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

Advice Memorandum

DATE: August 27, 1999

TO : Richard L. Ahearn, Regional Director
Region 9

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

SUBJECT: International Union of Electronic, Electrical, Salaried, Machine And Furniture Workers, AFL-CIO and Its Affiliated Local 798
(General Motors Truck Group, Moraine Assembly, General Motors Corporation)
Cases 9-CB-9977-1, -2

530-8081-0100
530-8081-6900
518-0160
518-4030-1408
518-4030-1485
518-4040-4500
518-4040-5000
518-4040-5025
518-4040-6700

International Union of Electronic, Electrical, Salaried, Machine And Furniture Workers, AFL-CIO And Its Affiliated Local 801
(General Motors Corporation, Delphi Harrison Thermal Systems and General Motors Powertrain Group, Moraine Engine Plant, General Motors Corporation)
Cases 9-CB-9978-1, -2

General Motors Truck Group, Moraine Assembly, General Motors Corporation
Case 9-CA-36499

General Motors, Corporation, Delphi Harrison Thermal Systems
Case 9-CA-36500-1

General Motors Powertrain Group, Moraine Engine Plant, General Motors Corporation
Case 9-CA-36500-2

These cases were submitted for advice on whether an International Union violated the Act by: splitting up a local union without a vote of the membership; and by accepting recognition from the Employer without an independent demonstration of majority support; and by accepting dues for the newly created local based upon dues authorization cards designating the original local. Also

submitted for advice was whether the Employer violated the Act by extending recognition to a newly created local union without an independent demonstration of majority support, and by disbursing dues to the newly created local union based upon dues authorization cards designating the original local.

FACTS

Background Facts

For many years, the employees of the three General Motors (GM or Employer) plants in Moraine, Ohio have been represented by the IUE under a national agreement covering a number of GM facilities nationwide and separate local agreements with Local 801. Local 801, an amalgamated local, was the local bargaining representative of the three plants in the instant case; the truck and bus plant (4,200 employees), Delphi Harrison (3,200 employees) and the powertrain plant (500 employees). Local 801 and the Employer are party to individual local contracts covering each of the plants. Local 801's agreements covering the truck and bus plant and the powertrain plant specifically state that they are subject to the approval of the International and are signed by the International, as well as local officials. The local agreement covering Delphi Harrison states that it is a local supplemental to the national contract and is signed by both local and International officials.

The Constitution and By-Laws of Local 801 states:

> The Local Union shall be, and act as exclusive representative and agent to represent an employee in the presentation, maintenance, adjustments and settlement of all grievances, complaints or disputes and any other matters relating to terms and conditions of employment or arising out of the employer-employee relationship, and shall negotiate, conclude and maintain any and all contracts between the employer and employees.[1]

The Local 801 Constitution and By-Laws also state that The Local Executive Board: may advise or control the course of any or all action of the Local Officers and committees, except as otherwise provided;[2] and shall establish and

---

[1] Article II Section 2 Constitution and By-Laws of Local 801 Revised July 27, 1997.

[2] Article VI Section 1.

maintain a committeeperson system capable of performing the duties and services required to enforce the terms and provision of all contracts and agreements.[3]

In October 1997, the Employer and Local 801 Executive Shop Chairman Owens entered into a redistricting agreement, which eliminated the plant chairman position, then filled by Duane Campbell. The agreement was never presented to nor approved by Local 801's negotiation committee, as required by the parties' bargaining agreement. Instead, an International Union officer approved it. The Employer ceased recognizing Campbell as a Union official and returned him to a unit job in the plant.

Thereafter, Local 801's Executive Board protested Owens' redistricting agreement and sought to displace Owens with Campbell as a new Executive Shop Chairman. The International Union, however, supported Owens' redistricting agreement. In October 1997, Local 801 filed a Section 8(a)(5) charge attacking the Employer's removal of Campbell and the honoring of Owens' redistricting agreement. In November 1997, the International reacted by placing Local 801 in trusteeship and removing Local 801 President George Dunaway from his position as President because he refused to accept the redistricting. The International appointed a Trustee who promptly filed a request to withdraw the Section 8(a)(5) charge. Local 801 officers responded by filing a federal district court lawsuit challenging the trusteeship.

In an Advice Memorandum dated May 27, 1998,[4] we concluded that the Employer and Local 801 headed by Executive Shop Chairman Owens unlawfully entered into the redistricting agreement eliminating Campbell's elected plant chairman position for discriminatory reasons. Thus, the Union violated Section 8(b)(1)(A) and (2) and the Employer violated Section 8(a)(3) by entering into this discriminatory agreement. [*FOIA Exemption 5*

.]

In an Advice Memorandum dated August 17, 1998, [*FOIA Exemption 5*

.]

---

[3] Article VI Section 7.

[4] Cases 9-CA-35701 and 9-CB-9767.

The Instant Case

On July 14, 1998, while 801 was still under an International trusteeship, the International announced the creation of a new Local Union (Local 798) to represent the truck and bus plant employees. This was done without a vote of the employees at any of the three plants, and over the objection of the Local 801 Executive Committee.

The International created the new local union despite the fact that the 801 Executive Board had voted unanimously on April 9, 1998 against splitting the Local Union. There was also substantial rank-and-file opposition to this action.

The Employer recognized Local 798 as the new local bargaining representative for the truck and bus plant employees without any independent demonstration of majority support. The Employer is still deducting dues pursuant to checkoff provisions previously in effect for Local 801. However, the dues are now being submitted to Local 798 even though the checkoff authorizations name Local 801. The Union did not obtain any new checkoff authorizations naming Local 798. The Employer has continued to recognize the downsized Local 801 as the local bargaining representative for Delphi Harrison and the powertrain plants.

By letter dated September 10, 1998, International President Fire declared former Local 801 President Dunaway ineligible to seek elected office in the IUE for a period of two years. On October 8 and 9, 1998, both Local 798 and Local 801 elected union officers. The new officers took office in January 1999, and the trusteeship was lifted.

The charges in Cases 9-CB-9977-1, -2 were filed by former Local 801 President Dunaway, and allege that the IUE and IUE Local 798 violated Sections 8(b)(1)(A) and 8(b)(2) of the Act on July 14, 1998 by substituting Local 798 for Local 801 as the representative of the employees of the General Motors Truck and Bus Group without a vote of the employees and by demanding and accepting Employer recognition of Local 798 without majority support. The companion charge in Case 9-CA-36499, also filed by Dunaway, alleges that the Employer violated Section 8(a)(1), (2) and (3) of the Act by recognizing a minority union and unlawfully encouraging membership in Local 798.

The charges in Cases 9-CB-9978-1, -2 were filed by former plant chairman Campbell, and allege that the IUE and IUE Local 801 violated Sections 8(b)(1)(A) and 8(b)(2) of the Act on July 14, 1998 by creating a substantially different Local 801 to continue representing the Delphi

Harrison plant and the powertrain plant employees without any employee vote and by demanding and accepting continued Employer recognition of this new version of Local 801 without majority support. The companion charges in Cases 9-CA-36500-1, -2, also filed by Campbell, allege that the Employer violated Section 8(a)(1), (2) and (3) of the Act by recognizing a minority union (the new Local 801) and unlawfully encouraging membership in the new Local 801.

The Charging Parties contend that the actions of the International in splitting Local 801 into two separate locals created two new labor organizations, which were so substantially different from the old Local 801 that the Union owed a duty of due process to the members before effecting such a change. Moreover, they maintain that the new labor organizations were not privileged to demand or accept recognition from the Employer without a demonstration of majority support, nor was the Employer privileged to extend recognition under these circumstances.

The International and new Local 801 and 798 argue that there is a substantial continuity of bargaining representatives and therefore no new showing of majority support is required. The International asserts that: it still is the national bargaining representative; although Local 798 is a new local, it is still a part of the same International Union governed by the same constitution and collective-bargaining agreements; the only change in Local 801 is that it now represents fewer employees at only two plants; the granting of a charter to Local 798 was in accord with provisions of the International constitution and was done to improve the representation of the employees.

The Employer's position is that the creation of the new Local Union was purely an internal union matter in which it was not involved. The Employer asserts that it recognized the new Local Union because it believes that since the International Union remained the bargaining representative, there was a continuity of representative, and the Employer had no basis for doubting or demanding proof of the Union's majority status. The Employer argues that to have done so would have subjected the Employer to a Section 8(a)(5) charge.

ACTION

For the reasons discussed below, we conclude that a Section 8(b)(1)(A) and (2) Complaint should issue, absent settlement, alleging that the International Union and Local 798 violated the Act by: substituting Local 798 for Local 801 as the representative of the employees of the General

Motors Truck and Bus Group and then demanding and accepting Employer recognition of Local 798 without majority support; and by enforcing the union-security clause in the contract in support of Local 798. We also conclude that a Section 8(a)(1)(2) and (3) complaint should issue, absent settlement, alleging that the Employer violated the Act by: recognizing a minority union, Local 798; by unlawfully encouraging membership in Local 798 by collecting and remitting dues to Local 798 based upon authorization for Local 801; and by honoring the union security clause in the contract in support of Local 798. We further conclude that the charges in case 9-CB-9978-1, 2 and 9-CA-36500-1,2 should be dismissed.

Initially, we note that while this case involves a union's division into two separate entities, unlike the usual situation of combining two organizations into one through a merger or affiliation, we nonetheless conclude that the same analytical framework should be used.[5] We further conclude, in agreement with the Region, that the International and Local 801 were joint Section 9(a) representatives of the three units. In addition to the master agreement signed by the International, each unit had a separate contract, with different effective dates, signed and administered solely by Local 801. The Constitution and By-Laws of Local 801 state that the Local is the "exclusive representative and agent" of the employees in the "presentation, maintenance, adjustments and settlement of all" disputes relating to or arising out of the employer-employee relationship, and "shall negotiate, conclude and maintain any and all contracts" between the Employer and the unit employees.

The Supreme Court in NLRB v. Financial Institution Employees of America (Seattle-First National Bank), 475 U.S. 192 (1986)(Seattle-First), held that the Board exceeded its authority by proposing a rule requiring that all unit employees, including those who were not union members, be given the opportunity to vote in an affiliation election. While the Court noted that it was not passing on the propriety of the Board's due process requirement,[6] it also indicated that in the absence of changes in the representative "sufficiently dramatic" to raise a QCR, the Board lacked authority to interfere at all with a union's decision to affiliate.[7] The Court stated:

---

[5] 1820 Central Park Avenue Restaurant Corp. d/b/a Charlie Brown's, 271 NLRB 378 (1984).

[6] 475 U.S. at 199, n. 6.

If these changes are sufficiently dramatic to alter the union's identity, affiliation may raise a question of representation, and the Board may then conduct a representative election. ... Otherwise, the statute gives the Board no authority to interfere in the union's affairs.[8]

On a number of occasions since Seattle-First, the Board has stated that it was unnecessary to decide whether the lack of "due process" raised a "question concerning representation" (QCR), the issue left open by the Supreme Court.[9]

In Western Commercial Transport, 288 NLRB 214, 217 (1988), a post-Seattle-First amendment of certification case arising out of a merger which the Board characterized as an affiliation,[10] the Board significantly moved in the direction of abandoning the due process requirement altogether. The Board held that once a QCR is raised because of a lack of continuity, "an affiliation vote cannot be used as a substitute for a representation proceeding before the Board," overruling Quemetco, 226 NLRB 1398 (1976), to the extent that it held that an amendment

---

[7] 475 U.S. at 206.

[8] Id. at 206.

[9] See for example Sullivan Brothers Printers, Inc., 317 NLRB 561, 562 n.2 (1995), enf'd. 99 F.3d 1217 (1st Cir. 1996)(because "due process" requirements were met, "we find it unnecessary to determine whether, in view of the Supreme Court's opinion in Seattle-First, the Board lacks authority to impose due process requirements"); Paragon Paint & Varnish Corp., 317 NLRB 747, 748 (1995), enf'd. 155 LRRM 2576 (D.C. Cir. 1996); May Department Stores Co., 289 NLRB 661, 665 n. 16 (1988), enf'd. 897 F.2d 221 (7th Cir. 1990); Hammond Publishers, Inc., 286 NLRB 49, 50 n. 8 (1987)(since both factors were met, did not have to reach the issue not reached in Seattle-First of "whether both continuity of representation and due process must be satisfied in all affiliation cases").

[10] In Seattle-First the Supreme Court noted that the same standards are used in examining affiliations in the context of both petitions to amend certifications and in cases involving an employer's refusal to bargain, 475 U.S. at 200, n. 8.

to certification can be granted despite a lack of evidence of continuity of representative, where the employees had unanimously voted to affiliate. 288 NLRB at 217, 218, n. 13. Thus, the expression of employee sentiment is no longer paramount and, in reality, after Western Commercial Transport the underlying rationale for employee member voting and due process arguably no longer exists.

In Western Commercial Transport, the Board further explained that in determining whether a "question concerning representation" exists because of lack of continuity, the Board seeks to determine whether the changes are so great that a new organization has come into being and should be required to establish its status as a bargaining representative through the same means that any labor organization is required to use in the first instance. The continuity requirement thus ensures that no one can substitute an entirely different representative in disregard of the established mechanisms for making such change. The Board further explained that the Court's Seattle-First decision reiterated the long understood role of the Board regarding union affiliations. The Board noted that the Court stated that changed circumstances, such as organizational and structural changes may alter the relationship between the union and the employees it represents, and this, may raise the question of whether the affiliated union enjoys continued majority support. Further, many purely internal organizational and structural changes may operate to alter a union's identity, such as changes in the constitution and bylaws, or reorganization of financial obligations. The Board concluded it was "clear ... that the Court did not intend to preclude the Board from inquiring into continuity of representative when there have been dramatic changes in the organization or structure of a bargaining representative."[11]

Applying the Court and Board standard to the instant case, we concluded that the creation of Local 798 by dividing it from Local 801, was a "sufficiently dramatic change in the identity of the bargaining representative" to find there was no continuity. Prior to the division of Local 801, the truck and bus plant employees were a part of, and represented by, a large local in the IUE, representing almost 8,000 employees. The creation of new Local 798 thus resulted in a structural change in identity of the representative from the former Local 801, including changes in the union officials and a new constitution and by laws, there can be no doubt that this is a separate labor organization, distinct and apart by Local 801. Given

[11] 288 at 218.

this lack of continuity of bargaining representative, under the rationale of Western Commercial Transport a QCR is raised. Thus, Local 798 can not demand, and the Employer can not give, recognition and union security prior to proof of majority support.

We concluded, however, that while the division of Local 801 and creation of Local 798 produced a smaller Local 801, it did not in anyway change the identity of Local 801 as the bargaining representative of the Delphi Harrison and the power train plant employees. Local 801 has the same organizational structure, by-laws and affiliation as it had before the division. Thus, there is continuity between Local 801 before and after the division as to the two units still represented by Local 801. The fact the employees at the truck and bus plant or in the alternative employees in all three units did not get to vote on the split is irrelevant to the representative status of Local 801 at the Delphi Harrison and power train plants. Therefore, we conclude that the charges in cases 9-CB-9978-1, 2 and 9-CA-36500-1,2 should be dismissed, absent withdrawal.

Finally, we conclude that the Employer violated Section 8(a)(1), (2) and (3) the Act as charged by recognizing a minority union, Local 798; by unlawfully encouraging membership in Local 798 by collecting and remitting dues to Local 798 based upon authorizations for Local 801; and by honoring the union security clause in the contract in support of Local 798. The Employer was clearly on notice of the underlying controversy. The Employer has collected and disbursed funds to Local 798 even though authorizations were for Local 801. The terms of Section 302(c)(4) require that there be a "written assignment" by the employee; that the assignment have been "received" by the employer; and that the authorization be revocable at certain times.[12] In litigation under Section 302, the courts have long held that when Congress imposed the statutory requirement of a "written assignment," Congress meant what it said.[13] Thus it would be unlawful for GM to

---

[12] The Board has added a further requirement that the authorization must have been freely given and not coerced. Luke Construction Co., 211 NLRB 602 (1974); NLRB v Atlanta Printing Specialties, 523 F.2d 783, 90 LRRM 3121 (6th Cir. 1975), enfg. 215 NLRB 237 (1974); Zurn Nepco, 316 NLRB 811, 818-819 (1995).

[13] ILA v. SeaTrain Lines, Inc., 326 F.2d 916, 55 LRRM 2278 (2d Cir. 1964); Schwartz v. Associated Musicians of Greater

check off dues to Local 798 in the absence of written authorizations. Further, the Board and Courts have held that when an employer and a minority union include a union security clause in their contract, the employer violates Section 8(a)(3) and the Union violates Section 8(b)(2).[14] The Board has ordered the employer to withdraw and withhold recognition from the union unless or until it has been certified by the Board as such representative. The Board has further ordered that the employer and unions jointly and severally reimburse the employees all dues deducted pursuant to the unlawful union security agreement.[15]

Accordingly, the Region should issue a Section 8(b)(1)(A) and (2) complaint, absent settlement, alleging that the International Union and Local 798 violated the Act as discussed above; and a Section 8(a)(2) and (3) complaint, absent settlement, alleging that the Employer violated the Act as discussed above. [*FOIA Exemption 5*

.]

B.J.K.

New York, Local 802, 340 F.2d 228, 58 LRRM 2133 (2d Cir. 1964). Cf. Moglia v. Geoghegan, 403 F.2d 110, 69 LRRM 2640 (2d. Cir 1968), cert. denied 394 U.S. 919 (Absent written agreement between employer and union, employer payments into union trusts were unlawful).

[14] Irwin Industries, 304 NLRB 78, 80 (1991), enforcement denied 980 F.2d 774, (D.C. Cir. 1992); Bryan Manufacturing Company, 119 NLRB 502, 510 (1957), enfd. sub nom. Local Lodge No. 1424, International Association of Machinist, AFL-CIO v. NLRB, 264 F.2d 575 (D.C. Cir. 1959), reversed on other grounds 362 U. S. 411 (1960); Masters-Lake Success Inc., 124 NLRB 580, 593-594 (1959); Katz's Deli, 316 NLRB 318, 334 (1995), enfd. 80 F. 3d 755, 767 (2nd Cir. 1996).

[15] 119 NLRB at 507-510.