National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: May 11, 1998

TO: F. Rozier Sharp, Regional Director, Region 17

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

SUBJECT: ConAgra/Banquet Foods, Case 17-CA-19291 (formerly Case 14-CA-24643)

332-2520, 385-2520, 385-2525-3400, 530-6033-8400, 530-6050-0400, 530-6050-8825, 530-6067-2080-4500, 554-8487

This Section 8(a)(5) case was submitted for advice as to whether the Employer lawfully refused to sign an agreed upon collective-bargaining agreement proffered by the 9(a) representative-International Union in which all references to that entity were changed to a committee of local unions.

FACTS

In the 1960s, the Employer's predecessor voluntarily recognized the International Brotherhood of Teamsters (IBT or the International) and the UFCW International Union as joint representatives.[(1)] In the 1980s, the Employer assumed the then-current collective-bargaining agreement and subsequently entered into three successive Master Agreements covering the Employer's multiple facilities. The Master Agreements, in turn, provided for supplemental agreements to be negotiated by the Employer and Local Unions at each facility.

The parties' 1988-1991 Master Agreement names the IBT on its cover page, in the recognition language of the preamble to the agreement and on the signatory page.[(2)] Immediately after the contract was executed, the IBT informed the Employer that it wanted to substitute as the Teamsters signatory to the contract a Teamsters Banquet Negotiating Committee consisting of Local Union representatives under the leadership of an IBT-appointed chair. By letter to the IBT dated December 8, 1988, the Employer, in no uncertain terms, declined the proposed substitution and stated its view that the direct involvement of the International Union was an essential ingredient in the success of the parties' bargaining relationship. There is no record of any IBT response to this letter.

In January 1991, Teamsters Central Conference official Roger Wallace sent a reopener letter to the Employer stating that the "Teamsters National Banquet Foods Negotiating Committee on behalf of [the Local Unions]" desired to negotiate a successor agreement. Negotiations resulted in a new agreement effective from 1991 to 1994. While the IBT is named on the cover of this agreement, the preamble/recognition language refers to the "Banquet Negotiating Committee representing local unions affiliated with the International Brotherhood of Teamsters." On the signatory page, the Teamsters representatives signed under the designation "International Brotherhood of Teamsters, Banquet Negotiating Committee." There are no bargaining notes or other contemporaneous explanations of the changed language or of any discussion or agreement concerning the identity of the contract signatory or 9(a) representative. In the instant investigation, Wallace stated that he does not recall how the change came about, but believes that it was part of a Teamsters-wide revision of all master and local agreements to limit the International's liability by replacing it with local signatories.

Although December 1993 and January 1994 letters to the Employer, respectively, requested negotiations and announced that the "Teamsters National Banquet Foods Negotiating Committee" (hereafter "TBNC") would be negotiating the agreement, there is no mention of TBNC in the resulting 1994-1997 Master Agreement. Rather, the new agreement names the IBT on the cover, in the preamble's recognition language and on the signatory page. There is no documentary or testimonial evidence concerning the bargaining representative/contract signatory identity issues in the 1994 negotiations.

The IBT dissolved all of its regional conferences in June 1994. Apparently, all conference functions were assumed by the

International. Specifically, Joe Fahey, an IBT Warehouse Division representative, appears to have taken over as the IBT representative responsible for administering the 1994-1997 Master Agreement with the Employer, including participation in third-step grievance panel sessions with UFCW and Company representatives.

Negotiations for a successor to the 1994-1997 Master Agreement were scheduled to begin on January 13, 1997. Fahey states that prior to that date, he had several conversations with Jim Shannon, the Employer's Director of Human Resources for Plant Operations, about the possibility of replacing the Master Agreement and Local supplements with separate contracts with the local union at each facility. Shannon was concerned that the International was not sufficiently committed to the Master Agreement. Fahey told Shannon that the International favored the use of master agreements because it had more bargaining power. Fahey also gave Shannon his personal assurances that he would have a strong commitment to bargaining and administration of the agreement. In one of these conversations, Fahey recalls telling Shannon that, as a housekeeping measure, they would need to change the signature page to identify TBNC as the party to the agreement, as opposed to the IBT. Shannon did not respond to this statement.

On January 13, at the outset of the first bargaining session, Fahey hand delivered to the Employer's representatives a letter from IBT President Ron Carey. The letter formally requested negotiations and advised that the International had designated, pursuant to the Teamsters Constitution, a committee of Local Union representatives (TBNC) to serve as the Teamster entity and "proper party" to the Master Agreement. The letter went on to state that all references to the IBT in the new Master Agreement should be replaced with references to the TBNC. Carey also stated that the TBNC would be chaired by either the chair of the IBT Warehouse Division or his designee, and that Fahey was the designee for the upcoming negotiations. Shannon served as the Employer's chief negotiator.

Fahey and Shannon again discussed the Company's concerns about the IBT's commitment to the Master Agreement in a separate meeting immediately following the January 13 bargaining session, at which the Employer offered and then withdrew a proposal to terminate the Master Agreement and bargain on a facility-by-facility basis. Shannon asked for more commitment from the IBT to the Master Agreement, complaining that Fahey and his UFCW counterpart had missed or sent substitutes to recent grievance panel meetings and that the IBT did not even want to be listed as a party to the Master Agreement. Fahey reiterated his prior assurances of his personal commitment to the agreement and promised that he was going to be a hands-on leader.

The parties met 13-14 more times between January 13 and March 8, 1997, when agreement was reached on the provisions of the new 1997-2001 Master Agreement. There is no evidence or contention that the identity of the 9(a) representative was ever discussed at the bargaining table or that any party formally proposed retaining the references to the International in the 1994-1997 Master Agreement or changing that language to conform with the January 13 Carey letter.

The employees voted to ratify the agreement the week of March 17. A signing ceremony was scheduled for June 18.

When Fahey notified Shannon that the agreement had been ratified, he told Shannon that the International wanted Fahey to remind the Employer to use the proper references to TBNC when preparing the ratified Master Agreement for signature. Shannon protested, saying that the Company's lawyers wanted IBT to sign the agreement because of concerns over liability. Fahey told Shannon that the language change was not to evade liability but to make the contract conform to the representative structures set forth in the IBT Constitution and attempted to assure Shannon that the Employer could successfully sue the IBT for breach of contract. Shannon was unconvinced and reiterated the concern that the International was attempting to shield itself from liability. Fahey and Shannon agreed to refer the matter to counsel.

On May 13, the Employer sent a draft of the 1997-2001 agreement to the Union, retaining references to the IBT from the 1994-1997 agreement. About a week later, Fahey called Shannon and complained that the draft was wrong because it did not have TBNC as the party to the contract. Shannon stated he did not agree and that the International was supposed to be the party to the contract.

Fahey and Shannon spoke again before the scheduled June 18 signing ceremony. Fahey told Shannon he would not sign the Company's version of the agreement but would have his own version, naming only TBNC as the Teamsters' signatory, which he would sign. A last minute telephone conference among the parties' attorneys failed to resolve the issue. At the signing

ceremony, Shannon and the UFCW's representative signed the Company's version of the Master Agreement and Fahey signed the version of the agreement he had prepared.[(3)]

The International supports its charge that the Employer unlawfully refused to sign the latest Master Agreement by arguing that the Local Unions and their representative, TBNC, have, since at least since 1985, been the exclusive representatives of the employees and that the Employer may not, as a matter of law, insist that the International be an additional party to the contract. In support of its position, the International relies upon the factual assertion that all of the Master Agreements since that time were negotiated with and administered solely by the now-defunct Central Conference and local representatives without any involvement or consent by the International, on the further contention that the Teamsters Constitution expressly prohibits such subordinate bodies from binding the International to any agreement without its express consent, and on the fact that the contractual recognition language dating back to at least 1985 states that the contracts have been between the Employer and the IBT or its designated locals and, in the case of the 1991-1994 agreement, the TBNC itself as the representative of the locals. In this latter regard, the International explains the appearance of its name in the 1994-1997 Master Agreement as a mere typographical error.

ACTION

We concluded that the Employer lawfully refused to sign the agreement proffered by the Union inasmuch as (1) there was no agreement or clear and convincing waiver as to a change in the identity of the 9(a) representative, and (2) given the ongoing involvement of the International in day-to-day contract administration, none of the conditions under which it could have transferred its representative status to the local unions or been relieved of its statutory bargaining obligations have been met.

Initially, we note that the Region has concluded that the International Union is the employees' exclusive representative. While this issue was not submitted for advice, it is clear that the Region's determination is supported, inter alia, by the following factors: (1) the Employer's predecessor expressly recognized the Teamsters and UFCW internationals as joint representatives of the employees; (2) the contract assumed by the Employer and all but one of the successor agreements were signed by the International; (3) in the absence of any evidence of notice to the Employer that the negotiators of those agreements lacked the authority to bind the International, under general contract and agency principles the Employer was entitled to rely upon the Conference and Locals' apparent authority to bind the International;[(4)] and (4) the active role played by Fahey, whose status as an agent of the International has not been contested, in negotiating and administering the agreement.

It is well settled that an employer violates Section 8(a)(5) by refusing to sign a written contact embodying the terms of an agreement reached with the bargaining representative of its employees.[(5)] It is equally clear that neither party to an agreement can insist on such permissive subjects as the exclusion of the 9(a) representative or inclusion of an additional entity.[(6)] Moreover, once a party has agreed to negotiate with the other side's chosen representative, it cannot later refuse to be bound by the resulting agreement.[(7)] Thus, in Asbestos Workers, 193 NLRB at 505, the Board found that the union's entire course of conduct, including its explicit awareness and discussion from the outset of negotiations of the employers' express intent that their bargaining representative, a multiemployer association, would be a party to any contract, as well as the union's actual participation in productive negotiations over a two-month period, constituted its agreement to recognize the association. Having so agreed, the union violated 8(b)(3) by subsequently refusing to sign an agreement to which the association was also a signatory and insisting upon separate agreements.[(8)] Similarly, in Electrical Workers IBEW Local 3 (Eastern Electrical),[(9)] the union refused to execute an agreed-upon contract negotiated with a multiemployer association. The union, which balked at signing the agreement because the association also had non-union employer-members, argued, inter alia, that it was not required to sign because the association was merely the employer's agent and not the actual employer of the employees or contracting party. The ALJ, with Board affirmance, rejected this defense based upon the union's express agreement during negotiations that the party executing the agreement on the employer's behalf would be the association.[(10)]

Application of these principles to the instant case compels dismissal of the instant charge. First, based upon the Region's finding that the International is the 9(a) representative, the IBT could not unilaterally insist on either its own exclusion or the substitution of TBNC in its place. Moreover, inasmuch as there is no evidence of a clear and unmistakable agreement to change or effective Employer waiver of its right not to change the identity of the 9(a) representative,[(11)] the exclusion of the International and inclusion of the TBNC in the 1991-1994 contract is not to the contrary. Thus, a permissive subject cannot be

transformed into a mandatory one by agreement between the parties.[(12)] Furthermore, the foregoing 8(b)(3) cases in which the unions unlawfully refused to sign agreements after negotiating with the bargaining representative chosen by the employer are distinguishable. Thus, in contrast to Asbestos Workers and Eastern Electrical, there is no evidence of an explicit agreement by the Employer and no facts from which the Employer's assent to substitute the TBNC for the IBT under the terms set forth in the January 13 Carey letter can be gleaned. Here, neither side proposed retaining or changing the recognition language of the predecessor agreement and the subject was not even discussed at the bargaining table. The affirmative evidence of the Employer's strong opposition before and during negotiations to an agreement without the International's involvement, and Fahey's assurances, in direct response to the Employer's concerns, of his personal commitment to the parties' agreement, provide further support for the conclusion that the Employer cannot be compelled to sign an agreement with the TBNC.

We also considered whether the Employer was required to recognize TBNC as the assignee of the International's representative rights and concluded that it was not. Thus, while unions clearly can transfer representational rights to other union entities without violating 8(b)(1)(A),[(13)] Board decisions in a variety of contexts make clear that whether the transfer will terminate the bargaining obligations of or to the original representative turns on whether the putative "transferor" has disclaimed or retains representational functions. For example, in Teamsters Local 595 (Sweetener Products),[(14)] the Board found that the ostensible disclaimer of representation by a local union in favor of another local was motivated by the desire to avoid a perceived bad agreement rather than by legitimate reasons. The Board concluded that the unilateral transfer of jurisdiction to a sister local did not operate as an effective disclaimer and found that the would-be transferor local was obliged to sign the ratified, albeit inferior contract.[(15)]

The Board has upheld bargaining obligations in other types of cases so long some representational function has been retained. Thus, in BASF-Wyandotte Corp.,[(16)] an employer unlawfully withdrew recognition during the life of a contract in circumstances where the certified local disclaimed representational status, but the international, which the Board found to be the joint representative, not only continued to claim that status but actively participated in negotiations and contract administration.[(17)]

A similar "industrial reality" test has been applied in amendment of certification cases where a party has sought to substitute another entity for the certified representative, granting the requested substitution of the employees' de facto representative for the certified international, which played no role in the representation of the employees.[(18)] Substitution was denied, and instead another certified representative was added, in a case where the employer had voluntarily recognized a local union as a joint representative with the certified international union, but refused to extend voluntary recognition to the local's successor after a valid merger. Based upon its finding that both the "new" local and international regularly engaged in representational activities, the Board chose to conform the certification to the facts.[(19)]

The common thread in all these cases is that a bargaining obligation is imposed where representational function continues and excused where such functions have ceased. There can be no serious argument, in view of Fahey's appointment by IBT president Carey, his leadership role in the 1997 negotiations and his admitted commitment to the administration of the Master Agreement, that the International has effectively disclaimed its 9(a) status in favor of or otherwise transferred that status to the TBNC. Accordingly, the Employer's refusal to sign an agreement excluding the IBT must be regarded as lawful.

We further agree with the Region that, based upon the inconsistency between the disavowal of 9(a) status and Fahey's ongoing representational involvement, the International also has created confusion as to the identity of the 9(a) representative sufficient to relieve the Employer of any obligation to sign the negotiated agreement under Newell Porcelain Company.[(20)]

Finally, the International's contention that the contractual recognition language "IBT or its designated locals" establishes that the Local Unions and their representative are the historical exclusive representative does not require a different result. Thus, even assuming, without deciding, that such language could confer 9(a) representative status on the TBNC, the International has clearly retained a representative function based upon Fahey's ongoing involvement, and would remain at least a co-representative of the employees along with the TBNC.[(21)] As such, the contractual language does not provide a basis for requiring the Employer to sign a contract excluding the IBT.

In sum, the IBT has neither clearly disclaimed nor transferred its representative status, rights and obligations to the TBNC. Accordingly, the Employer has not violated the Act by refusing to sign the version of the agreement substituting the TBNC as the employees' bargaining representative and the charge should be dismissed, absent withdrawal.

B.J.K.

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[1] **The parties' written recognition agreement expressly conferred recognition upon the international unions.**

[2] **Regarding recognition the preamble states "This agreement . . . by and between [the Employer and the UFCW] and the INTERNATIONAL BROTHERHOOD OF TEAMSTERS, or such of its chartered Local Unions as it may designate . . . ."**

[3] Certain allegations concerning the Employer's refusal to abide by the grievance-arbitration provisions appear to have been resolved and both sides apparently are honoring the substantive terms of the negotiated agreement.

[4] **Thus, a bargaining representative may, by its actual delegation or course of conduct and acquiescence, confer upon an agent actual or apparent authority to act on its behalf. See, e.g., Rath Packing Co., 275 NLRB 255, 256 (1985); Spriggs Distributing Co., 219 NLRB 1046, 1049 (1975).**

[5] **H.J. Heinz Co. v. NLRB, 311 U.S. 514 (1941).**

[6] **See, e.g., NLRB v. Wooster Division of Borg-Warner Corp., 356 U.S. 342, 350 (1958) (while the NLRA does not prohibit the voluntary addition of a party, employer's insistence on signing agreement with local union and excluding the certified international union deemed an "evasion" of statutory duty to bargain); NLRB v. Taormina, 207 F.2d 251 (5th Cir. 1953) (employer unlawfully insisted on permissive subject where it sought to force labor congress to be a party to contract; certified local union had no control over labor congress's refusal to be a party to the agreement).**

[7] **Local 42, Asbestos Workers (Delaware Contractors Association, Inc.), 193 NLRB 504, 505 (1971) ("[w]e think it is indispensable to the stability of collective bargaining that, once recognition of the contracting parties has been given and bargaining is well underway, neither party may unilaterally withdraw that recognition without the uncoerced consent of the other party").**

[8] **Ibid.**

[9] **306 NLRB 208 (1992).**

[10] **Id. at 211.**

[11] **Thus, a bargaining waiver will not be not lightly inferred and must be clear and unmistakable. Metropolitan Edison Co. v. NLRB, 460 U.S. 693 (1983).**

[12] **Allied Chemical and Alkali Workers Local 1 v. Pittsburgh Plate Glass Co., 404 U.S. 157, 187 (1971)("[b]y once bargaining and agreeing on a permissive subject, the parties, naturally, do not make the subject a mandatory subject of future bargaining").**

[13] **Teamsters Joint Council No. 42 (Grinnell Fire Protection Systems Co.), 235 NLRB 1168, 1169 (1978).**

[14] **268 NLRB 1106, 1111 (1984).**

[15] **See also Electrical Workers IBEW (Texlite, Inc.), 119 NLRB 1792, 1798-1799 (1958), enfd. NLRB v. IBEW, 266 F.2d 349, 43 LRRM 2875 (5th Cir. 1959) (after union violated 8(b)(3) by unsuccessfully demanding employer agree to enlarge bargaining unit, union submitted self-serving disclaimer of representation to employer). Cf. Sheet Metal Workers Local 80 (Limbach Co.), 305 NLRB 312, 314-315 (1991) (otherwise lawful renunciation of an 8(f) bargaining relationship can be proscribed as an unfair labor practice where engaged in for an unlawful object).**

[16] **276 NLRB 498 (1985). See also Royal Iolani Apartment Owners, 292 NLRB 107 (1988) (parent international transferred jurisdiction from 1 local to another; employer's refusal to bargain with either entity held unlawful where first local had not acquiesced in the international union's transfer of jurisdiction and was presently willing and able to represent the employees).**

[17] **See also Yates Industries, Inc., 264 NLRB 1237 (1982) (employer bound by agreement despite signatory-local union's attempted disaffiliation from jointly-certified international union; non-signatory international was able to provide continued representation to the employees on both the international and local levels).**

[18] **Duquesne Light Company, 248 NLRB 1271, 1273 (1980).**

[19] **Kentucky Power Co., 213 NLRB 730, 732 (1974).**

[20] **307 NLRB 877 (1992), enfd. 986 F.2d 70 (4th Cir. 1993) (newly certified independent local affiliated with international during bargaining for its first contract; employer held justified in breaking off negotiations because the international created confusion over whether employer was bargaining with certified 9(a) representative when it rejected employer's proposal to recognize "new" local as an affiliate of international and, instead, insisted employer recognize it and its local).**

[21] **Cf. Kentucky Power, supra.**