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

Advice Memorandum

DATE: August 16, 2011

TO : Martin M. Arlook, Regional Director
Region 10

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

SUBJECT: Hyatt Corp., d/b/a
Hyatt Regency Atlanta 712-5042
Case 10-CA-38863 725-6783

This case was submitted for advice as to whether the Servicing Agreement between the Joint Board (the 9(a) representative) and UNITE HERE is lawful, such that the Employer unlawfully refused to deal with a labor organization as the Union's designated representative; and if so, whether this Section 8(a)(5) allegation should be deferred to the parties' grievance and arbitration procedure.

We conclude that the Servicing Agreement is lawful, and that the Joint Board validly delegated another union as its agent to serve the bargaining unit. We also conclude that this matter is not appropriate for Collyer deferral.[1] Thus, the Region should issue complaint, absent settlement, alleging that the Employer's refusal to recognize and bargain with the agent violated Section 8(a)(5).

FACTS

Hyatt Regency Atlanta (the Employer) is a hotel located in Atlanta, Georgia, which employs about 290 employees in a bargaining unit represented by the Southern Regional Joint Board, Workers United, Local 151 (the Joint Board). The most recent collective bargaining agreement (CBA) between the Joint Board and the Employer was in effect from October 19, 2008 through July 31, 2011.[2]

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[1] Collyer Insulated Wire, 192 NLRB 837 (1971).

[2] Employees in this bargaining unit were historically represented by HERE Local 151, which subsequently became UNITE HERE Local 151 after the 2004 UNITE HERE merger. Local 151 affiliated with Southern Regional Joint Board, Workers United/SEIU, and in 2009, the Joint Board Local 151 disaffiliated from UNITE HERE. All parties involved agree that the recognized 9(a) representative is the Joint Board.

In August 2010, UNITE HERE International Union (UNITE HERE) and Workers United, affiliated with SEIU, reached a global settlement agreement intended to award exclusive jurisdiction to UNITE HERE to organize workers in the hospitality industry. UNITE HERE and Workers United agreed that in cases where employers refused to recognize UNITE HERE pursuant to the terms of their global settlement agreement, UNITE HERE and the respective joint boards of Workers United would enter into individual agreements giving UNITE HERE the right to service the collective bargaining agreements covering certain bargaining units, while preserving ultimate responsibility for the representation of these units with the various joint boards.

At some hotels, including the Employer, the Hyatt Corporation refused to recognize UNITE HERE as the employees' representative pursuant to the global settlement agreement between the two labor organizations. On December 29 and 30, 2010, the Joint Board and UNITE HERE executed a Servicing Agreement covering the instant bargaining unit. Under the Servicing Agreement, the Joint Board retained the services of UNITE HERE to provide representation in grievance procedure and arbitration hearings and at labor-management meetings, assistance to bargaining unit members appearing before the National Labor Relations Board on behalf of the Union in matters arising out of their workplace, and assistance to the Joint Board in collective bargaining negotiations. These service were to be provided at a set fee amounting to a portion of the dues collected from the bargaining unit members, with a provision for reimbursement for agreed upon special or time-consuming services.

The Servicing Agreement contains a provision explicitly stating that the Joint Board maintains ultimate responsibility for collective bargaining matters and for fulfilling its duty of fair representation to bargaining unit members; and that the Joint Board will maintain oversight by meeting regularly with the UNITE HERE staff member assigned to the day-to-day servicing, and by requiring UNITE HERE to provide advance notice to the Joint Board of all membership meetings and to obtain approval of all major correspondence. The Joint Board continues to administer the collection of dues and has access to all records pertaining to this bargaining unit.

The Servicing Agreement allows either party to unilaterally terminate the agreement with advance notice. It also makes no changes with respect to rank-and-file employee representatives. Bargaining unit employees retain full membership status and rights with the Joint Board, and although they retain access as participants to UNITE HERE's

"educational functions" and as guests at "other" UNITE HERE functions, they have no UNITE HERE membership rights.

By letter dated January 13, 2011,[3] the Joint Board notified the Employer of the servicing arrangement and provided the names of the UNITE HERE staff members designated to carry out the duties in the Servicing Agreement. The letter also stated that the Joint Board retained ultimate responsibility for the representation of the bargaining unit and would oversee the services provided by UNITE HERE staff members.

By letter of January 27, the Employer accused the Joint Board of having effectuated an inappropriate substitution of a separate labor organization for itself, indicated that it would only continue to recognize and deal with the Joint Board, and refused to recognize and deal with UNITE HERE. On the same day, the Employer filed a grievance alleging that the Joint Board had violated the parties' CBA because it "contains no provision for the Union to unilaterally transfer, delegate, substitute or assign the performance of any of its obligation under the CBA to another party, including a separate labor organization." The Joint Board took the position that the grievance was not arbitrable under the parties' grievance and arbitration procedure because the issue did not raise a question relating to the meaning and application of the CBA. Nonetheless, the parties have scheduled the grievance for arbitration.[4]

To date, UNITE HERE has not performed any of its representational or bargaining duties under the Servicing Agreement because of the Employer's refusal to accept the Servicing Agreement. The Joint Board has also not reimbursed UNITE HERE for any services because the Joint Board continues to fully service the CBA and to carry out all representational and bargaining functions with its own staff.

ACTION

We conclude that the Servicing Agreement is valid on its face; that the Joint Board has not improperly transferred its responsibilities as the exclusive 9(a) representative of the Employer's employees to UNITE HERE; and that the Employer has thus violated Section 8(a)(5) by refusing to deal with the Joint Board's designated agent.

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[3] All dates hereafter are 2011, unless otherwise indicated.

[4] The arbitration hearing is scheduled for sometime in December 2011.

Further, this matter is not appropriate for deferral because it presents a statutory representational issue. Accordingly, the Region should issue complaint, absent settlement.

The Servicing Agreement is Valid

An employer is obligated to bargain solely with the 9(a) representative selected by a majority of the bargaining unit employees. However, a bargaining representative may confer upon an agent the authority to act on its behalf, and one labor organization may act as the agent of another.[5] Both employers and unions have the right to choose who they wish to represent them in labor negotiations.[6] Although a certified representative may delegate its duties under a contract, it cannot transfer its responsibilities as the 9(a) representative.[7]

These principles apply when evaluating servicing agreements like the one at issue in this case. The Board has found an improper delegation of representation where there has been a wholesale substitution of another union for the designated Section 9(a) representative, rather than a delegation of duties from the principal to the agent.[8]

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[5] See Goad Co., 333 NLRB 677 (2001); Rath Packing Co., 275 NLRB 255, 256 (1985); Mountain Valley Care, 346 NLRB 281, 282-3 (2006); Mine Workers Local 17 (Joshua Industries), 315 NLRB 1052, 1064 (1994) enfd. 85 F. 3d 616 (4th Cir. 1996) (Table); Kodiak Island Hospital, 244 NLRB 929(1979).

[6] General Electric Co. v. NLRB, 412 F. 2d 512, 516 (2d Cir. 1969).

[7] Nevada Security Innovations, Ltd., 341 NLRB 953, 955 (2004).

[8] See Goad Co., 333 NLRB at 679-680 (agreement between Section 9(a) representative and its purported agent contained an indemnification clause which would hold the principal union harmless of any breach of duty of fair representation arising out of the agent's service to the principal union); Sherwood Ford, Inc., 188 NLRB 131 (1971) (the servicing agreement was invalid where it provided that the principal union would carry out all instructions it received from its supposed agent, and where the agent would receive compensation for its services dues according to its own schedule). See also Arlen Beach Condominium Association, Case 12-CA-24507, Advice Memorandum dated November 8, 2005 (improper transfer of 9(a) representational duties where the terms of the servicing agreement made a

To determine whether there was a valid delegation of duties or an unlawful substitution, it is appropriate to review the servicing agreement and the actual conduct of the unions.

In this case, the Servicing Agreement establishes a clear-cut principal/agent relationship, in which the 9(a) representative Joint Board maintains overall control and ultimate responsibility over bargaining and representation of the unit while delegating certain duties to the agent union. Indeed, the Joint Board and UNITE HERE modeled the Servicing Agreement on the valid agreement between two labor organizations in Suburban Pavilion, Inc.[9] The instant Servicing Agreement delegates no more authority to the agent than did the one in Suburban Pavilion. Both agreements provide a similar scope of functions and duties delegated to the agent union, and allow the principal union to retain oversight over bargaining and the administration of the CBA. And, unlike in Goad, the Servicing Agreement does not contain an indemnification clause benefiting UNITE HERE, nor, as in Sherwood Ford, is the Joint Board acting at the direction of UNITE HERE. To the contrary, under the Servicing Agreement, the Joint Board retains ultimate control and authority over collective bargaining agreements and collective bargaining matters; remains responsible for fulfilling the duty of fair representation; and retains the ability to perform all representative functions if the Employer refuses to accept the legitimacy of the Servicing Agreement. Unit employees retain full membership status and rights with the Joint Board, and have no UNITE HERE membership status or rights other than as guests or participants at UNITE HERE functions.

As to the instant service fee arrangement, unlike the inappropriate arrangement in Sherwood Ford, in which the

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regional vice president the final arbiter of disputes under the servicing agreement, and failed to reserve to the principal union any collective-bargaining or representational duties);

FOIA EX. 5, 7(A)

[9] Case 8-CA-33560, Advice Memorandum dated February 20, 2003.

purported agent received compensation for its services based on its own dues schedule,[10] UNITE HERE provides services at a set fee for services rendered, amounting to a portion of the dues collected by the Joint Board (plus any additional agreed-upon reimbursable costs for "special or particularly time-consuming services"). As a result, the Joint Board's fees to UNITE HERE are directly related to the service provided and not to the agent's dues structure. Further, since the Servicing Agreement prohibits servicing fees until the Employer ceases to challenge the legitimacy of the Servicing Agreement, none have yet been remitted.

Moreover, the two labor organizations have engaged in no conduct inconsistent with the terms of the Servicing Agreement. Indeed, since the Employer continues to challenge the legitimacy of the Servicing Agreement, and refuses to recognize UNITE HERE as a lawful agent, the Joint Board has to this date delegated none of its collective bargaining responsibilities to UNITE HERE and has maintained complete control of representation and bargaining. Further, in its correspondences to the Employer, the Joint Board has assured the Employer that it haw retained ultimate representational responsibility and oversight of its unit.[11]

Finally, the fact that the two unions intend that UNITE HERE will ultimately have jurisdiction of the hospitality industry (as laid out in the UNITE HERE and Workers United/SEIU global settlement agreement) has no bearing on the validity of the Settlement Agreement, where the Servicing Agreement is itself a valid delegation and the unions did not execute it to circumvent an adverse Board

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[10] See Sherwood Ford, Inc., 188 NLRB at 134 (provision that purported agent would receive, as compensation for its services, dues according to its own schedule, in an amount twice that of dues the employees paid to the other union, supported conclusion that the parties sought to substitute representatives).

[11] Compare Sherwood Ford, 188 NLRB at 131-132 (where the purported agent had failed in attempts to claim status as the 9(a) representative by filing a certification petition and an unfair labor practice charge with the Board). See also Goad Co., 333 NLRB at 678 (where the purported agent had previously attempted to force the employer to recognize it as the 9(a) representative by filing an unfair labor practice charge that was dismissed by the Regional Director.)

determination.[12] Rather, until that plan can be accomplished by lawful means, the Joint Board has the right to delegate some duties to another labor organization while maintaining ultimate authority for representing the Hyatt Regency unit employees.

Deferral is not appropriate

Statutory issues such as the lawfulness of an employer's withdrawal of recognition are particularly poor subjects for deferral because they involve the very existence of a collective-bargaining relationship between the parties, a matter within the exclusive jurisdiction of the Board.[13] Thus, when it is alleged that an employer is "refusing to recognize a designated representative of its employees, especially for a matter of such obvious importance to employees as processing grievances, it is not simply a matter of contract interpretation but rather an alleged interference with a basic statutory right of employees."[14]

Here, the heart of the dispute is the representational issue of whether the Joint Board validly delegated another union as its agent to serve the bargaining unit such that the Employer's refusal to recognize, and bargain with, the designated bargaining agent violated Section 8(a)(5). Since this is a statutory question within the exclusive jurisdiction of the Board, the issue is not deferrable.[15]

Accordingly, the Region should issue complaint, absent settlement, alleging that the Employer violated Section

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[12] See Suburban Pavilion, Case 8-CA-33560, Advice Memorandum dated February 20, 2003, at 10.

[13] Avery Dennison, 330 NLRB at 391 (lawfulness of the employer's withdrawal of recognition and subsequent changes in working conditions was not suited to resolution by arbitration).

[14] Native Textiles, 246 NLRB 228, 229 (1979) (finding deferral inappropriate where the employer refused to deal and meet with a former employee who was appointed by the union as the designated agent to process grievances).

[15] Ex. 5.

8(a)(5) by refusing to recognize the Joint Board's validly recognized agent.

B.J.K.