UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

TOWN DEVELOPMENT, INC. t/a
PARKWAY CENTER INN

(Respondent)

and **Case 6–CA–37267**

PENNSYVLANIA JOINT BOARD a/w
WORKERS UNITED, SEIU

(Charging Party)

and

UNITE HERE LOCAL 57

(Servicing Agent)

Suzanne S. Donsky, Esq. (NLRB Region 6),
for the Acting General Counsel

William Bevan III, Esq. (Reed Smith LLP),
of Pittsburgh, Pennsylvania, for the Respondent

Claudia Davidson, Esq. (Law Offices of Claudia Davidson),
of Pittsburgh, Pennsylvania, for the Charging Party

Kristin L. Martin, Esq. (Davis, Cowell & Bowe, LLP),
of San Francisco, California, for the Servicing Agent

DECISION

DAVID I. GOLDMAN, ADMINISTRATIVE LAW JUDGE. In the summer of 2010, the Service Employees International Union (SEIU) and UNITE HERE entered into a settlement agreement intended to resolve a contentious dispute over resources, finances and bargaining unit representation. As part of the settlement, the unions reached an agreement on representation of various industry sectors and bargaining units. The agreement recognized that where a transfer of representation rights from one union (or affiliated labor organization) to the other was desired, objections from an employer could stymie a transfer and alternative procedures, including the filing of a representation petition or the use of a servicing agreement were detailed as methods the unions could utilize to resolve the matter.

The representation of employees at a Pittsburgh area hotel had been one of the units disputed by SEIU and UNITE HERE prior to their settlement. Pursuant to the settlement agreement, the unit was to be transferred to a UNITE HERE local from the Pennsylvania Joint Board, a labor organization affiliated with Workers United, a conference of SEIU. When the employer objected to the intended transfer, the unions, following the procedure outlined in the SEIU-UNITE HERE settlement, executed a servicing agreement under which the UNITE HERE local would act as the servicing agent for the Joint Board, performing specified representational duties, including grievance-handling, while the Joint Board remained the legally responsible collective-bargaining representative.

Informed of this arrangement, the hotel accused the unions of establishing a transfer of representation under the guise of a servicing agreement and the hotel refused to deal with the UNITE HERE local in the grievance procedure as the agent of the Joint Board.

The Joint Board filed an unfair labor practice charge against the hotel. The Acting General Counsel of the National Labor Relations Board issued a complaint against the hotel, alleging that the hotel's refusal to recognize the UNITE HERE local as the agent of the Joint Board and meet with its representatives as agents of the Joint Board was a violation of the hotel's statutory duty to bargain under the National Labor Relations Act. For the reasons set forth herein, I agree and conclude that the hotel is in violation of the National Labor Relations Act as alleged in the complaint.

Statement of the Case

On March 21, 2011, the Pennsylvania Joint Board a/w Workers United, SEIU (Pennsylvania Joint Board or Joint Board) filed an unfair labor practice charge against Town Development, Inc., t/a Parkway Center Inn (hotel or Inn or Respondent), docketed by Region 6 of the National Labor Relations Board (Board) as Case 6–CA–037267.

On September 30, 2011, based on an investigation into the charge filed by the Union, the Acting General Counsel (General Counsel), by the Acting Regional Director, for Region 6 of the Board, issued a complaint and notice of hearing against the Inn alleging a violation of Section 8(a)(1) and (5) of the National Labor Relations Act (Act). The Inn filed an answer denying all violations of the Act.

A trial in this case was conducted before me on January 30, 2012, in Pittsburgh, Pennsylvania. Counsel for the General Counsel, the Joint Board, the servicing agent UNITE HERE Local 57 (Local 57), and the Inn filed excellent briefs in support of their positions by March 6, 2012. On the entire record, I make the following findings, conclusions of law, and recommendations.

Jurisdiction

The Inn operates a hotel in Pittsburgh, Pennsylvania. During the 12-month period ending February 28, 2011, the Inn, in conducting its hotel operations, derived gross revenues in excess of $500,000, and purchased and received at its Pittsburgh, Pennsylvania facility goods valued in excess of $50,000 directly from points outside the Commonwealth of Pennsylvania. The Inn admits that at all material times it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Joint Board and Local 57 have been labor organizations within the meaning of Section 2(5) of the Act.

Based on the foregoing, I find that this dispute affects commerce and that the Board has jurisdiction of this case, pursuant to Section 10(a) of the Act.

UNFAIR LABOR PRACTICES

5

A. Background Facts

The Respondent Inn operates a Best Western hotel in Pittsburgh, Pennsylvania. Beginning in 1978, the Inn's bargaining unit employees were represented by Local 57 of the
10 Hotel and Restaurant Employees Union (HERE).[1]

In July 2004, the Union of Needletrades, Industrial and Textile Employees (UNITE) merged with HERE to create UNITE HERE. With the merger, HERE Local 57 became UNITE HERE Local 57 and became the collective-bargaining representative for the Inn's unit
15 employees.

UNITE HERE integrated intermediate regional joint board organizations, originally a feature of UNITE, into local and international union structures, creating a three-level organizational structure within the UNITE HERE umbrella. The Pennsylvania Joint Board was
20 one of a number of regional joint boards that had been part of the UNITE organizational structure and with the merger became part of UNITE HERE.

In or about December 2005, UNITE HERE Local 57 affiliated with the Pennsylvania Joint Board of UNITE HERE. At this point, then Western District Director of the Joint Board Sam
25 Williamson bargained all of the hotel contracts in Pittsburgh for units where employees were members of Local 57 and the Joint Board.[2]

The Inn was party to a collective-bargaining agreement covering the bargaining unit employees, effective from December 1, 2008, through November 30, 2011 (2008 Agreement).
30 The 2008 Agreement recognized the Pennsylvania Joint Board of UNITE HERE Local 57 as the sole and exclusive collective-bargaining representative for the unit employees.

In March 2009, in a move contested by UNITE HERE, some joint boards, including the Pennsylvania Joint Board and some local unions, left UNITE HERE and formed a separate
35 organization, Workers United, which then affiliated with the SEIU.

In March 2009, the hotel received letters from the Joint Board claiming that the Joint Board and Local 57 had disaffiliated from UNITE HERE, affiliated with Workers United and the Service Employees International Union (SEIU), and that the Joint Board and its Local 57 (newly

[1]The represented bargaining unit, which is admitted to constitute a unit appropriate for collective bargaining within the meaning of Sec. 9(b) of the Act, is currently composed of approximately 25 employees in the following positions:

> All full-time and regular part-time employees, including maids, house persons, front desk clerks, bell-persons and limousine drivers employed by the Employer at its Pittsburgh, Pennsylvania, facility; excluding guards, professional employees and supervisors as defined in the Act.

[2]As of the time of the hearing, the Pennsylvania Joint Board was comprised of approximately 20 local unions in Pennsylvania.

chartered by the Joint Board sometime after the disaffiliation) was the exclusive collective-bargaining representative of the unit employees and the extant union party to the 2008 Agreement.

However, the hotel also received correspondence during this same time period from the Local 57 officers asserting that Local 57 remained affiliated with UNITE HERE and that UNITE HERE Local 57 was the exclusive collective-bargaining representative of the unit and the extant union party to the 2008 Agreement. According to the hotel, it also reviewed correspondence from a president of UNITE HERE taking the position that UNITE HERE locals remained affiliated with UNITE HERE and that UNITE HERE was the collective-bargaining representative of the hotel employees.

The hotel found itself in the middle of these competing demands. It responded, in part, by placing checked off union dues in escrow pending further clarification or resolution of the matter.

The dispute led to unfair labor practice charges filed by both the Joint Board and UNITE HERE Local 57 against the hotel, in October and August 2009, respectively. Each union claimed that the hotel violated the Act by its refusal to remit dues to it. Essentially, each claimed they were the proper collective-bargaining representative and proper union party to the 2008 Agreement.

On March 25, 2010, the Board's Regional Director dismissed UNITE HERE Local 57's charge and indicated that, absent settlement, the Region would issue a complaint on the Joint Board's charge.[3] On June14, 2010, a non-Board settlement agreement was reached between the hotel and the Joint Board, named in the settlement agreement as the "Pennsylvania Regional Joint Board, Workers United, a/w SEIU as the successor to the Pennsylvania Joint Board of UNITE HERE, Local 57." In the settlement agreement, the hotel agreed to "continue to recognize the [Joint Board] as the sole exclusive bargaining representative for the bargaining unit of employees at the [hotel]." The parties agreed to amend the 2008 Agreement by changing all references to "Pennsylvania Joint Board of Unite Here Local 57" to "The Pennsylvania Joint Board of Workers United, SEIU, representing members of Local 57, Workers United, SEIU."

B. The SEIU-UNITE HERE Global Settlement

In late July 2010, SEIU and UNITE HERE reached a nationwide global settlement of their dispute. The global settlement provided that UNITE HERE "shall have exclusive jurisdiction over future organizing of hotel workers," which included a process for resolving jurisdiction of current and future bargaining units between the two groups. As to currently represented hotels in the U.S. and/or Puerto Rico, the global settlement provided, in relevant part:

> All units of hotel employees represented by any affiliate of UNITE HERE as of March 1, 2009[,] shall be transferred to or retained by UNITE HERE (and/or its affiliates as it directs) . . .

[3] UNITE HERE Local 57's appeal to the General Counsel's office of appeals was denied on June 22, 2010.

The settlement provided for the following procedures for transferring current units:

A. Transfer of Current Units

1. The parties shall take whatever actions are reasonably necessary to effectuate the transfer of bargaining units as specified above by December 31, 2010. The parties intend to preserve the collective-bargaining rights of the affected units with the employer. The parties shall resolve pending NLRB cases in accordance with the terms of this Settlement Agreement. Any disagreement over the identity of a unit to be transferred and/or the implementation of the transfers shall be resolved by the Permanent Arbitrator if the parties are unable to resolve them otherwise.

2. The Parties recognize that in many cases of units to be transferred, no action is needed because the employer currently recognizes the Party to which the unit is to be transferred, and no other Party contests the recognition. Where action is necessary because the employer does not recognize the union to which the unit is to be transferred or has escrowed dues payments, the Parties shall draw from the following techniques to accomplish the transfers:

a. The Party required to make the transfer notifies the employer that the Party no longer makes any claim to represent employees in the unit or a claim to all or any part of the dues payments by employees in the unit.

b. Upon the request of the receiving Party, the Party required to make the transfer withdraws all unfair labor practice charges against the employer which would prevent a representation election from going forward. Notwithstanding the above, the Parties shall also cooperate at the NLRB to make sure any escrowed dues are paid to the proper party designated under Article IV, Section A.

c. The Party required to make the transfer withdraws any representation petition.

d. The Parties jointly request the General Counsel of the NLRB to take action on pending unfair labor practice charges that will help effectuate the agreed transfers and avoid unnecessary litigation.

e. The Parties enter into an agreement with the employer to recognize the union to which the transfer is to be made upon a successful card check showing majority support for that union and a disclaimer by the other union.

f. If none of the above result in the transfer of the unit within 60 days after the Closing Date, then the Party to which the unit is to be transferred may elect either—

i. To file an election petition with the NLRB, in which case the other Party shall not intervene and shall request the NLRB to remove its name from any ballot where it might be listed as the incumbent, or

ii. To execute servicing agreements for applicable bargaining units substantially in the form set forth in Exhibit 1 hereto.

5 To summarize, the global settlement provided for the retention or transfer of units to one or the other union (or their affiliate) and specified steps to facilitate a mandated transfer. In the event the employer objected to the transfer, and would not voluntarily recognize a substituted union as its employees' union, then the settlement provided that the union to which the unit was to be transferred either file a representation petition with the Board or execute a servicing
10 agreement to service the unit as an agent of the recognized union.

Tom Snyder, chief of staff to the president of UNITE HERE, testified that he was one of five or six UNITE HERE officials who negotiated the settlement agreement. He testified that the agreement's reference to "transferring" units was intended to establish a procedure for "mov[ing]
15 properties from one Union to the other by lawful means. It worked for both Unions. Some properties went from UNITE HERE to Joint Boards and vice-versa."

Snyder testified that servicing agreements were an alternative to transferring units if a transfer of the unit was impossible because of an employer's objection. Snyder testified that the
20 unions "overriding concern was that the workers keep [c]ollective [b]argaining rights and that they not lose a Union." A valid servicing agreement would permit continued representation without risking the loss of collective-bargaining rights that could occur if a new representation election resulted in rejection of representation by employees. Neither union wanted an NLRB election to be the only means of meeting an employer's objection because "in our case we have
25 a . . . long-standing policy not to use elections . . . [w]hen we believe that the Employer was hostile to the Union and unwilling to commit to being neutral during an election process."

According to the testimony of the associate manager of the Joint Board, Sam Williamson, "[p]rior to the settlement agreement, we had an interest in every hotel in the City of
30 Pittsburgh, including this one[.]" However, pursuant to the global settlement agreement, "the goal was to have UNITE HERE Local 57 become the 9(a) rep[resentative] for workers in the hotel industry." Williamson contacted employers or their representatives to "talk to them about the general terms of the settlement agreement and legal avenues through which it could be carried out in Pittsburgh." Williamson testified at the hearing that currently the Joint Board
35 doesn't represent any other hotels in Pittsburgh other than the Inn.

C. The Inn Refuses to Allow the Transfer of the Unit to Local 57

The Inn's general manager, Delbert McBane, testified that in late July 2010, Joint Board
40 Business Agent Joe Balsamo told him that "he would no longer be representing the hotel and the unit." McBane was unsure, but thought that Balsamo told him that this change had to be completed by October. Shortly thereafter, McBane received a report from one of the hotel managers that UNITE HERE Local 57 representatives had come to the hotel property. McBane told his manager to escort them off the property and then McBane called Adam Patten, one of
45 the representatives reportedly on the property, and told him that he would need to contact the Inn's attorney, William Bevan.

A couple of days after that McBane saw Patten and UNITE HERE organizer Mackenzie Smith at the hotel front desk. They told McBane they were trying to meet with employees.
50 McBane asked them to leave.

Around this same time, in late July 2010, Joint Board Associate Manager Sam Williamson contacted Attorney Bevan and informed him of the settlement agreement. At trial, Williamson related telling Bevan that

> the dispute between SEIU and UNITE HERE had been resolved at the national level. Part of that resolution was that the UNITE HERE would receive jurisdiction over the hotel industry and that . . . we wanted to explore ways of essentially transferring representation of the employees of the Parkway Center Inn to UNITE HERE through voluntary recognition.[4]

On behalf of the hotel, Bevan informed Williamson, orally and then in writing, that the hotel would not agree to voluntarily recognize UNITE HERE. In correspondence to Williamson dated August 31, 2010, Bevan, relying upon the recent Regional Director's disposition of the charges filed against the Inn, and upon the settlement agreement recently entered into between the Inn and the Joint Board, indicated that the Inn would not recognize UNITE HERE Local 57 "until such time as that union demonstrates, in an NLRB-conducted election, that it is the lawful representative of the Inn's employees." According to Williamson, in his conversations with Attorney Bevan, Bevan explained that

> the feeling coming out of the management and ownership of the Inn was that it had complied with what it had been asked to do by the Board in settling the charges and entering into a non-Board settlement agreement with the Joint Board months earlier and that it was particularly frustrating to management that they . . . would be asked to do essentially the opposite just a few months later.

In light of the Employer's opposition to the change in bargaining representative, the officers of the Joint Board then began to explore other ways of implementing the SEIU-UNITE HERE settlement. In December 2010, Williamson asked Bevan if the hotel would recognize UNITE HERE Local 57 as the bargaining representative on the basis of a voluntary card check. On December, 16, 2010, Bevan, after further conversations with Williamson, wrote to Williamson and confirmed that the hotel would not recognize UNITE HERE Local 57 based on a voluntary card check. Bevan reiterated that for the hotel to accord recognition to UNITE HERE Local 57, the hotel would require demonstration of the union's majority support through a Board-conducted election.

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[4] I reject the Respondent's effort (R. Br. at 8) to assert as fact the account of Williamson's comments to Bevan set forth in Bevan's August 31 letter to Williamson. (R. Exh. 18.) In that letter, Bevan wrote that Williamson told him in their conversation that the Joint Board "would be abandoning its representation" of the bargaining unit. Williamson testified credibly and denied making this statement to Bevan. Bevan did not testify. The account of the conversation in Bevan's letter is uncorroborated hearsay to the extent it differs from Williamson's account, inadmissible for proving what Williamson stated to Bevan (much less the truth of the matters purportedly asserted therein). See *Southern Stone Co. v. Singer*, 665 F.2d 698, 702–703 (5th Cir.1982). Contrary to the Respondent's assertion on brief, Williamson's failure to write Bevan back to correct the record does not provide a reasonable basis to find an admission by silence. *Southern Stone Co.*, supra.

In any event, this dispute is of little consequence. Whether or not the Joint Board representative talked in terms of abandoning the unit, there is no question but that based on the terms of the global settlement agreement, the initial intent and preferred course of the Joint Board was to transfer the unit to UNITE HERE and, thereafter, no longer to represent these unit employees.

D. The Servicing Agreement

Williamson consulted with David Melman, manager of the Joint Board, as well as with counsel. Consistent with the SEIU-UNITE HERE settlement provisions, Melman and Williamson decided to pursue a servicing agreement with UNITE HERE.

The servicing agreement entered into between Local 57 and the Joint Board was based on the model servicing agreement attached to the global settlement agreement. The text of the Joint Board-UNITE HERE Local 57 servicing agreement is reproduced here:

SERVICING AGREEMENT

This SERVICING AGREEMENT is entered into between UNITE HERE Local 57 ("UNITE HERE") and the Pennsylvania Joint Board, Workers United, SEIU ("Joint Board") on this 23rd day of December 2010.

WHEREAS, Joint Board is the sole and exclusive collective-bargaining representative for a unit of employees at Parkway Center Inn ("Hotel"); and

WHEREAS, Joint Board wishes to obtain for its members at the Hotel the professional services available through UNITE HERE, and UNITE HERE is willing to make its professional services available to Joint Board's members at the Hotel;

THEREFORE, it is AGREED as FOLLOWS:

1. **<u>Effective Date</u>**

The terms of this Servicing Agreement shall become effective on December 31, 2010.

2. **<u>Cost of Services</u>**

Joint Board shall reimburse UNITE HERE for the costs of the services outlined herein by paying a base fee of $31.40 per month per member serviced and additional amounts as agreed for special or particularly time-consuming services by UNITE HERE. The amounts due and owing under this Agreement to UNITE HERE shall be paid within 30 days of receipt from the employer for the period covered by this Agreement. In the event that Joint Board receives less than the full amount of dues from the employer for any particular month, the base fee for that month shall be adjusted to reflect the diminished income. In the event that UNITE HERE provides services for less than a full month, it shall be entitled to a pro-rated base fee based on the number of days it provides services under this Agreement in that month.

3. **<u>Duration of Agreement</u>**

This Servicing Agreement shall remain in full force and effect for a period of one year. The duration of this Servicing Agreement may be mutually extended

by the parties. Additionally, this Agreement can be altered, amended, or rescinded by the mutual agreement of the parties. Either party may unilaterally terminate this Agreement by giving three months notice to the other party, provided that if Joint Board terminates this Agreement, it shall reimburse UNITE HERE for all unamortized fixed costs, including personnel costs, incurred in preparing for and performing the services under this Agreement.

4. **Services Provided By UNITE HERE**

For the duration of this Servicing Agreement, UNITE HERE's staff, acting as designated agents of Joint Board, shall provide the following professional services to Joint Board for its members at the Hotel:

Representation in the grievance procedure and at arbitration hearings

Representation at labor-management meetings

Assistance to members appearing before the National Labor Relations Board on behalf of Joint Board in matters arising out of the Hotel

Assistance to Joint Board in collective-bargaining negotiations

Site visits to the workplace

5. **Oversight By Joint Board**

The UNITE HERE staff member assigned to the day-to-day servicing of the Hotel will meet on a regular basis with a Joint Board representative to review the status of representation matters within the unit. In addition, UNITE HERE will provide Joint Board with advance notice of all membership meetings for the Joint Board's members and clear all major correspondence with Joint Board. The parties acknowledge that Joint Board has the ultimate responsibility for collective-bargaining matters on behalf of the Hotel and is responsible for fulfilling the duty of fair representation to members of the Hotel.

6. **Services Provided By Joint Board**

For the duration of this Agreement, Joint Board shall continue to administer the collection of membership dues, and shall have access to, and may assist with, all membership meetings for the Joint Board's members, and shall have access to all records associated with the Hotel.

7. **Designation of Agency Status**

Joint Board shall notify the Employer in writing of its designation of the appropriate employees of UNITE HERE to serve as the agents of Joint Board in providing services to Joint Board's membership at the Hotel.

Should the Employer challenge or refuse to accept the legitimacy of this Servicing Agreement, the parties will cooperate in processing the legal actions necessary to its enforcement. (This may include filing an unfair labor practice

charge in the name of Joint Board). UNITE HERE will provide professional assistance in this process. During the pendency of this process, Joint Board will continue to provide representation and the administration of all aspects of the collective-bargaining agreement through its own staff until such matter is resolved. Reimbursement provided in Section 2 shall begin when UNITE HERE is able to begin performing the services required under this Agreement.

8. **Structure and Members' Rights**

a) Following the implementation of this Servicing Agreement, the same rank-and-file officers and other employee-representatives, under the same shop-floor representation structure that existed prior to implementation of this Agreement, shall continue holding elections to fill any vacancies;

b) Following implementation of this Servicing Agreement, [Joint Board[5]] members at the Hotel will continue to be full members of Joint Board with the right to vote in Joint Board elections and otherwise participate in Joint Board's affairs.
.

c) Nothing herein shall prohibit UNITE HERE from permitting Joint Board's shop-floor leaders or members from the Hotel to participate in UNITE HERE's educational functions, or appearing as guests at other UNITE HERE functions.

9. **Severability**

The parties hereto believe that all provisions of this Servicing Agreement comply with applicable law. However, should any position of this Agreement be found illegal by any tribunal of competent jurisdiction this shall not affect the remainder of the Agreement. Rather, the parties shall promptly meet to negotiate an acceptable, lawful substitute to the stricken provisions.

Explaining the servicing agreement, Williamson testified that “[t[he servicing agreement provides for regular meetings between, among us, you know, and really ultimately for the Joint Board to direct their work as it pertains to the Parkway Center Inn.”

Williamson testified that UNITE HERE Local 57 was qualified to be the servicing representative because of UNITE HERE’s extensive representation of hotel and hospitality workers nationality and in the Pittsburgh area. Williamson explained that

[5]Williamson testified that at this point in the text the Servicing Agreement contained an error and inaccurately stated “UNITE HERE” instead of “Joint Board.” I credit Williamson’s testimony on this point, which makes sense in the context of the whole agreement, as the agreement otherwise (and repeatedly) refers to the employees as Joint Board members. In addition, the retention of the employees as Joint Board members is consistent with the “model” servicing agreement attached to the SEIU-UNITE HERE global settlement agreement.

> UNITE HERE represents all of the other hotels in the City of Pittsburgh, they follow industry trends and have their pulse on the industry in a way that the Joint Board right now simply does not. The hospitality industry is no longer a focus of [ ] mine or a focus of our Union's.

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As a result of the global settlement agreement, the Joint Board no longer represents any of the other hotels in Pittsburgh. Williamson explained that UNITE HERE is the union

> for hospitality workers with exclusive jurisdiction currently and for the future in that industry according to [the SEIU-UNITE HERE] settlement agreement, their Union brings expertise to the table that benefit[s] both the Joint Board and the workers there [at the hotel]. There's a certain amount of . . . power that the workers gain and expertise that they benefit from by receiving the services of the Union that represents all of the other people who do the same work as them in the region and across the country.

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Williamson testified that the $31.40 per-month-per-member base fee paid by the Joint Board to UNITE HERE pursuant to Section 2 of the Servicing Agreement represented 80 percent of the total amount of monthly dues at the time the agreement was entered into, but because of a dues increase implemented since that time, the $31.40 figure currently constitutes a little less than 80 percent of dues charged per employee.[6]

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E. The Inn's Refusal to Recognize or Meet with Local 57 as the Agent of the Joint Board

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On January 25, 2011, Williamson wrote to the Inn's general manager McBane advising McBane that

> [t]he Pennsylvania Joint Board of Workers United, SEIU has retained UNITE HERE Local 57 to assist in providing service to the employees in the Joint Board bargaining unit at the Best Western. The Local 57 personnel who will be carrying out these duties are:
>
> Adam Patten
> Mackenzie Smith
>
> Please give these representatives your cooperation. As the Joint Board retains ultimate responsibility for the representation of this unit of employees and will engage in regular oversight of the work of the Local 57 representatives, I invite you to bring to my attention any problems that you believe may interfere with effective representation of these employees.

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Williamson testified that he selected Patten and Smith because they were the ones directing the work of UNITE HERE in Pittsburgh.

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Attorney Bevan responded by letter dated January 27, asking for four days to respond, and asking Williamson not to send the UNITE HERE representatives to the hotel property until Bevan had an opportunity to review the letter and discuss it with the hotel.

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[6] Williamson was the sole witness for the General Counsel. His testimony was uncontradicted, presented credibly, and I credit it.

On January 31, 2011, Bevan responded with a letter to Williamson questioning the Joint Board's motives for the servicing arrangement:

> The Inn's question, at this point, is why? Your organization in the past has not required any assistance from representatives of a completely different International Union to carry out its statutory responsibilities. Indeed, in the immediate past, the Joint Board has bitterly opposed Local 57's attempts at representation of the employees at the Inn. You will pardon the Inn's skepticism, but the servicing arrangement outlined in your letter appears to be a device to transfer recognition, in fact, if not in law, to Local 57, pursuant to the National Settlement Agreement between the two unions. . . .
>
> At bottom, if the Joint Board no longer wants to represent the unit at the Inn because of "political consideration" based on the National Settlement Agreement between Workers United and Unite Here, it should simply disclaim interest. If Local 57 wants to represent the employees, it should file an election petition with the NLRB and the Board can determine whether the Joint Board should be allowed to disclaim representation during the terms of the current labor contract between the Joint Board and the Inn. The current arrangement outlined in your letter of January 25 seems to be nothing more than an end around the election process, and the Inn will not go along with it for the reasons previously set forth in my August 31, 2010 and December 16, 2010 letters to you.

In early February, Williamson telephoned McBane to tell him that UNITE HERE representatives Patten or Smith would be contacting McBane to schedule a grievance meeting regarding a recent employee grievance. McBane asked if Williamson had received Bevan's recent letter. Williamson said he had but "it was our position that the hotel had a legal obligation to deal with the agents we assigned to the hotel and that we expected them to comply with their legal obligation regardless of [Bevan's] letter." In a letter dated February 3, 2011, McBane wrote to Williamson, summarizing their conversation, and stating:

> Please be advised, based on the letter from our counsel that we will not agree to meet with either Mr. Patten or Ms. Smith. They are representatives of a different union, and one that is not recognized by the Inn as the bargaining representative of our hourly employees. We will be happy to meet with you, Joe Balsamo, or any other representative of the Pennsylvania Joint Board ("Joint Board"). The Joint Board is the lawful representative of our employees. I would suggest that we proceed with the grievance meeting with either you or Mr. Balsamo, or both, and if the Joint Board wishes to file a charge concerning our unwillingness to meet with representatives of Unite Here Local *57,* you can, of course, do so. This seems to me to be a better and more efficient course of action so that the processing and possible resolution of this grievance is not delayed pending the NLRB's review of the union representatives' issue.

As a result of the Inn's position, Joint Board Business Agent Joe Balsamo handled the grievance meeting for the Joint Board. He also has handled the subsequent grievances arising at the hotel. More generally, the servicing agreement has not been in effect due to the hotel's unwillingness to accept UNITE HERE as the servicing agent of the unit. No compensation has been remitted to UNITE HERE Local 57 pursuant to the servicing agreement. Williamson has led the ongoing collective-bargaining negotiations with the hotel, which as of the date of the trial

had comprised three meetings (two of which took place in November 2011). The Joint Board's bargaining committee is composed Balsamo, Williamson, several hotel employee members, and a UNITE HERE staffer. At the bargaining table the parties agreed that the UNITE HERE staffer's presence did not mean that the hotel was bargaining with UNITE HERE, and that they were bargaining with the Joint Board, but could not dictate whom the Joint Board brought to the bargaining table.

There is no evidence that UNITE HERE Local 57 is currently seeking to organize or collect authorization cards from unit employees (Williamson testified that he was unaware of any such efforts by UNITE HERE).[7] UNITE HERE official Snyder testified that in UNITE HERE the title "organizer" is "a very generic term" held by most "any Union employee who works with workers." Williamson testified that UNITE HERE staff organizers "do organizing work broadly speaking, both with existing members and potentially with future members." Snyder denied that the purpose of the servicing agreement was to permit UNITE HERE to engage in organizing.

Analysis

Introduction

It is a fundamental premise of the Act that "it is the duty of an employer to bargain solely with a statutory representative and no other person or group. However, a bargaining representative may . . . confer upon an agent . . . authority to act on its behalf." *Goad Co.*, 333 NLRB 677, 679 (2001), quoting *Rath Packing Co.*, 275 NLRB 255, 256 (1985). Employers and unions have the right "to choose whomever they wish to represent them in formal labor negotiations." *General Electric Co.*, *v. NLRB*, 412 F.2d 512, 516 (2d Cir. 1969). This includes designating another labor organization as an agent. *Mine Workers, District 17*, 315 NLRB 1052, 1063–1064 (1994).

However, quite apart from a union (and an employer's) right to choose who its agents will be, while a bargaining "representative may delegate its duties under a contract, it cannot delegate its responsibilities." *Goad Co.*, 333 NLRB at 680; *Sherwood Ford, Inc.*, 188 NLRB 131, 133–134 (1971). See *Nevada Security Innovations,* 341 NLRB 953, 955 (2004). In other words, a bargaining representative is free to appoint an agent to represent it in dealings with the employer, but it cannot substitute the purported agent for itself by disavowing responsibility for the actions of its agent. The designated collective-bargaining representative cannot transfer its bargaining rights and responsibilities to another union. The bargaining representative may not "bow out" of its 9(a) responsibilities, effectively transferring its responsibilities off its shoulders and onto the purported agent. *Goad Co.*, supra; *Sherwood Ford,* supra.

Where a collective-bargaining representative has substituted another union for the bargaining representative the employer has no obligation to bargain with the new bargaining representative. *Goad*, supra.

[7] During the hearing I sustained objections to McBane's attempt to testify (according to the Respondent's offer of proof) that during March 14, 2011 employee meetings employees complained that UNITE HERE representatives had called them at home and been making visits to employees' homes. In an apparent effort to claim that UNITE HERE was organizing at the hotel, in its brief the Respondent twice returns to this point (R. Br. at 11 fn. 14, and at 20 fn. 21), but concedes that the proposed evidence would be hearsay. It was not received for that reason. (Tr. 126. 127.) No employees testified about UNITE HERE activities (or any other matters).

In this case it alleged by the General Counsel and admitted by the Respondent that the Joint Board is the collective-bargaining representative of the hotel's bargaining unit employees. It is also undisputed that the Joint Board has entered into a servicing agreement with UNITE HERE Local 57, pursuant to the terms of which UNITE HERE Local 57 is designated by the Joint Board to act as the agent for the Joint Board in carrying out certain representational functions with the hotel. The Respondent admits that it has refused to meet with representatives of UNITE HERE Local 57 to process grievances. (GC Exh. (1)(e) at ¶11.)

This refusal to recognize UNITE HERE Local 57 as the Joint Board's agent and to meet with UNITE HERE Local 57 representatives in the grievance procedure, is unquestionably a violation of the statutory duty to bargain *unless* the Respondent can—as it claims—justify its refusal to bargain with the Joint Board's agents on grounds that the Joint Board has transferred its bargaining rights and responsibilities to UNITE HERE. The Respondent believes this to be the case and offers this as its sole defense to the refusal to bargain allegations in this case.

There are three potential sources for the Respondent's defense. First, the actual conduct of UNITE HERE and the Joint Board in carrying out the representational duties and responsibilities; second, the terms of the servicing agreement; and third, what the Respondent calls the "context" in which the servicing agreement was authorized.

1. The representation

The basis of the General Counsel's complaint is the Respondent's refusal to permit UNITE HERE and the Joint Board to carry out their respective duties pursuant to the servicing agreement. As the Respondent has not permitted it, the actual representation by the Joint Board and UNITE HERE affords no basis on which to base a conclusion that the Joint Board has effectively "bowed out" of its responsibilities or transferred representative status to UNITE HERE. As counsel for the Joint Board put it in her opening statement (in a point also vigorously advanced by the General Counsel and UNITE HERE Local 57): "because the Employer has never allowed the servicing relationship to take place, there's really no conduct for you to evaluate because [UNITE HERE Local 57] have not been allowed on the premises." (Tr. 37.)

There is force to this point. Clearly, to date, the Joint Board has not transferred representation of the unit to UNITE HERE Local 57. The Joint Board has continued to perform all representational duties in the face of the Respondent's refusal to deal with UNITE HERE Local 57 as the Joint Board's agent. Thus, the actual representation of employees provides no evidence to support a claim that the Joint Board has transferred its representational responsibilities to UNITE HERE.

There is no argument or precedent for permitting the Respondent to refuse to bargain because it anticipates future action by the unions will privilege it to do so. See, *Nevada Security Innovations*, 337 NLRB 1108 (2002) (rejecting employer's objection to certification based on assertion that the union intends to transfer its bargaining rights to an affiliated union: "If after certification [the union] seeks to transfer bargaining rights, the Board can deal with that in an appropriate manner").

2. The terms of the servicing agreement

The second possible basis for the Respondent's defense is the servicing agreement between UNITE HERE and the Joint Board. This is the contract between the unions that defines the representational relationship at the hotel.

The terms of the servicing agreement do not support the Respondent's defense. Its terms include the recitation that the Joint Board remains the "sole and exclusive collective-bargaining representative" for the unit employees, and that UNITE HERE servicing staff "will meet on a regular basis with a Joint Board representative to review the status of representation matters." The servicing agreement includes the parties' acknowledgement "that Joint Board has the ultimate responsibility for collective-bargaining matters on behalf of the Hotel and is responsible for fulfilling the duty of fair representation to members of the Hotel." The agreement provides that the "Joint Board shall continue to administer the collection of membership dues, and shall have access to; and may assist with, all membership meetings for the Joint Board's members, and shall have access to all records associated with the Hotel." The agreement provides that "UNITE HERE will provide Joint Board with advance notice of all membership meetings for the Joint Board's members and clear all major correspondence with Joint Board." The agreement further provides that "[f]ollowing implementation of this Servicing Agreement, [Joint Board] members at the Hotel will continue to be full members of Joint Board with the right to vote in Joint Board elections and otherwise participate in Joint Board's affairs."

Delegated to the UNITE HERE under the agreement is grievance and arbitration representation and representation at labor-management meetings, assistance to members appearing before the Board on behalf of the Joint Board, site visits to the hotel, and assistance to the Joint Board in collective-bargaining negotiations.

The duties delegated to UNITE HERE are typical contract administration and representational duties. As the General Counsel points out (GC Br. at 16), these duties

> in no manner impart Section 9(a) status to the agent. Indeed under the terms of the Servicing Agreement, the agent is responsible for regularly reporting to the Joint Board its progress in carrying out these duties and the Joint Board is responsible for overseeing the agent's actions vis-à-vis the unit employees.

It is also noteworthy that the servicing agreement may be terminated by either party upon three months notice. This means the Joint Board is free to retract the delegation to its agent upon notice (and similarly, UNITE HERE can cease being the agent should it choose). This is inconsistent with a purported transfer of representational status to UNITE HERE, as the arrangement can be ended by the Joint Board should it decide to, and at that point the Joint Board would continue as the collective-bargaining representative but would administer the contract and engage in bargaining on its own. It is also important that under the servicing agreement compensation to UNITE HERE (at the time the agreement was executed) equaled approximately 80% of the dues owed by a Joint Board member, a shortfall that suggests that the unions do not view UNITE HERE as exclusively responsible for representation of the employees and that the Joint Board will continue to play a role in the representation. In addition, the servicing agreement provides that if the Joint Board receives less than full dues, it will remit less to UNITE HERE Local 57.

The Joint Board has, for sure created an agency relationship by delegating contractual and statutory duties to UNITE HERE. But nothing in the agreement suggests that the Joint Board has disavowed legal, financial, or other responsibility for its agents' actions. In other words, while the Joint Board delegated many (but not all of) its duties in the servicing agreement, it did not delegate its responsibilities.

In this regard, it is profitable to compare the servicing agreement here with that in other cases in where a servicing agreement has been challenged as a disguised transfer of bargaining rights.

5 In *Goad, Co.*, 333 NLRB 667 (2001), the Board found that while the collective-bargaining representative claimed it had merely hired a servicing agent, in fact, it had effectively transferred jurisdiction of the unit to the other union.

In *Goad*, supra, the servicing agreement made the servicing agent solely and completely 10 responsible for "negotiating and servicing a new contract" with the employer, including grievance handling and "other actions comprising the duty of representation." In other words, the collective-bargaining representative left itself no role at all in the representation process. In this case, while UNITE HERE is to provide representation at grievance and arbitration hearings at labor-management meetings, its role includes providing "[a]ssistance to Joint Board in 15 collective-bargaining negotiations," which is far less than a mandate to replace the Joint Board at the bargaining table. I need not reach the issue of whether it would be permissible for a bargaining representative to contract out to an agent the entirety of its representational duties, while maintaining control and legal and financial responsibility for its agent and the agent's conduct, but in this case, there has not been such a complete delegation. That cuts sharply 20 against the suggestion that the Joint Board has transferred its representational responsibilities.

Similarly, as the Board explained in *Goad*, supra, the individual servicing agent selected to represent the designated union was chosen by the servicing union's business agent. In our case, Joint Board Representative Williamson testified that he chose the UNITE HERE 25 agents that were designated to service the hotel unit and that it is "for the Joint Board to direct their work as it pertains to the [hotel]." In this regard, Williamson referenced that the servicing agreement expressly provides, in a section titled "Oversight By Joint Board," that "[t]he UNITE HERE staff member assigned to the day-to-day servicing of the Hotel will meet on a regular basis with a Joint Board representative to review the status of representation matters within the 30 unit." This same section of the servicing agreement states that "[t]he parties acknowledge that Joint Board has the ultimate responsibility for collective-bargaining matters on behalf of the Hotel and is responsible for fulfilling the duty of fair representation to members of the Hotel." [8]

[8] On brief, the Respondent makes much of Joint Board Representative Williamson's statement that, pursuant to the global settlement agreement (and the Employer's refusal to accept the transfer of the unit to Local 57), he was required to cause the Joint Board to enter into the servicing agreement. The Respondent repeatedly asserts that Williamson and the Joint Board were "forced" (R. Br. at 21 & 21 fn. 23, 22) to sign the agreement. I note that this is in no way analogous to the lack of discretion enjoyed by the principals in *Goad,* supra, and *Sherwood*, supra, over their purported servicing agents, a factor that was important to the Board's condemnation of those servicing agreements. Williamson and the Joint Board were "forced" to sign the agreement only in the sense that any agent or affiliate of an employer (such as a company lawyer or human resources agent) is "forced" to act in accordance with the agreements reached by the entity for which he or she is employed. Thus, Williamson was "forced" to sign the servicing agreement in the sense that he worked for the Joint Board and the Joint Board chose to affiliate and remain affiliated with Workers United of SEIU, which entered into an agreement with UNITE HERE. The essential point is not that Williamson was "forced" to follow the directives of his employer the Joint Board and Workers United, but that under the servicing arrangement Local 57 and its representatives are bound to follow the direction of the Joint Board (and of Williamson as a high-ranking official of it).

Finally, but importantly, the servicing agreement in *Goad* provided that the putative servicing agent would hold the designated bargaining agent harmless "including defense costs" in the event "of any claim arising during the term of the new contract . . . . which claim arises from [the designated bargaining representative's] duty of fair representation of the employees." 333 NLRB at 678. This provision, which, as the Board explained "stands the law of agency on its head" meant that the designated bargaining representative was fully indemnified by the servicing agent for the acts of the "purported agents" of the bargaining representative. 333 NLRB at 679. In the instant case, there is no provision in the Joint Board-UNITE HERE servicing agreement that shifts liability to the servicing agent, indemnifies the Joint Board for UNITE HERE's actions, or in any way absolves the Joint Board of its legal responsibilities as the unit's collective-bargaining representative. To the contrary, as noted above, the servicing agreement here expressly provides that the Joint Board retains "ultimate responsibility" for "collective bargaining matters" and for "fulfilling the duty of fair representation to members" of the unit.

It is also worth comparing the instant servicing agreement with the resolution authorized in *Sherwood Ford*, supra, adopted by the membership of Local 1 and authorizing the Teamsters Local 604 to represent Local 1 "in collective bargaining and all other matters related to the hours, wages and other terms and conditions of employment of the [unit employees]." The resolution authorized Local 604 "to do all things necessary and/or reasonably convenient or desirable by it in such capacity in behalf of the association and the . . . employees . . . ." The resolution provided for employees to pay for Local 604's services the amount that Local 604 would derive in dues if the employees were members of Local 604 and represented directly by it and the resolution directed the association's officers "to follow and carry out all instructions received from said Local 604 as it relates to matters of collective bargaining." This last quoted provision, in particular, offered support to the Board's conclusion that the unions were attempting to substitute Local 604 in place of Local 1 as the statutory bargaining representative. As the ALJ remarked, in reasoning adopted by the Board, referencing the latter provision: "It was there that the switch became manifest, for the dog had now become the tail, and Local 1 was thenceforth to be wagged at will by Local 604. Under elementary principles of agency law, however, the principal controls the agent, not the reverse." 188 NLRB at 134.

Consistent with this, in a case considered by the General Counsel's Division of Advice, the General Counsel found that evidence that the agent controlled the terms of the arrangement between it and the 9(a) representative suggested an impermissible effort to transfer 9(a) responsibility to the servicing agent. In *Arlen Beach Condominium Ass'n, Inc.*, Case 12–CA–24507 (Div. of Adv. November 8, 2004), the Division of Advice found that "the agreement makes the [servicing agent] the final arbiter of any dispute under the agreement, and thus the [section 9(a) representative] would not be able to prevail in a dispute with the [servicing representative] over how best to represent the employees." Id. at 5. Further in order to cancel the agreement, the servicing representative had to consent to the cancellation. According to the Division of Advice, these provisions "belie the existence of a bona fide agency relationship. . . . The contractual inability to control its ostensible agent or terminate the agency relationship makes clear that [the section 9(a) representative] has impermissibly tried to delegate its 9(a) responsibility."[9]

[9]Division of Advice memoranda represent the views of the General Counsel's office. They are not Board decisions and have no precedential weight. They are of persuasive weight to the extent that the reasoning is persuasive. In this case, the *Arlen Beach* memorandum helps to explain the position of the General Counsel and the type of evidence that (he would agree) would be counter to his position.

The servicing agreement in the instant case provides no similar bases supporting the conclusion that the Joint Board has substituted UNITE HERE as the statutory bargaining representative. As discussed, the delegation of duties to UNITE HERE is less than the total and complete delegation of duties transferred to the agent in *Sherwood Ford*. Unlike in *Sherwood Ford*, payment by the Joint Board to UNITE HERE for services rendered is not based on the amount the agent would receive if the unit employees were members of the servicing agent and represented directly by it. Rather, under the servicing agreement, the Joint Board pays UNITE HERE an amount less than the dues owed by a Joint Board member, a shortfall that suggests that the unions do not view UNITE HERE as exclusively responsible for representation of the employees. Moreover, in the instant case, unlike in *Arlen Beach*, either party to the servicing agreement may cancel the agreement without the consent of the other party. And, most significantly, unlike in *Sherwood Ford*, supra, there is no provision requiring the principal to take orders from the purported agent. The terms of the servicing agreement provide no basis for the refusal of the employer to meet with UNITE HERE agents of the Joint Board.

Finally, in a third Board case, *Nevada Security Innovations*, 341 NLRB 953 (2004), the certified union entered into an agreement with Local 2001 providing for the local to hold meetings with the union's bargaining unit membership, create mailings for the membership, "work with [the employer's] leadership, keep up to date records of all complaints, unfair labor practices and other items "that need to be handled," and keep the union informed of the local's activities. 341 NLRB at 954. The agreement between the local and the union stated: "As the certified bargaining representative, the [union] will, of course, be in charge of negotiations once the Company agrees to sit down and bargain." Id.

The Board found the employer was obligated to bargain with the union, and rejected the employer's defense that the union had transferred bargaining rights to the local, pointing out that the union's agreement with the local "emphasized that the Union, not Local 2001, would be in charge of negotiations on behalf of the unit." 341 NLRB at 953, 954. Similarly, in the instant case, the agreement provides that the bargaining representative—i.e., the Joint Board—retains "ultimate responsibility for collective-bargaining matters on behalf of the Hotel."

In sum, the Joint Board's delegation of agency to UNITE HERE Local 57 is fully consistent with its statutory obligations. The Joint Board (1) retains oversight responsibilities and the servicing agreement requires meetings between the unions on a regular basis to review representation matters; (2) retains responsibility for the duty of fair representation; (3) has access to all records about the unit; (4) has delegated less than the full amount of representational duties to the servicing agent; (5) is free to cancel the servicing relationship upon notice (6) retains hotel employees as members of the Joint Board and these employees retain full rights to vote and participate in Joint Board affairs; and (7) reimburses the servicing agent for its services in an amount less than the full amount of dues collected from the unit members.

3. The context of the servicing agreement's adoption

This brings us to the nub of the Respondent's case. While neither the terms of the servicing agreement nor the actual representation of employees provides a basis for questioning the arrangement between the Joint Board and UNITE HERE, the Respondent contends that the "context" in which the servicing agreement was adopted does.

The context relied upon by the Respondent involves undisputed facts: acting for the General Counsel, the Regional Director dismissed UNITE HERE's charge premised on the

claim to be the unit's collective-bargaining representative and was prepared to issue a complaint on the Joint Board's charge, effectively siding with the Joint Board's claim to be the 9(a) representative of the hotel employees. Propelled by the Region's position, the Respondent reached a settlement with the Joint Board that included recognition of the Joint Board as the unit employees' collective-bargaining representative. Then, only a few months later, pursuant to the global settlement between SEIU and UNITE HERE, the Joint Board told the Inn that it wanted to transfer bargaining rights for the unit to UNITE HERE. When the employer objected, and then refused a proposal to recognize Local 57 based on a card check, the unions, following the terms of the global settlement, entered into a servicing agreement.

The Respondent contends there is no legitimate explanation for the unions' servicing agreement. It argues (R. Br. at 19) that it is an effort to circumvent an adverse Board ruling, to wit the Regional Director's resolution of the unions' competing unfair labor practice charges, as well as a circumvention of the Respondent's non-Board settlement with the Joint Board. The Respondent points out that there is no evidence that hotel employees wanted a servicing agreement or that it was discussed with unit employees before the Joint Board agreed to it. (R. Br. at 22.) The Respondent dismisses (R. Br. at 21) the unions stated rationale of UNITE HERE hotel industry "expertise" because "the Joint Board had no need to enter into a Servicing Agreement" as it had previously represented hotels throughout Pittsburgh. The Respondent maintains that the "obvious purpose of the Servicing Agreement between the Joint Board and Local 57 is to facilitate access to the Inn's employees for organizational purposes in order to transfer recognition from one union to another in accordance with the global private settlement agreement of their parent unions." (R. Br. at 19.) The Respondent argues that the servicing agreement was a requirement of the global settlement agreement and declares that "the servicing agreement must be seen for what it is in fact—not for what it says—a transparent attempt to transfer the Inn's employees to Local 57." (R. Br. at 22.)

The Respondent's evidence adds up to exactly nothing. The Respondent's "points" in support of its case misapprehend the issue at stake. Thus, while the Act's concern with employee sentiment is real, and meaningful, it does not extend to dictating how, when, or if, a union discusses a servicing arrangement with employees or permit an employer to refuse to bargain when a union does not prove it discussed these matters with employees.

The Joint Board's decision to rely on Local 57's expertise is a matter for it to decide, not the Employer, but, in any event, Williamson's explanation is believable: since the global settlement the Joint Board has, so to speak, gotten out of the hospitality industry in Pittsburgh, leaving it UNITE HERE. The Inn is now the Joint Board's sole unit in the hospitality industry and closer alliance with UNITE HERE makes sense on that ground alone.

As to whether the ultimate purpose of the servicing agreement is to enable Local 57, at a later date, to accomplish the unions' original goal of becoming the 9(a) representative, I, like the Respondent, can speculate, but cannot draw a conclusion based on the evidence. But even assuming that this is an ultimate objective, it cannot justify a refusal to bargain by the Respondent. Such a motive cannot undermine the legitimacy of a properly conducted servicing agreement.

This, indeed, seems to be the key error animating the Respondent's defense: it deems illegitimate an otherwise legitimate servicing agreement that could lead, in the future, to a lawful transfer of collective bargaining rights. However, the Respondent's argument misconceives the statutory policy that its defense has placed at issue. Board policy privileges an employer to refuse to bargain where a union has been *improperly substituted* for the 9(a) representative

(through the pretense of a servicing agreement or otherwise). But there is no policy discouraging servicing agreements and no policy discouraging the possibility that a union may translates its permissible and unobjectionable functioning as a servicing agent into a basis to *properly* take steps to become the designated 9(a) representative of the unit.

The reason that an employer is not required to bargain with an improperly substituted union is that the new union is not the designated representative of employees. However, should employees properly make the new union their designated representative, the employer has no cause to complain that exposure to the new union as a servicing agent benefited the new union's acquisition of majority support from employees. Thus, at a future date, should the unit employees vote in a representation election to make Local 57 their bargaining representative, or express the same choice through authorization cards accepted by the employer as a basis for recognition, no policy of the Act would be offended by the fact that Local 57 gained support of employees from its service as agent of the Joint Board. Indeed, the Act's policy in support of employee choice would only be vindicated, and vindicated in a manner consistent with the Act's concern for stability in bargaining relationships.

In this regard, although it is not controlling precedent, I agree with the reasoning of the General Counsel's Division of Advice in *Suburban Pavilion Inc.*, Case No. 8-CA-33560 (Div. of Adv. Feb. 20, 2003), another case considering whether an employer violated the Act by refusing to deal with a labor organization (SEIU) designated as the servicing agent of the recognized union (HERE). The Division of Advice memorandum acknowledged that "[u]ltimately, the two Internationals plan to transfer representational responsibilities for HERE's health care units to SEIU." Id. at 2. However, this was not considered a defense to the charge:

> Although HERE ultimately hopes to transfer representational responsibility for the Suburban unit to SEIU, unlike Goad and Sherwood Ford, the unions here did not execute the Agreement to circumvent an adverse Board determination, nor have they actually executed such a transfer. Rather, until such time as a lawful transfer can be accomplished, Local 10 merely delegated certain duties to District 1199, and unquestionably retained ultimate authority for representing the Suburban unit employees.

Id. at 9 (footnotes omitted).

At bottom, this is the sum and substance of the Respondent's case: the servicing arrangement—unassailable on its own terms, and to date, unassailable in practice—should be deemed illegitimate because it might facilitate a preexisting interest that the Joint Board and Local 57 have in making Local 57 the next designated union at the hotel. The Respondent finds an offense to the Act in this possibility but there is none, as long as the Joint Board retains its 9(a) responsibilities until such time as Local 57 properly becomes the representative based on the majority support of the unit, demonstrated by a method and procedure accepted by Board rules.

Finally, the Respondent's contention that the unions have circumvented Board rulings by entering into the servicing agreement is a red herring. The "circumvention" of Board rulings described in *Goad* and *Sherwood*, involved servicing agreements that effectively provided for a de facto transfer of bargaining responsibility to a union that Board rulings had determined was not the collective-bargaining representative. Here, the Respondent has failed to show that the servicing agreement provides for a transfer of bargaining responsibility, either by its explicit terms or by effect. Without such a showing, there can be no illicit "circumvention." Indeed,

rather than circumvention, the evidence shows an accommodation by the unions to the legal landscape they faced. The Respondent was within its rights to refuse to agree to a transfer of bargaining rights to Local 57, and within its rights to refuse to agree to recognize Local 57 based on a card check. Confronted with this legal reality, the unions crafted a lawful alternative arrangement that permitted less than the desired transfer but permitted Local 57 to perform representational duties. It is unconvincing to suggest that because the parties sought an arrangement—i.e., the privately-arranged transfer of the unit to Local 57—that would have an unpalatable legal consequence—i.e., an unchallengeable refusal to bargain by the employer—that the crafting of a lawful alternative arrangement may be judged, without further evidence, as tantamount to the prohibited legal arrangement.

In short, there is no evidence at all that the Joint Board or Local 57 of UNITE HERE has taken any action to offend the policies of the Act. Until such time as the evidence shows that there has been an *impermissible* transfer of bargaining rights to Local 57, there is no basis for the Respondent to refuse to deal with the Joint Board's designated servicing agent.

Based on the Respondent's failure to recognize UNITE HERE Local 57 as the Joint Board's servicing agent, and the Respondent's refusal to meet with Local 57 representatives to discuss grievances, I find a violation of the Act as alleged.

Conclusions of Law

1. Respondent Town Development, Inc., t/a Parkway Center Inn (Respondent) is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Charging Party Pennsylvania Joint Board a/w Workers United, SEIU (Pennsylvania Joint Board) and the servicing agent UNITE HERE Local 57 are labor organizations within the meaning of Section 2(5) of the Act.

3. At all material times since June 2010, the Pennsylvania Joint Board has been the recognized exclusive collective-bargaining representative of the Respondent's bargaining unit employees.

4. The Respondent violated Section 8(a)(1) and (5) of the Act by refusing to recognize UNITE HERE Local 57 as the Pennsylvania Joint Board's designated servicing agent and by refusing the request of the Pennsylvania Joint Board to meet with Local 57 representatives for the purpose of discussing contract administration including grievances.

5. The unfair labor practices committed by Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist there from and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent shall recognize UNITE HERE Local 57 as the servicing agent of the Pennsylvania Joint Board, which is the designated collective-bargaining representative of the Respondent's bargaining unit employees. Upon the Pennsylvania Joint Board's request, the

Respondent shall meet with representatives of UNITE HERE Local 57 for the purpose of discussing contract administration including grievances.

The Respondent shall further be ordered to refrain from in any like or related manner abridging any of the rights guaranteed to employees by Section 7 of the Act.

The Respondent shall post an appropriate informational notice, as described in the attached appendix. This notice shall be posted in the Employer's facility or wherever the notices to employees are regularly posted for 60 days without anything covering it up or defacing its contents. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 3, 2011. When the notice is issued to the Employer, it shall sign it or otherwise notify Region 6 of the Board what action it will take with respect to this decision.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[10]

ORDER

The Respondent Town Development, Inc. t/a Parkway Center Inn, Pittsburgh, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from:

a. Failing and refusing to recognize UNITE HERE Local 57 as the servicing agent of the designated collective-bargaining representative of the Respondent's unit employees, the Pennsylvania Joint Board.

b. Refusing the request of the Pennsylvania Joint Board to meet with representatives of UNITE HERE Local 57 for the purpose of discussing contract administration including grievances.

c. In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

[10] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

a. Recognize UNITE HERE Local 57 as the servicing agent of the Pennsylvania Joint Board, which is the designated collective-bargaining representative of the Respondent's unit employees.

5 b. Upon the Pennsylvania Joint Board's request, meet with representatives of UNITE HERE Local 57 for the purpose of discussing contract administration including grievances.

c. Within 14 days after service by the Region, post at its Pittsburgh,
10 Pennsylvania facility the attached notice marked "Appendix."[11] Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to the physical posting of paper notices, notices shall be
15 distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed any facility
20 involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 3, 2011.

d. Within 21 days after service by the Region, file with the Regional Director
25 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. March 22, 2012

30

____
David I. Goldman
U.S. Administrative Law Judge

[11] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT refuse to recognize UNITE HERE Local 57 as the servicing agent of your Union, the Pennsylvania Joint Board.

WE WILL NOT refuse the request of your Union, the Pennsylvania Joint Board, to meet with representatives of UNITE HERE Local 57 for the purpose of discussing contract administration including grievances.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of rights guaranteed you by Section 7 of the Act.

WE WILL recognize UNITE HERE Local 57 as the servicing agent of the Pennsylvania Joint Board.

WE WILL, upon the request of your Union, the Pennsylvania Joint Board, meet with representatives of UNITE HERE Local 57 for the purpose of discussing contract administration including grievances.

TOWN DEVELOPMENT, INC. t/a
PARKWAY CENTER INN
(Employer)

Dated __________________ By ____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

1000 Liberty Avenue, Federal Building, Room 904, Pittsburgh, PA 15222-4111
(412) 395-4400, Hours: 8:30 a.m. to 5 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (412) 395-6899.