authority, or at the very least apparent authority, with respect to labor relations matters."[17] In Richmond Toyota,[18] the Board held that a vice president-general manager, by virtue of her status as the highest ranking official at the facility and in charge of its day-to-day operations, possessed at least apparent authority to recognize a union, notwithstanding that the president and sole owner had personal responsibility for labor relations.

---

[14] To the contrary, the officers-elect subsequently indicated their disapproval to the Guild.

[15] Service Employees Union Local 87 (West Bay), 291 NLRB 82, 82-83 (1988).

[16] Id. at 83; Allegany Aggregate, Inc., 311 NLRB 1165, 1165 (1993); Dentech Corp., 294 NLRB 924, 925-26 (1989).

[17] Opportunity Homes, Inc., 315 NLRB 1210, 1217 (1994), enf'd, 101 F.3d 1515 (6th Cir. 1996)(Board adopted ALJ's conclusion that the administrator for residential care home possessed actual and apparent authority to orally recognize the union).

[18] Richmond Toyota, 287 NLRB 130, 131 (1987).

As noted above, here, any actual authority the Executive Board held to recognize a staff union and negotiate a contract expired when the incumbents lost the election. However, "the termination of actual authority does not by itself end any apparent authority held by an agent. . . . Apparent authority ends when it is no longer reasonable for the third party with whom an agent deals to believe that the agent continues to act with actual authority."[19] Thus, here it must be determined whether the Guild, directly or through its business agent negotiating team, could or could not reasonably believe that the outgoing officers had actual authority. Comment C to Restatement §3.11 gives examples of circumstances that would make it unreasonable to assume the putative agent has authority. Among these is notice that:

> the principal has revoked the agent's actual authority, . . . that the agent's authority was limited in duration or to a specific undertaking, or that circumstances otherwise have changed such that it is no longer reasonable to believe that the principal consents to the agent's act on the principal's behalf.[20]

On the one hand, here it could be argued that the outgoing officers possessed the apparent authority to recognize, bargain with, and enter into a contract with the Guild because they were the highest ranking officers of the Employer on site, and continued to exercise day-to-day responsibilities of the Executive Board during this time period. They used Local 743 stationery that clearly identified the names and titles of each of the outgoing officers for the letter of recognition. Under Richmond Toyota, these factors could lend support to a conclusion that the outgoing officers possessed apparent authority to

---

[19] Restatement 3rd Agency, Section 3.11 (2006).

[20] See also 2A C.J.S. Agency Section 162, at 801-02:

> If [the third person] knows or has good reason for believing, that the acts exceed the agent's powers or if such reasonable inquiry as he is under the duty to make would result in a discovery of the true state of the powers, and he fails to fulfill that duty, he cannot assert an apparent authority effective against the principal.

recognize, bargain and enter into an agreement with the Guild.[21]

On the other hand, the Employer raises strong bases for believing that some or all of those acting for the Guild knew or should have known about the outgoing officers' lack of authority. Specifically, the Employer points to evidence relating to three categories of persons associated with the Guild which, it claims, demonstrates they knew or should have known that the outgoing officers were acting outside the scope of their authority. First, it notes that Guild Executive Director Minkkinen knew he was dealing with lame duck officers who had been ousted in a controversial election that the DOL was involved in. And, it asserts he the Local President's indictment was sufficiently notorious that Minkkinen can be charged with knowledge of it. In these circumstances, Minkkinen's insistence that the contract needed to be negotiated quickly suggests he knew the incoming officers would not approve the contract. This implication is reinforced upon consideration of the Employer's acquiescence to the unusually favorable terms protecting the business agents' jobs (jobs that might soon be held by the ousted officers as well). [*FOIA Exemptions* 2 and 5

.][22]

---

[21] See Teamsters, Local 1150, Case 34-CA-8776, Advice Memorandum dated July 26, 1999 (outgoing officers acting in their official capacity possessed apparent authority to recognize union).

[22] [*FOIA Exemptions* 2 and 5

.]

[*FOIA Exemptions* 2 and 5

Second, the Employer asserts that the two business agents who served on the negotiating committee with Minkkinen should have known of the amendments to the Constitution and bylaws that precluded the lame duck officers' authority to recognize and negotiate the contract. Third, it also suggests that other business agents would have known of the provisions and should have put the Guild on notice of them. The Employer asserts that the business agents were not only obligated to be familiar with the International Constitution but also necessarily used it. The Employer asserts that the business agents who attended the 2006 convention knew or should have known about the amendment to the Constitution because one of the purposes in sending the business agents to the convention was that they would be conversant with what had occurred there so that they could inform members about it. The Employer notes that one Employer delegate who voted on the Constitutional amendment had become a business agent by the time of the organizing campaign. The Employer further contends that the business agents must have known about this amendment because it arose out of a controversy in another Chicago Teamsters Local which was openly discussed at Joint Teamster Council meetings attended by the Employer's business agents.

Concerning the Employer's Bylaws, one business agent now apparently admits to business use of the Bylaws, albeit in their pre-2007 version. The Employer also asserts the business agents likely were exposed to discussions about the 2007 Bylaw amendment since they attended Union meetings at the time it was under consideration, they worked closely with the Employer's executive officers who were responsible for enacting the amendment and their offices were close by the officers' offices such that they likely would have been aware of discussions of the issue.

In further support of the claim that the Guild and the business agents could not reasonably have been ignorant of the limitation on the officers' authority, the Employer points to the DOL litigation that was occurring simultaneously with the recognition and negotiations. In that litigation, DOL advanced the argument that the immediate installation of the newly elected officers was necessary to forestall untoward expenditures by the defeated officers. The Employer asserts that the Local's

_____

.]

then-counsel argued that immediate installation was unnecessary because other provisions in Article XXII (the article that prohibits recognition and negotiation by lame duck officers) already limited expenditures by lame duck officers. The Employer asserts that business agents attended hearings at which these issues were discussed and it is therefore reasonable to charge them with knowledge of the limitations on the outgoing officers' authority.

The Region can prevail on a complaint in this case only if it can carry the burden of establishing that the outgoing officers had apparent authority. Such a claim requires showing that the Charging Party reasonably did not and should not have known that the officers actually lacked authority. Given the significant claims made by the Employer, we are not prepared to accept simply blanket denials of knowledge by the Guild and the business agents as establishing a reasonable lack of knowledge. Rather, a determination of the reasonableness of the Charging Party's claimed ignorance requires evaluating its attempts, if any, to explain away the Employer's claims. [*FOIA Exemptions* 2 and 5

.]

B.J.K.