

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

# Advice Memorandum

DATE: December 21, 2000

TO : Victoria Aguayo, Regional Director  
Region 21

FROM : Barry J. Kearney, Associate General Counsel  
Division of Advice 420-0150  
420-0628

SUBJECT: Insurance Courier Services, et al. 420-1209  
Cases 21-CA-34012; 30437 440-1760-9101  
530-0167  
530-2025-6700  
712-5014-0140  
712-5028-2562

These cases were submitted for advice as to whether the Union made a valid demand for recognition such that the successor employer violated Section 8(a)(5) by refusing to recognize and bargain with the Union.<sup>1</sup>

### FACTS

Insurance Courier Services ("ICS") is a Canadian-based company that began operations in the United States (Seattle, Washington) in the late 1980's. ICS is engaged in the business of delivering packages and documents, primarily servicing the optical industry. It employs sorters, who sort and scan packages at the facility, and drivers, who courier the packages and other documents directly to customers. In 1995, ICS expanded its United States operations and opened facilities in Orange, San Diego, and Burbank, California.

In late 1999, ICS decided to withdraw from the United States marketplace. ICS announced this decision in a press release on February 23, 2000.<sup>2</sup> On or about February 28, ICS informed its employees, by memorandum, of its intention to withdraw from the United States marketplace. In this

---

<sup>1</sup> These cases, which include Section 8(a)(3) and (1) allegations, as to which the Region has found merit and did not submit to Advice, were also submitted as to the propriety of Section 10(j) relief. That request will be discussed in a separate memorandum.

<sup>2</sup> All dates hereafter are in 2000.

memorandum to employees, ICS indicated that it would solicit offers for the purchase of the Company, but that a complete withdrawal would take effect June 30 (i.e., should there be no prior sale, the facility would close on that date).

On February 14, Teamsters Local 952 ("the Union") had filed a petition in Case 21-RC-20181, wherein it sought to represent a unit of employees ("the unit") consisting of all full-time and regular part-time drivers and sorters employed by ICS at the ICS Orange facility, excluding all other employees, office clerical employees, professional employees, guards and supervisors as defined in the Act. On March 2, the Regional Director approved a stipulated election agreement setting an election for March 30 and 31. An election was held on these dates, and the Union received over 70% of the votes cast. On April 12, a certification of representative issued.<sup>3</sup>

On Monday, April 17, ICS sold the assets of its U.S. operations (specifically, customer lists, equipment, and contracts) to Sameday Transportation Services, LLC, ("Sameday") also known as Consolidated Routing. The sales agreement called for the closing of the ICS operations on Friday, April 21.<sup>4</sup> On April 17, after completion of the sale, ICS notified the Union of the sale and indicated its willingness to meet with the Union to bargain about its effects.

The ICS Orange facility continued operations through April 21. On April 19, representatives from Sameday came to the Orange facility to speak with the sorters. They were introduced to the sorters as being "the new owners of the Company." Shortly after their arrival, one of these

---

<sup>3</sup> On February 28, in Case 21-RC-20190, Teamsters Local 542 ("Local 542") filed a petition for election in a unit of the sorters and drivers employed at the San Diego facility. On March 31, Local 542 received a majority of the votes cast and a certification of representative issued on April 12. There were no union organizing efforts at the Burbank facility.

<sup>4</sup> A provision of the sales agreement indicates that the Union is the certified representative of certain of the Employer's employees. Thus, Sameday was on notice that the Union represented the unit employees at the Orange facility.

representatives, Elisha Gilboa, began meeting with the sorters in small groups of five to six at a time.

In these meetings, Gilboa introduced himself as the owner of Sameday. Gilboa told the sorters that Sameday had purchased ICS's business and that Sameday would be operating out of the ICS facility in Burbank. During the meeting, Gilboa told the sorters that "we [Sameday] need you guys to come to work for us." Gilboa asked the sorters to come to work for Sameday at the Burbank location after ICS closed on April 21. Gilboa indicated that everything would be the same at the Burbank location, and informed the sorters that their ICS supervisors would provide them with more information.

The next day, April 20, ICS supervisor Merida informed the sorters that the facility was closing the next day, but that it would be open for the sorters to come in and pick up their final paychecks. Merida also informed the sorters that they would begin working at the Burbank facility on Sunday, April 23, and that if anyone did not show up, it would be assumed that he was quitting.

On April 21, the sorters picked up their final ICS paychecks. Included with their final paychecks was a letter of recommendation from ICS, along with a map to the Burbank facility.

On April 21, representatives of NICA<sup>5</sup> came to the Orange facility to talk to the ICS drivers. The NICA representatives said that Sameday had bought ICS, that NICA had a contract with Sameday, and that NICA was offering employees a job delivering Sameday packages under the condition that they use their own cars and that their pay would now be salary. The NICA representatives left a paper informing the drivers of a meeting being held the next day.

At the April 22 meeting conducted by NICA, ICS drivers were told that NICA was offering jobs to the employees, but that the employees would have to use their own vehicles. NICA then distributed an application form. The NICA representatives also stated that if a driver did not wish to use his own vehicle, the driver could work a night shift and be provided with a vehicle.

---

<sup>5</sup> NICA is a company that holds itself out to handle financial and other administrative services to enable entities wishing to use independent contractors to do so without those individuals actually being "employees."

On April 23, the sorters reported to work at the Burbank facility. When they arrived, they saw Merida who pointed to the lab department of the Burbank facility, and told the sorters to begin working. The sorters began performing the same tasks at the Burbank facility that they had performed in Orange, using the same kind of equipment they had used at the Orange facility.

All of the 20 sorters who started work on April 23 were former ICS employees (14 of the sorters were previously from Orange, 6 were from Burbank). Among the supervisors of the sorters when Sameday began its operations at Burbank were Merida and Salguero, who had both been supervisors at the ICS Orange facility. Marshall Wayland, a manager at the ICS Orange facility, was now a manager at the Burbank facility for Sameday. The sorters [FOIA Exemptions 6, 7(C), and 7(D)] were not required to participate in job interviews. The sorters did fill out job application forms, but not until the second or third week after beginning work at Burbank.

Shortly thereafter, former ICS drivers began working at the Burbank facility. [FOIA Exemptions 6, 7(C), and 7(D)]

.]

When Sameday commenced driver operations on April 24, it utilized approximately 23 drivers. Of these 23 drivers, 9 had previously been employed at the ICS Orange facility and 6 had prior experience with ICS at a different ICS facility. The Region was unable to ascertain where the remaining 8 employees were previously employed.

On April 24, Union Organizer Cadena went to the Burbank facility. Sameday manager Hong greeted him and asked if he could help Cadena. Cadena said that he was with the Teamsters Union and that he was there to deliver two letters. Cadena handed Hong two letters, then left.

Nothing further was said. One of the letters was addressed to the attention of Consolidated Routing (i.e. Sameday), and the other was addressed to the attention of NICA.

The letter addressed to Sameday requested recognition by Sameday with regard to a unit composed of "[a]ll full-time and regular part-time sorters located at [the Burbank facility]...[e]xcluding all other employees, office clericals, guards and supervisors as defined in the Act." The letter addressed to NICA contained a demand for recognition by NICA of a unit composed of "[a]ll full-time and regular part-time drivers located at [the Burbank facility]...[e]xcluding all other employees, office clericals, guards and supervisors as defined in the Act."

NICA has no managers or supervisors on site at the Burbank facility. There is no evidence that NICA directs or assigns work, disciplines, or otherwise exercises control over terms and conditions of employment. Nor is there any evidence that NICA referred drivers to Sameday; at most, NICA merely informed the ICS drivers at Orange that, and how, they could continue performing their jobs for the new owner (Sameday) at Burbank. It appears that NICA's sole function is to provide administrative and payroll services for Sameday, including the execution of "Independent Contractor" agreements by the drivers.

According to Sameday and NICA in this regard, the drivers at the Burbank facility are independent contractors, whose payroll is handled by NICA and who are performing services for Sameday. In support of this claim, they assert that these drivers: use their own vehicle or a leased vehicle provided by Sameday; are responsible for their own fuel and maintenance; receive no employee benefits; receive lump sum compensation itemized by the job for deliveries; have no employment or social security taxes withheld but receive a 1099 form indicating total compensation; can select their own route of travel; can substitute other drivers to perform delivery services and take time off when he or she desires; can refuse to accept delivery assignments offered; have the opportunity to perform delivery services of other companies; have independent occupational accident coverage for injuries; and have signed the NICA Application and Agreement which states that the driver is an "Independent Contractor." Sameday and NICA presented no witnesses in support of these assertions.

#### ACTION

We conclude that complaint should issue, absent settlement, alleging that Sameday violated Section 8(a)(5)

by refusing to recognize and bargain with the Union after the Union made a valid demand for recognition and bargaining.

Initially, we agree with the Region that: (1) Sameday is a Burns<sup>6</sup> successor and violated Section 8(a)(5) assuming the Union made a proper bargaining demand; (2) Sameday and NICA are not joint employers because NICA is not an employer but merely provides payroll and other administrative services for Sameday;<sup>7</sup> and (3) the drivers are not independent contractors but employees of Sameday.<sup>8</sup>

We further conclude that the Union made a valid demand for recognition and bargaining for the certified unit because (1) NICA was an agent of Sameday, so the demand on NICA was a demand on Sameday, and (2) the demand should have been treated as a demand for bargaining in the certified unit.

It is well established that in determining whether a person is acting as an agent of another, the Board applies common law principles of agency.<sup>9</sup> The common law describes the agency relationship as "the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act."<sup>10</sup> The Board has further stated:

---

<sup>6</sup> NLRB v. Burns International Security Services, 406 U.S. 272 (1972).

<sup>7</sup> See American Geriatric Enterprises, 235 NLRB 1532, 1535-36 (1978) (insufficient evidence of joint employer relationship where parent company only supplied housekeeping, bookkeeping and payroll services for subsidiary).

<sup>8</sup> See Roadway Package System, 326 NLRB 842 (1998) (drivers found to be employees). Cf. Dial-A-Mattress Operating Corp., 326 NLRB 884 (1998) (drivers found to be independent contractors).

<sup>9</sup> See Allegheny Aggregates, 311 NLRB 1165 (1993), citing Dentech Corp., 294 NLRB 924 (1989) and Service Employees Local 87 (West Bay Maintenance), 291 NLRB 82 (1988).

<sup>10</sup> Restatement 2d, Agency Section 1 (1958).

Agency is a contractual relationship, deriving from the mutual consent of principal and agent that the agent shall act for the principal. But the principal's consent, technically called authorization or ratification, may be manifested in conduct, sometimes even passive acquiescence as well as by words. Authority to act as an agent in a given manner will be implied whenever the conduct of the principal is such as to show that he actually intended to confer that authority.<sup>11</sup>

The Board has specifically noted that "[w]hen applied to labor relations. . . , agency principles must be broadly construed in light of the legislative policies embedded in the Act," which "necessarily requires sensitivity to the particular circumstances of industrial labor relations."<sup>12</sup>

The Board also has adopted the common law agency concept of apparent authority that:

If the principal places an agent in such a situation that a person of ordinary prudence and discretion is justified in assuming that an agent is authorized to perform in behalf of his principal the particular act in question, and such act has been performed, the principal is bound by what his agent did.<sup>13</sup>

The Board has found agents to have had apparent authority in numerous cases.<sup>14</sup> In Eldeco, Inc.,<sup>15</sup> the Board found

---

<sup>11</sup> International Longshoremen's and Warehousemen's Union, CIO (Sunset Line and Twine Company), 79 NLRB 1487, 1508 (1948).

<sup>12</sup> Longshoremen ILA (Coastal Stevedoring Co.), 313 NLRB 412, 415 (1993), enf. denied 56 F.3d 205 (D.C. Cir. 1995), cert. denied 516 U.S. 1158 (1996), quoting Longshoremen Local 1814 v. NLRB, 735 F.2d 1384, 1394 (D.C. Cir. 1984), cert. denied 469 U.S. 1072 (1984).

<sup>13</sup> Westward Ho Hotel, 251 NLRB 1109, 1209 (1980), quoting Ferro Concrete Construction Co. v. United States, 112 F.2d 488, 491 (1st Cir. 1940).

<sup>14</sup> See, e.g., Gourmet Foods, 270 NLRB 578, 610-11 (1984) (employer's industrial relations consultant who conducted pre-hiring screening interviews was employer's agent); M.

that two representatives of a personnel service were agents of the employer where they informed job applicants that they were hiring for the employer and the service was under contract with the employer to provide personnel.

In the instant case, NICA had apparent authority to act for Sameday in hiring drivers. Thus, NICA representatives were at the ICS Orange facility on the day employees picked up their final paycheck from ICS, and told the ICS drivers that NICA was contracted by Sameday and was offering employees a job under the condition that they use their own car and that their pay would now be salary.<sup>16</sup> NICA representatives invited drivers to a meeting the next day, where they again told drivers that NICA was offering them jobs, but they would have to use their own vehicles. NICA then distributed job application forms.

Sameday also acquiesced in and ratified NICA's exercise of its apparent authority to hire drivers. The ICS drivers who applied with NICA began working for Sameday on the next business day. One driver stated that he began working before he filled out his application form, and he worked for Sameday but was paid by NICA. Furthermore, the application form says that the driver provided messenger/delivery service "through NICA from or to various companies who have contracted for these services with NICA." The form lists Sameday as the contracting company. Sameday disavowed none of these facts, and therefore let NICA operate such that the drivers and the Union were justified in assuming that NICA was Sameday's agent

---

K. Morse Co., 302 NLRB 924 (1991) (employee of employment agency used by employer to screen applicants was employer's agent); Montgomery Ward & Co., 228 NLRB 750 (1977) (outside placement specialist allowed to enter warehouse and speak to employees who were her former patients was employer's agent); Sterling Faucet Co., 203 NLRB 1031, 1032 (1973) (psychological testing firm conducting attitude survey among employees was "held out" as agent of employer).

<sup>15</sup> 321 NLRB 857, 863 (1996).

<sup>16</sup> NICA has stated that there is no contract between Sameday and NICA with regard to providing drivers to Sameday to perform work out of the Burbank facility. However, the NICA "Independent Contractor Application and Agreement" lists "Consolidated Routing Burbank CA" (Sameday) as the "Contracting Company."

authorized to hire drivers and deal with various other aspects of employment such as pay, insurance, and tax preparation.

Since we conclude that NICA was Sameday's agent authorized to hire and otherwise deal with the drivers, we also conclude that the demand on NICA was a valid demand on Sameday. A demand for recognition to represent employees, in part, on economic terms of employment apparently delegated to the agent, and served on that agent constitutes, in our view, a valid demand on the principal. Furthermore, the Union served its letters demanding recognition for both the sorters and drivers on Chris Hong, a manager for Sameday, and thus Sameday had actual notice of the bargaining demand.

We further conclude that Sameday should have treated the Union's demands, jointly, as a single demand for bargaining in the certified unit. The Board repeatedly has held that a valid demand for recognition need not be made in any particular form, or in *haec verba*, so long as it clearly indicates a desire to negotiate on behalf of employees in an appropriate unit.<sup>17</sup> Thus, the Board has held, for example, that a verbal request to commence negotiations for a contract covering certain employees was a valid request for recognition;<sup>18</sup> and that a general request to sign a contract covering certain employees "subsumed a demand for recognition."<sup>19</sup>

With respect to the need to refer to an "appropriate unit," the Board will deem a demand to be insufficient only if there is a "substantial deviation" between the unit specified in the demand and the appropriate unit.<sup>20</sup> Thus, the description of the unit in the demand need not correspond exactly to the description ultimately found

---

<sup>17</sup> Hydrolines, Inc., 305 NLRB 416, 420 (1991); Stanford Realty Associates, 306 NLRB 1061, 1066 (1992).

<sup>18</sup> Dollar Rent-A-Car, 236 NLRB 206, 208 (1978).

<sup>19</sup> Stanford Realty Associates, 306 NLRB at 1061 n.2.

<sup>20</sup> Waste Management of Utah, 310 NLRB 883, 908 fn. 117 (1993), citing Soil Engineering Co., 269 NLRB 55, 79 (1984). See also Heck's, Inc., 166 NLRB 674, 683 (1967).

appropriate. For example, a general, imprecise demand referring to "all your employees" has been found sufficient despite the fact that the appropriate unit as eventually defined excluded a few classifications of employees.<sup>21</sup> Moreover, the Board has found a demand for alternative units to be not a "substantial variance" from the appropriate unit.<sup>22</sup>

We conclude that the Union sought bargaining for the certified unit of sorters and drivers. When the Union made its demand (the first day of work for drivers and second day of work for sorters), 25 of the 42 employees were former ICS Orange employees represented by the Union. The Union served separate demands for separate units only because the employees and the Union were led to believe that Sameday and NICA were separate employers, with Sameday employing the sorters and NICA dealing with the drivers' employment conditions. The Union had not indicated any interest in separating the unit, nor would there appear to be any benefit to the Union in doing so. Under these circumstances, we would view the demands together as a demand for bargaining in the certified unit, and Sameday's refusal violated Section 8(a)(5). [FOIA Exemption 5

.]

Finally, we conclude that if the two bargaining demands are found not to cover the single certified unit, at a minimum the demand on behalf of the sorters was a demand for bargaining in an appropriate unit.<sup>23</sup> The former

---

<sup>21</sup> Waste Management of Utah, 310 NLRB at 908. See also Enterprise Products Company, 265 NLRB 544 (1982) (the addition of one classification and of a few individuals to the unit constitutes "tailoring of a unit" and "does not make the demand for recognition defective").

<sup>22</sup> See Heck's Inc., supra.

<sup>23</sup> Because the former ICS drivers did not constitute a majority of Sameday's drivers at Burbank when the Union made its demand, Sameday did not unlawfully refuse to bargain with the Union as to them if the Board disagrees with our argument that the demand was to bargain in the certified unit and finds that the Union requested bargaining in two separate units.

ICS sorters were clearly a majority of the sorters (14 of 20) when Sameday opened for business. By its refusal to recognize and bargain with the Union for the sorters, following a valid demand, Sameday violated Section 8(a)(5) and (1) of the Act.

B.J.K.