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

Advice Memorandum

DATE: June 30, 2011

TO: Jonathan B Kreisberg, Regional Director
Region 34

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

SUBJECT: Mory's Association, Inc. 596-0420-5500-0000
Case No. 34-CA-12839

This case was submitted for advice as to whether the Employer violated Section 8(a)(5) by withdrawing recognition from the Union during a hiatus in operations. We conclude that the charge in the instant case should be dismissed, absent withdrawal, since the Union had notice of the withdrawal of recognition more than six months before it filed its charge on November 15, 2010, and the charge is therefore untimely filed under Section 10(b) of the Act.

FACTS

Mory's Association, Inc. (the Employer) operates a private club in New Haven, Connecticut. For many years, UNITE HERE! Local 217 (the Union) has represented Mory's food service workers. The parties have had a series of collective bargaining agreements, the most recent of which was scheduled by its terms to expire on December 31, 2011.

In December 2008, Mory's ceased operations and laid off all unit employees. The Union requested bargaining over the effects of the apparent closing, but was told that the Employer had not decided yet whether it was permanently closing, that the Employer hoped to be able to reopen after a reorganization, and that, if the Employer decided to permanently close, it would engage in effects bargaining at that time.

In March 2009,[1] the parties had a meeting to discuss the prospects of reopening and to clarify the recall process and employees' terms and conditions of employment if the Employer did reopen. At that time, the Employer indicated that it hoped to reopen in early-to-mid September. Over the next several months, the parties met and e-mailed each other several times regarding the progress of plans to reopen.

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[1] All dates hereafter are in 2009, unless otherwise noted.

In early August, the Employer informed the Union that it had hired a [redacted]. On August 21, several Employer officials, including the Employer's [redacted] and its attorney, met with the Union. The Employer's attorney stated that the parties could work together to outline the terms of a possible agreement "that could come into play once the Union established majority support." On August 28, the Employer's [redacted] and the Union's representative met again. The Employer's [redacted] stated that everything was contingent on the Union showing majority support.[2]

In early September, the Employer e-mailed the Union a spread sheet showing preliminary labor projections to be met by the end of the first year of operations, which included the proposed positions, hourly rate, and length and number of shifts. The projected wages were lower than the wages in the latest CBA.

On September 11, the parties met again. At this meeting, the Employer and the Union's representative agreed that the Union would produce a recognition agreement by October 1. On September 21, the Union's representative e-mailed the Employer and said he would get a signed recognition agreement to him by the following week. The Union never provided such an agreement, apparently because other Union officials had decided that, as a legal matter, the Union continued to represent the bargaining unit. The Union did not communicate its position to the Employer at that time.

On November 3, the Employer e-mailed the Union a draft collective-bargaining agreement which significantly modified the parties extant agreement, along with a recognition agreement that provided that the contract would not take effect until the Union demonstrated majority support:

> [T]he attached collective bargaining agreement will take effect on the date that the Union proves to Mory's satisfaction that the Union represents an uncoerced majority of Mory's employees in the appropriate bargaining unit.

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[2] These statements are asserted by an Employer witness; the Union has not disputed them. The Union's representative does not have any recollection of the August 21 meeting, although it is clear that it occurred based on the parties' e-mail correspondence.

On November 13, the Employer spoke with the Union by telephone. The Employer explained that it was not proposing changes to an existing contract, but instead was proposing a new contract that would be entered into only if the Union established a majority.[3]

The Employer again e-mailed the Union on December 9, stating that the Union's comments and thoughts were important to the Employer and that it needed to hear from the Union by December 15. The Union did not reply to this e-mail because it had concluded that a recognition agreement was unnecessary and that the parties' extant agreement was still in effect, but the Union did not communicate its position to the Employer at that time. On December 17, the Employer called the Union, and the Union stated that it would not discuss the specifics of an agreement until after the hiring process began, so that employees could give their advice and guidance. There was little or no contact between the parties for several months.

After the Employer began its hiring process in July 2010 in anticipation of reopening, the parties began meeting again to discuss the terms of a collective-bargaining agreement. The Employer reopened on August 25, 2010, with employees working under terms and conditions different than those set forth in the parties' last collective-bargaining agreement.

In late September, October, and early November 2010, the Union requested dues from the Employer, requested employee information from the Employer, and filed several grievances. The Employer refused to provide the requested dues and information, or to consider the Union's grievances, asserting that the Union was not the recognized bargaining agent of its employees, and the old collective-bargaining agreement was null and void.

On November 15, 2010, after the parties were unable to reach a collective-bargaining agreement and broke off negotiations, the Union filed the charge in the instant case, alleging that the Employer violated Section 8(a)(5) by unilaterally withdrawing recognition from the Union, unilaterally changing the terms and conditions of employment, and refusing to provide information requested by the Union. Along with other defenses, the Employer argues that the charge in the instant case is time-barred

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[3] This statement is asserted by an Employer witness. The Union has not disputed it.

by Section 10(b), as it had withdrawn recognition of the Union more than six months before the charge was filed.

ACTION

We conclude that the charge in the instant case should be dismissed, absent withdrawal, since it was untimely filed under Section 10(b) of the Act. In this regard, no later than November 13, 2009, more than six months before the Union filed its charge on November 15, 2010, the Employer gave the Union clear and unequivocal notice that it had withdrawn recognition. The Employer's subsequent refusals to bargain, to honor the terms of the parties' last collective-bargaining agreement, or to provide information are merely consequences of the time-barred withdrawal of recognition and, therefore, are not independently actionable.

Section 10(b) of the Act precludes the issuance of a complaint based upon any unfair labor practice occurring more than six months prior to the filing of the charge.[4] When the alleged unfair labor practice constitutes a repudiation of the union's representational status, the unfair labor practice occurs at the moment of the repudiation, and the Section 10(b) period begins to run at the moment the union has clear and unequivocal notice of that act.[5] Whether there has been clear and unequivocal notice is determined based on all the circumstances of the case.[6]

Thus, for example, in A&L Underground, a dispute arose as to whether the parties' agreement applied to more than a single project. By letter to the union, the employer set forth its stance that it was not bound by the terms of the agreement, and it ceased complying with them for more than a year before the union filed a charge. The Board found that, by its letter, the employer "severed the bargaining relationship in one stroke, and its failure to apply the contract thereafter is little more than the effect of that action."[7] The Board concluded that the employer totally repudiated the contract and that the 10(b) period began to

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[4] See generally Machinists Local 1424 v. NLRB (Bryan Manufacturing Co.), 362 U.S. 411 (1960).

[5] A & L Underground, 302 NLRB 467, 469 (1991).
[6] J & S Drywall, 303 NLRB 24 (1991), enf. denied 974 F.2d 1000 (8th Cir 1992).

[7] 302 NLRB at 469.

run when the union received notice of that repudiation.[8]

In contrast, the Board found no such clear and unequivocal notice in CAB Associates.[9] There, the employer failed to reply to a union demand that it sign an independent collective-bargaining agreement, although it did not affirmatively take any action to inform the union of its refusal to be bound by it. At the same time, the employer complied with the terms of the agreement by employing two individuals as onsite union stewards, by paying them at the higher rate given to stewards, and by deducting and remitting union dues. In addition, when it laid off the two stewards for lack of work, it gave no indication that it meant to repudiate the collective-bargaining agreement or withdraw recognition from the Union, merely stating that the two stewards would be recalled when new work was obtained. In light of these conflicting signals and the lack of any clear statements of repudiation of the agreement or withdrawal of recognition, the Board found that the employer's failure to reply to the union did not suffice to put the Union on constructive notice of an 8(a)(5) violation.

We find here, as in A&L Underground and unlike CAB Associates, that the Employer clearly and unequivocally gave the Union notice of its withdrawal of recognition well outside the 10(b) period. Specifically we find that the 10(b) period began to run by no later than November 13, 2009, more than a year before the Union filed its charge. Thus, on August 21, 2009, the Employer's attorney stated that the parties could work together to outline the terms of a possible agreement "that could come into play once the Union established majority support." On August 28, the Employer's [redacted] stated that everything was contingent on the Union showing majority support. In September, the Employer and the Union's representative agreed that the Union would produce a recognition agreement. On November 3, after the Union had not provided such an agreement, the Employer sent one which stated that "the attached collective bargaining agreement will take effect on the date that the Union proves to Mory's

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[8] See also, e.g., Dixon Commercial Electric, 302 NLRB 946, 947-948 (1991) (withdrawal of recognition charge barred where, outside the 10(b) period, the employer denied being bound by collective bargaining agreement and also announced that it would resist union claim to any bargaining relationship).

[9] 340 NLRB 1391, 1392 (2003).

satisfaction that the Union represents an uncoerced majority of Mory's employees in the appropriate bargaining unit." And, on November 13, the Employer explained that it was not proposing changes to an existing contract, but was instead proposing a new contract that would be entered into only if the Union established a majority.

In sum, over the course of several months from August to November, the Employer repeatedly made clear its withdrawal of recognition of the Union, its repudiation of the parties' last collective-bargaining agreement, and its demand for a new showing of majority support before any new agreement would become effective. The Union has not denied that these meetings took place, or disputed the particular statements. In any case, the documentary evidence of the parties' correspondence, particularly regarding the execution of a recognition agreement, can only be understood in a context in which the Employer had already withdrawn recognition -- absent a withdrawal of recognition, no new recognition would be necessary. While it might be argued in another context that the Employer's willingness to engage in bargaining over terms and conditions gave conflicting signals to the Union, here, its repeated statements and proffered recognition agreement made it clear that such bargaining was for a new collective-bargaining agreement that would only take effect after the Union newly demonstrated majority support.

Taken together, this evidence demonstrates clear and unequivocal notice to the Union of the Employer's withdrawal of recognition. Therefore, by no later than November 13, 2009, the Union was aware of the Employer's allegedly unlawful conduct, and any charge over that conduct needed to have been filed within six months thereafter. As the charge in the instant case was not filed until November 15, 2010, more than a year later, we conclude that allegations of the Employer's withdrawal of recognition is untimely under Section 10(b) of the Act.

Finally, we note that the Union's other allegations, that the Employer violated Section 8(a)(5) by unilaterally changing the terms and conditions of employment and refusing to provide information requested by the Union, are also untimely under Section 10(b), as they are all merely consequences of the Employer's earlier withdrawal of recognition. In St. Barnabas Medical Center,[10] the Board concluded that a clear refusal to recognize a union as the representative of a group of employees and to apply a collective-bargaining agreement to them outside the 10(b) period was a completed violation of the Act, and that all

[10] St. Barnabas Medical Center, 343 NLRB 1125, 1129 (2004).

subsequent failures of the respondent to honor the terms of the agreement were merely consequences of the initial repudiation. Here, the Employer's 2009 withdrawal of recognition, if unlawful, similarly was a completed violation of the Act, and its subsequent conduct, including unilateral changes and refusals to provide information, was merely a consequence of that earlier action. Thus, these additional allegations should also be dismissed.

Accordingly, the Region should dismiss the charge in the instant case, absent withdrawal.

B.J.K.

[redacted]