

**UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD**

Office and Professional Employees International Union	Case 12-RC-113181
Employer	
and	
News Media Guild, Local 31222, The Newspaper Guild, Communication Workers of America, AFL-CIO	
Petitioner	

REQUEST FOR REVIEW

I. Basis for Request for Review

The Employer hereby files the instant Request for Review based on 102.67 (c) (1) and (2) of the Board's Rules and Regulations.

The Decision and Direction of Election (DDE) issued by the Acting Regional Director of Region 18 on November 29, 2013 is based on the absence of and departure from officially reported Board precedent and therefore falls within the grounds for granting a Request for Review under Section 102.67(c) (1).

The Request for Review may also be appropriately granted on the ground that the DDE was based on clearly erroneous factual findings that prejudicially affect the rights of the Employer. Section 102.67 (c) (2).

II. Facts and Brief Statement of the Issue

A full statement of the facts set forth in the Acting RD decision need not be repeated here. The central undisputed fact is that a Local of the CWA, the employer with whom the OPEIU has a longstanding 9(a) relationship is seeking to become the 9(a) representative of OPEIU's organizers and representatives. Specifically, the Petitioner herein is a Local of The Newspaper Guild (TNG), Communications Workers of America, AFL-CIO. The question addressed in this Request for Review is whether there is a conflict of interest in these circumstances, particularly since the unit sought herein: (i) includes the organizers and representatives employed by OPEIU and; (ii) the CWA and the OPEIU seek to represent employees in the same industries.

The Acting Regional Director found that this unique situation does not create a potential conflict of interest. He based this conclusion on erroneous factual findings, incorrect statements of the OPEIU's position, a total lack of understanding or appreciation of the nature of proper collective bargaining and the misapplication of existing precedent. These points will be discussed below.

III. Argument

A. Petitioner as a 9(a) representative would be under the control of CWA, the labor organization that bargains as an employer with the OPEIU as the 9(a) representative.

The Acting Regional Director found that the Petitioner can engage in the requisite single-minded purpose of bargaining in the interest of the bargaining unit notwithstanding the fact that the Petitioner cannot strike without the approval of the CWA. He stated that there was no evidence that the CWA is involved in collective bargaining by the Petitioner or any representational activities conducted by the Petitioner except, he noted, that CWA Executive Board must approve any strikes called by the Petitioner. DDE p. 15 Preliminarily, it is noted that the self-serving testimony of Petitioner's agent that the Local has full authority to negotiate contracts is inconsistent with Art. 12 Sec. 1 of TNG By-Laws and Article XIX of TNG Constitution that state that Locals shall conduct negotiations under the supervision of TNG Executive Committee and that the Executive Committee must ratify all contracts. ER Exhibits 7 and 10.

However, even assuming the Local had full authority to negotiate a CBA except the right to call a strike, the Petitioner's position is tantamount to saying "Except for the authority of a police officer, you can drive as fast as you want." The point is, of course, that such a major constraint on authority means that there is, in fact, no real full authority. The Acting RD apparently believes that collective bargaining can be conducted normally notwithstanding Petitioner's lack of control over the timing or ability to strike. The Acting RD's conclusion in this regard fails to appreciate that the power to call a strike is the essential ingredient in effective collective bargaining. Collective bargaining without the right to call a strike is not the collective bargaining contemplated by the Act. While the strike weapon could be employed by Petitioner, it could only be employed with the approval of the CWA -- the very employer that has a bargaining relationship with the OPEIU as the 9(a) representative of over one hundred (100) CWA employees! Hearing Transcript (TR) at 503. To conclude that CWA is not involved in collective bargaining when it controls the timing and authority to engage in a strike and that its Constitution must be followed by all locals in formulating its proposals is to be blinded by Petitioner's rhetoric on its self perceived autonomy and demonstrates a complete lack of understanding of what motivates parties to

reach a collective bargaining agreement. While most international unions, including the OPEIU, require approval before a strike is initiated by a local union, the consideration by the international in these other circumstances is limited to what is best for the members of the bargaining unit. That is not necessarily the situation in this case.

Several obvious potential conflicts arise. On what basis will the CWA approve a strike request by the Petitioner? In making that decision, will the CWA have any interest in mind other than the single-minded purpose of bargaining in the interest of the unit involved herein? Art. XVIII of the CWA Constitution states that in deciding whether to authorize a strike, the Executive Board shall consider “all factors connected therewith.” Sec. 3(c). ER EX 9 at 30. There is, therefore, no limitation on what the Executive Board may consider in making its decision whether to permit the Petitioner to strike. There would certainly be an incentive for the CWA Executive Board to consider the fact that the OPEIU as the 9(a) representative may be threatening a strike against CWA. There would certainly be an incentive for the CWA to reach out to the OPEIU to offer terms upon which it would reject a strike request from the Petitioner in return for an agreement involving matters unrelated to the employees in the unit herein. Should Petitioner request from CWA the authority to strike OPEIU, it would place inappropriate pressure upon OPEIU in its negotiations with CWA and TNG. There comes a time in every set of negotiations between a union and an employer when a party must decide on the appropriate pressure to apply to the other party in order to reach an agreement. Should there be a request pending by the Petitioner to strike OPEIU, clearly inappropriate pressures would be created both on CWA and OPEIU in formulating their reaction to that request. The Acting RD suggested that the OPEIU has failed to explain how these clearly present inappropriate incentives create a conflict of interest which he characterized as merely “theoretical”. DDE p. 15 The pervasive evidence of potential conflicts can hardly be considered “theoretical” and as noted below the conclusion is contrary to Board Law that holds the potential for conflict is sufficient to disqualify the petitioner from representing the employees.

Further, the CWA exercises extensive control over the local unions affiliated with the CWA, independent of direct supervision of collective bargaining, which can have an impact on a local’s ability to act totally independently. For example, initiation fees, a portion of which must be forwarded to CWA, have to be within prescribed amounts. Art. V. Section 2. ER EX 9 at 2. Membership dues must be collected in a manner as determined by the CWA convention or the Executive Board with a per capita amount forwarded to CWA. Art. VI Sections 1 and 2, id. at 4-5. CWA sets the guidelines for assessments of members by the locals and the CWA retains the right to impose assessments on all members. Art. VI Sections 3 and 4, id. at 5. Local unions send delegates to the CWA Conventions, which have the power, *inter alia*, to determine the jurisdiction and boundaries of all locals and cause the

issuance and revocation of local charters. Art. VIII Sec. 7(d), id. at 8. Thus, merely by refusing or neglecting to conform to or abide by any direction or decision of the CWA Convention, Executive Board or referendum vote of the membership, the Petitioner could lose its charter and the CWA could take control of the Petitioner's affairs. Art. XIII Sec. 5(f) and Sec. 8, id. at 19-20. The Convention as well as the Executive Board may change the jurisdiction of a local and resolve jurisdictional disputes between locals. Art. XIII Sections 3 and 4, id. at 18-19. The employees of The Newspaper Guild are supervised by a Vice President of the CWA Art. XII Sec. 3, id. at 15. The structure of local union positions is dictated by the CWA as well as the procedures and timing of local elections. Art. XV Section 3, id. at 23.

These supervisory constraints place the locals under pervasive control of CWA. To say that collective bargaining decisions can be made totally divorced from such extensive supervision is an indication of a lack of understanding of how an international may influence decisions of a local by both direct and indirect means.

The Acting RD curiously states that there is no evidence that actual conflicts have arisen. DDE p. 15 Since the relationship sought by the Petitioner herein has not been established, the fact that no actual conflict has yet been established is a tautological statement that cannot be the basis of a rational conclusion. As the Board stated in Bausch & Lomb Optical Co., 108 NLRB 1555, 1559 (1954):

We do not believe it is incumbent upon the Board to hold, in the situation such as is involved here, which possesses latent dangers, that merely because the hazards which can be anticipated have not yet been realized, the Respondent-employer is nonetheless under a statutory duty to bargain. We do not mean to imply that given the opportunity the Union would inevitably take advantage of its position in the manner theretofore indicated. It is enough for us that it could and that the temptation is too great.

B. Bargaining unit organizers and representatives placed in a dual loyalty situation

The Acting Regional Director properly found that bargaining unit employees, as members of the Petitioner, would be obliged to follow the CWA Constitution. The Acting RD, however, failed to set forth the provision of the CWA Constitution that would apply to bargaining unit members who became members of the CWA. That provision states in pertinent part:

Article XIX, Sections 2(a) and (b):

Section 2 – Specifications of Offenses – Union Members may be fined, suspended or expelled by trial courts ... for any of the following acts:

- (a) Willfully supporting or assisting any other labor organization in connection with a claim of jurisdiction in conflict with the jurisdiction of the [CWA];
- (b) Willfully supporting or assisting any person, group of persons, or organization, in any act or activities for the purpose of seeking or obtaining the replacement of the [CWA] as collective bargaining representative.

ER EX 9 at 32-33 and ER EX 24. TR at 546

By virtue of ARTICLE 13 Section 1 of the By-Laws of the Petitioner, the members of Petitioner are subject to the CWA Constitution. (ER EX 10 at 12) Thus, should the International Representatives and Organizers involved in the instant petition become members of the Petitioner, they would be subject to being fined suspended or expelled from membership if they willfully supported or assisted OPEIU in seeking or obtaining the replacement of CWA as the collective bargaining representative. TR at 543-546; ER EX 24) This is not a theoretical issue; the above provision has been applied by CWA to expel members who violated the provision as Employer Exhibit 24 unequivocally demonstrates. Employer Exhibit 24 is an April 2011 motion presented to the CWA Executive Board in which it upholds a CWA Trial Board decision suspending a CWA member for two years for sending an e-mail to fellow CWA members inviting them to join a conference call to discuss replacing CWA with the Teamsters. ER EX 24 and TR at 543-544.

The Acting RD depreciated the potential impact on the OPEIU International organizers and representatives for OPEIU becoming bound by the CWA Constitution by stating that the impact is similar to any attempt by employees to organize and bargain collectively against their employer. DDE p. 14. Apparently ignoring the above quoted provision of the CWA Constitution, the Acting RD went on to state that there is no record evidence supporting the argument that the CWA can force the Employer's employees to be involved in CWA organizing campaigns should they become members of the Petitioner. However, that is precisely the impact of Article XIX, Section 2(a) and (b). ER EX 8 at 32-33. It must be remembered that the unit sought in this case is not one of job classifications unrelated to organizing. The Petitioner seeks to represent the organizers and international representatives of OPEIU. Organizing, by definition, is what these employees do. To subject them to the requirements of the CWA Constitution would place them in an intolerable conflict. If they had a lead that employees in a CWA unit wanted to be represented by

another union, how should the OPEIU unit employees respond, assuming it was permitted by the AFL-CIO no raiding pact? Would they report such information to their superiors at OPEIU? Would they report such information to the CWA? What if the CWA seeks to organize the telephone workers represented by the OPEIU in Puerto Rico as it has in the past? TR at 478. What potential adverse action by the CWA would the bargaining unit employees be subjecting themselves to if they worked against CWA interests? What if both unions are competing to represent the same unrepresented group of employees? To say, as the Acting RD stated, that these conflicts can be resolved by the OPEIU discharging the employees involved for any misconduct is not a responsible method of eliminating the clear problem posed by the organizers and representatives becoming members of the CWA. DDE p. 14 It is hardly an effective recommendation that the best way to avoid the hazards of Scylla and Charybdis is to drown!

This problem of a conflict of loyalties is exacerbated by the fact that Petitioner's superior body -- CWA -- is in direct competition with OPEIU seeking to represent many of the same classifications of employees. The Acting RD noted that OPEIU and Petitioner separately represent units of employees in the same industries and among employees who are similarly classified. The Acting RD cited Supershuttle International Denver, Inc., 357 NLRB No. 19 (2011) for the proposition that such competition is not sufficient to create a conflict of interest. DDE p. 10-13 The employer in that case was engaged in transportation of passengers and baggage. 357 NLRB No. 19 at 1. It was licensed to serve the Denver International Airport from the Denver metropolitan area. In order to service that area, the Employer entered into sublicense franchise agreement with shuttle van drivers to use the Employer's systems and trademarks and to provide transportation services in the applicable market. A Local of the Petitioner had entered into an agreement with the Professional Taxicab Operators Association in which the in the Association became a division of the Local. The RD found that the relationship between the Union and the Association creates a "disabling conflict of interest". Id. at 2. The Board reversed that holding noting that, even assuming the drivers of the Association and the Employer were in direct competition, no disabling conflict existed because unions commonly represent employees in the same industries often in the same competitive market. Id. at 2-3. The Board cited as an example the situation in Commercial Workers, Local 951 (Meijer, Inc) 329 NLRB 730, 733-736 (1999) en'f'd. 307 F.3d. 760 (9th Cir. 2002) en banc, cert. denied 537 U.S. 1024 (2002) Id. at 3. These situations are obviously distinguishable from a situation, as in the instant case, where both the employer and the union are in the same business, i.e., seeking to represent the same classifications of employees and the very employees, involved in the petition are the employees who are doing the organizing.

IV. Erroneous Factual Findings

The Acting RD stated that a local of OPEIU, not the OPEIU itself is involved in the negotiations with CWA. DDE at 7. Even assuming this was a significant factor in demonstrating a conflict of interest, it is an erroneous finding. The contract is between CWA and the OPEIU, not a local of OPEIU. ER EX 19 at 1 (“This Agreement, ... is between the Communications Workers of America, ... and the Office and Professional Employees International Union”). A supplemental agreement to the master agreement was signed by OPEIU Local 2 (ER EX 19 at March 26, 2013 Tentative Agreement at 3) but the basic agreement is with OPEIU, which remains the collective bargaining representative. Local 2, President Dan Dyer testified without contradiction as follows:

Question. But the international, it’s your understanding is the collective bargaining representative is that right, under the basic agreement.

Answer. I think yes, that would, yes. (TR at 505)

The Acting RD erroneously found that there is no record evidence that CWA can force the Employer’s employees to be involved in CWA organizing campaigns. DDE at 13. As noted above, however, the CWA Constitution permits discipline against members who engage in dissident activity, a threat that the Acting RD characterized as theoretical, apparently because the CWA has yet to take action against any OPEIU organizer. DDE 7-8. Moreover, Terry Pluta, Senior Director and Assistant to the CWA Secretary Treasurer, testified that CWA expects local members to support their campaigns. TR at 547. She stated that the CWA asks local members to support a CWA campaign by talking to employees, making phone calls, making house calls and doing anything they can to make the campaign successful. Id.

The Acting RD erroneously stated that it appears that OPEIU would argue that the employees Petitioner seeks to represent can only be represented by an unaffiliated labor organization. DDE at 5. The Employer has never made that argument. Note: See Footnote 1 to our post-hearing brief which states: “It should be noted that OPEIU has maintained throughout this proceeding that it does not object to its representatives and organizers being represented by an independent union per the CWA model because such representation does not present the conflicts of interest inherent in the instant petition” The Employer’s position herein hardly disqualifies every international union. The Acting RD’s overreaching conclusion to the contrary permits him to overstate the limits sought by the Employer on the union that may represent its employees.

To resolve the conflicts which the Acting RD conceded were a “potential,” he suggested that they be resolved through collective bargaining. DDE at 16. One problem with that curious suggestion, which the Acting RD seems not to recognize, is that the impact of the certification of a Local of CWA as the 9(a) representative of the unit herein on the negotiations between OPEIU and CWA is not a mandatory bargaining subject. It has nothing to do with the wages, hours and conditions of employment of the employees in the unit sought. It is precisely because of the potential problems the certification of Petitioner herein may have in the negotiations between CWA, as the employer, and OPEIU, as the 9(a) representative, that there is a real and inherent conflict of interest.

V. Conclusion

In several comments, the Acting RD inappropriately mischaracterized the Employer’s positions perhaps in an effort to make it easier to reject them. Thus, the Acting RD stated that the Employer’s argument herein that the certification of the Petitioner for the unit sought would create obvious conflicting loyalties is a common argument by employers to prevent unionization. DDE at 13. The Employer has never argued that unionization by OPEIU employees creates conflicting loyalties. The employees in the bargaining unit manifestly have Section 7 rights to engage in collective bargaining and this has been the Employer’s repeatedly expressed position throughout this case. It is not unionization, but unionization by the very employer with whom the OPEIU has to negotiate as the 9(a) representative, that is the essence of the conflict. The inability of the Acting RD to perceive this critical distinction is undoubtedly the basis for his failure to see the consequences of the certification of the Petitioner for the unit involved herein.

Finally, it is respectfully submitted that it is critical for the Board to consider the effects of the Acting RD’s decision should it be adopted by the Board. Every labor organization whose employees are represented by a union would be able to use as a tactic its ability to organize that union’s employees. Petitioning for the right to represent employees should not be permitted to be a weapon used by employers. The Acting RD correctly noted that in the history of the Act no group of organizers has ever attempted to petition the Board to have as their 9(a) representative the labor organization with which their employer, as a union, has a 9(a) relationship. DDE at 12. There is a reason why there is no such case. Adoption by the Board of the Acting RD decision will disturb this history. It should not be done.

Accordingly, the Board should grant the Request for Review and dismiss the Petition.

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