UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

INDEPENDENCE RESIDENCES, INC.,

Employer

and 29-CA-30566

WORKERS UNITED, a/w SEIU,

Union

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WORKERS UNITED'S BRIEF OPPOSING EMPLOYER'S EXCEPTIONS TO ALJ'S DECISION

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Introduction

During the interval between its win of a Board conducted election and its certification for Independence Residences (IRI) employees – who provide services to the developmentally disabled – Union of Needletrades, Industrial and Textile Employees (UNITE) merged with Hotel Employees and Restaurant Employees (HERE) to form UNITE HERE, and later split from HERE to form Workers United. Post-certification, IRI refused to bargain with Workers United. Administrative Law Judge Steven Fish found that IRI violated §8(a)(5). Among other issues, IRI asserts that it properly refused to bargain because (1) it was confused by the union's reorganizations, (2) the union had lost its earlier focus on employees who provide services to the developmentally disabled. Workers United here argues that (1) IRI's alleged confusion did not excuse its bargaining refusal and (2) any shift in the union's industrial focus did not cause discontinuity in representation so as to obviate IRI's bargaining obligation. Workers United also relies on the positions set forth by Counsel for Acting General Counsel in her answering brief.

Statement of the Case

Workers United relies generally on the facts as found by the ALJ. A very brief summary follows:

IRI provides "training, housing and related activities for developmentally disabled adults."[1] In 2003, a majority of IRI's employees in an appropriate unit voted for representation by UNITE.[2] The Board finally certified UNITE on August 27, 2010.[3] Meanwhile, UNITE had merged in 2004 with HERE to form UNITE HERE.[4] That merger acrimoniously dissolved in 2009, when almost all of the former UNITE left to form Workers United.[5]

The ALJ found that Workers United is UNITE's successor. IRI therefore violated §8(a)(5) by refusing to bargain with Workers United.[6] IRI filed exceptions to the ALJ's decision.

I. IRI must bargain with Workers United despite any alleged confusion.

IRI says it was confused. That's no excuse for denying the employees their right to union representation. And if IRI really were confused, it would have asked Workers United for clarification. It didn't.

In *Seafirst*,[7] the Supreme Court stated explicitly that confusion doesn't excuse the employer from recognizing a union post-reorganization. "Any uncertainty on the employer's part does not relieve him of his obligation to

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[1] *Independence Residences*, JD(NY)–27–11 (August 24, 2011) (hereafter, ALJ Decision), at 2.
[2] *Id.*, 2-3.
[3] *Independence Residences*, 355 NLRB No. 153 (2010).
[4] ALJ Decision, 12.
[5] *Id.*, 14-15.
[6] *Id.*, 32-33.
[7] *NLRB v. Financial Institution Employees Local 1182*, 475 U.S. 192 (1986).

bargain collectively."[8] If a reorganization confuses an employer, it can file an RM petition.[9] IRI filed no such petition.

IRI essentially argues that, because it determine whether Workers United is the §9(a) representative, (1) it need not bargain, (2) Workers United loses its §9(a) status, and (3) the employees lose their right to union representation. But, no matter how difficult the case, "an employer acts at its peril" in refusing to bargain with a union that wins an election.[10] Even in difficult cases, because an employer's bargaining refusal undermines important statutory policies, an employer's good faith confusion does not excuse its bargaining obligation.[11]

Here, however, the ALJ found that IRI was not confused.[12] When an employer is confused about whether the union requesting recognition is the employees' §9(a) representative, the employer may ask the union for clarification.[13] An employer's failure to make such an inquiry "suggests that it

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[8] *Id.*, 209.

[9] *Id.* ("If an employer has doubts about his duty to continue bargaining, it is his responsibility to petition the Board for relief….").

[10] *Mike O'Connor Chevrolet*, 209 NLRB 701, 703 (1974), enf. denied on other grounds 512 F.2d 684 (8th Cir. 1975) (employer violated §8(a)(5) by unilaterally changing terms and conditions after union wins election but before certification).

[11] *NLRB v. Katz*, 369 U.S. 736 (1962) (reversing appellate court holding that Board must show employer bad faith to prove that employer violated §8(a)(5) by unilaterally changing employment terms); *Levitz Furniture Co. of the Pacific*, 333 NLRB 717 (2001) (employer may no longer rely on its good faith doubt of union's majority status to withdraw recognition; employer must show actual loss of majority status, and bears the risk of being wrong).

[12] ALJ Decision, 25.

[13] *SEIU Local 715 (Stanford Hospital)*, 355 NLRB No. 65 (2010), slip op., 3-4 (union violated §8(b)(3) by refusing to provide information to employer about another union where the

was not interested in the facts but only looking to avail itself of a perceived opportunity to be rid of the union."[14]

IRI primarily relies on *Newell Porcelain Co.*[15] In *Newell*, after an independent union – which had historically represented unit employees – affiliated to an international, the international representative repeatedly claimed that the international was a §9(a) representative (jointly with its new affiliate). Moreover, the international representative rejected the employer's proposal for a contractual recognition provision stating that the local was affiliated to the international, but not recognizing the international as a §9(a) representative. The Board found that the employer did not violate §8(a)(5) by refusing to bargain because the international representative rejected the employer's proposal and continued insisting upon the international's §9(a) status.[16] It distinguished *Insulfab*, in which the employer unlawfully refused to bargain with a formerly independent local that initially told the employer that its new international had assumed its §9(a) status, but later clarified that the local alone remained the §9(a) representative.[17]

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employer had "an objective, factual basis for believing that such information would be relevant in determining the union to which it has a collective-bargaining obligation").

[14] *Mountain Valley Care & Rehabilitation Center*, 346 NLRB 281, 283 (2006) (employer violated §8(a)(5) by refusing to bargain with international, the employees' historic §9(a) representative, after international informed employer that employees would be changing their membership from one local to another).

[15] 307 NLRB 877 (1992), enfd. 986 F.2d 70 (4th Cir. 1993).

[16] 307 NLRB at 878-879.

[17] *Id.*, 878 at n.4, citing *NLRB v. Insulfab Plastics*, 789 F.2d 961, 964 (1st Cir. 1986).

The instant case is distinguishable from *Newell*. Workers United is the §9(a) representative, and no union is claiming that some other union represents the employees.

IRI is not confused. It has not requested information to clarify any confusion. Rather, it has unjustifiably refused to recognize Workers United.

II. IRI failed to meet its burden of demonstrating that there was no continuity of representation between UNITE and Workers United because of a shift the union's focus away from disabilities services employees.

The ALJ found that UNITE's reorganizations did not break its continuity of representation. Most significantly, UNITE's leadership led UNITE's affiliates into UNITE HERE in 2004, and then led them out again into Workers United in 2009. Both UNITE's leadership and its affiliates remained remarkably intact through these reorganizations. Moreover, UNITE's means of providing representation – through joint board staff assisted by bargaining unit leadership – continued through the reorganizations. IRI has the burden of proving that the instant reorganization departs from the normally occurring situation in which the union post-reorganization maintains continuity of representation. IRI has not met its burden by proffering a novel and unsupportable criterion for the maintenance of continuity, that a union must maintain its industrial focus.

A. **The employer must prove that a union post-reorganization does not maintain continuity of representation.**

Numerous cases hold that the employer bears the burden of proving that a union loses continuity of representation through reorganization.[18] In *News/Sun Sentinel Co.*, the D.C. Circuit reasoned that, because a discontinuity finding tends to undermine the statutory policy favoring industrial stability, the employer, as the party seeking this finding, has the burden of proof.[19] Additionally, in *Seafirst*, the Court indicated that continuity of representation is the norm,[20] and that discontinuity results only from unusual circumstances.[21] It makes sense that the norm is presumed, and that the burden of proof falls on the party attempting to show a departure from the norm.

IRI primarily relies on two cases, *Continental Linen Services* and *Goad*. These cases actually suggest that IRI has the burden here.

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[18] *Allied Mechanical Services*, 351 NLRB 79, fn.5 (2007), reconsideration denied, 352 NLRB 662 (2008), vacated and remanded, 189 LRRM 2543 (D.C. Cir. 2010), reconsideration denied, 356 NLRB No. 1 (2010), citing *CPS Chemical Co.*, 324 NLRB 1018, 1020 (1997), enfd. 160 F.3d 150 (3d Cir. 1998); *Sullivan Bros. Printers*, 317 NLRB 561, 562 (1995), enfd. 99 F.3d 1217 (1st Cir. 1996); and *Minn-Dak Farmers Cooperative*, 311 NLRB 942, 945 (1993), enfd. 32 F.3d 390 (8th Cir 1994).

[19] *News/Sun Sentinel Co. v. NLRB*, 890 F.2d 430, 432 (D.C. Cir. 1989).

[20] E.g., 475 U.S. at 206 ("an affiliation does not create a new organization, nor does it result in the dissolution of an already existing organization"). See also, *CPS Chemical*, 324 NLRB at 1020 ("Most affiliations or mergers would change a union's organizational structure to some extent, but clearly such natural and foreseeable consequences would not automatically raise a question concerning representation.").

[21] 475 U.S. at 206 (discontinuity only "[i]f these changes are sufficiently dramatic to alter the union's identity").

In *Continental Linen Services*, the General Counsel claimed that a local union lost its §9(a) status by becoming defunct, and that, thereafter, its parent union became the §9(a) representative.[22] In support of his imposing the burden of proof on General Counsel, the ALJ cited *Mountain Valley*, in which the employer argued that the original §9(a) representative – there the international – lost its §9(a) status to a an affiliated local through relinquishment.[23] According to *Mountain Valley*, the burden allocation in relinquishment cases is the same as that applied to cases like the instant case, where an employer claims that a union lost its §9(a) status through reorganization: The "party seeking to avoid an otherwise binding bargaining obligation by asserting the change in the bargaining representative . . . bears the burden of demonstrating that change."[24]

IRI also cites *Goad*.[25] But *Goad* doesn't discuss the burden of proof. And *Goad* suggests an allocation of the burdens similar to that in the instant case, where the General Counsel must overcome a minimal burden to establish its prima facie case, and the employer has a more difficult burden to establish its defense. In *Goad*, General Counsel alleged that an employer violated §8(a)(5) by refusing to deal with a union to which the employees' §9(a) representative

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[22] 2010 NLRB LEXIS 347 (ALJ Decision, Sept. 15, 2010) at *28-*29, motion to withdraw charge granted, 2011 NLRB LEXIS 278 (NLRB, June 1, 2011).
[23] *Mountain Valley Care and Rehabilitation Center*, 346 NLRB 281 (2006).
[24] *Id.*, 282, citing several cases cited above at fn.18.
[25] 332 NLRB 677 (2001).

purported to assign its servicing duties. General Counsel proved its prima facie case merely by showing that the §9(a) representative attempted to make the assignment.[26] The burden then shifted to the employer, who then showed that the purported servicing agreement was a subterfuge to transfer representation rights.[27] The Board agreed, and dismissed the complaint.

Similarly, in the instant case General Counsel showed that UNITE – and later Workers United – has been the §9(a) representative, as demonstrated (a) by the certification and (b) by the reorganizations. IRI now has the burden of proving its discontinuity defense. It can't.

B. IRI did not establish discontinuity by showing a union shift in industrial focus.

After a union's reorganization – whether a disaffiliation, affiliation, merger, etc. – an employer must recognize and bargain with the reorganized union if there is sufficient continuity between the pre-reorganization union and post-reorganization union.[28] Here, there is more than enough of the minimally necessary continuity. IRI's assertion, that the union shifted its industrial focus,

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[26] *General Electric Company v. NLRB*, 412 F.2d 512, 516 (2d Cir. 1969) (unions may "choose whomever they wish to represent them in formal labor negotiations"), cited in *Goad,* 332 NLRB at 679.
[27] *Id.*, 680.
[28] Compare, *Raymond F. Kravis Center for the Performing Arts*, 351 NLRB 143 (2007), enfd. 550 F.3d 1183 (D.C. Cir. 2008) (merger of several locals into a single local); *New London Convalescent Home*, 281 NLRB 893 (1986), enfd. 815 F.2d 517 (2d Cir. 1987) (disaffiliation); *Mike Basil Chevrolet*, 331 NLRB 1044 (2000) (independent local dissolving into larger local); *Defiance Hospital*, 330 NLRB 492, 497-500 (2000) (dividing local's units among two separate, pre-existing locals).

is not a change so dramatic as to cause discontinuity. Moreover, Workers United affiliated with SEIU, which is focused on representing disabilities services employees.

Historically, the Board has sanctioned only those reorganizations conducted with sufficient due process, i.e. in which the union conducted a membership referendum or a delegate vote meeting certain minimum due process criteria. However, in *Raymond F. Kravis*,[29] the Board overruled decades of case law, and decided that the Supreme Court's *Seafirst* decision[30] compelled abandoning the due process criterion. Only the continuity criterion remains.

A reorganization lacks continuity of representation if it involves "changes [that] are sufficiently dramatic to alter the union's identity…."[31] Where "the changes are so great that a new organization comes into being," that organization "should be required to establish its status as a bargaining representative" as if it were newly organizing the employees.[32] In other words, a drastically changed organization must establish anew its majority support through an election or otherwise.

Since around 1990, the Board has leniently construed the continuity criterion. Then, the Board adopted the D.C. Circuit's formulation that

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[29] 351 NLRB 143.
[30] *NLRB v. Financial Institution Employees Local 1182*, 475 U.S. 192 (1986).
[31] *Id.,* 206.
[32] *Kravis*, 351 NLRB at 147.

"[c]ontinuity is evidenced by the maintenance of traces of a pre-existing identity and autonomy over the day-to-day administration of bargaining agreements."[33] Apparently sympathetic to the concern that reorganizations are internal union matters,[34] the Board stated that it "will interject itself only in the most limited of circumstances involving such internal changes."[35] Among the numerous cases addressing continuity since 1990, few, if any, have found continuity lacking.[36]

So, in the instant case, the ALJ examined a number of the usual criteria – "including structure, administration, officers, assets, membership, autonomy, by-laws, size and jurisdiction"[37] – and found continuity.[38] IRI, however, proffers a new criterion, which can be denominated "industrial focus."

IRI asserts discontinuity by arguing that Workers United lacks UNITE's focus on employees who provide services to the developmentally disabled. It argues essentially as follows: The union no longer has a Disabilities Services Council, a body through which UNITE organized the employees. In 2006, after the UNITE HERE merger, the UNITE-formed Disabilities Services Joint Board

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[33] *Central Washington Hospital*, 303 NLRB 404, 413-414 (1991), and, more recently, *Deposit Telephone Co.*, 349 NLRB 214, 221 (2007) and *Defiance Hospital*, 330 NLRB 492, 498 (2000), all quoting *News/Sun Sentinel v. NLRB*, 890 F.2d 430, 432 (D.C. Cir. 1989).
[34] *Seafirst*, 752 F.2d 356, 362-364 (9th Cir. 1984), aff'd, 475 U.S. 192, 206 (1986).
[35] *Sullivan Bros. Printers*, 317 NLRB at 562.
[36] See post-1989 cases cited in Higgins, 1 Developing Labor Law, Ch. 14.III.B (fifth ed. 2006).
[37] ALJ Decision, 22-23, citing *May Dept. Stores v. NLRB*, 897 F.2d 221, 228 (7th Cir. 1990); *NLRB v. Insulfab Plastics*, 789 F.2d 961, 966 (1st Cir. 1986).
[38] ALJ Decision, 23-24.

affiliated a large local representing airport and racetrack employees, and reconstituted itself as the Airport Racetrack Joint Board. And, in 2009, when almost all of the former UNITE affiliates left UNITE HERE to form Workers United, the few disabilities services locals stayed with UNITE HERE.

So what. In *Seafirst*, the Supreme Court recognized that unions are faced with a myriad of challenges and opportunities, and must be free to reorganize to meet them. Affiliation "is but one of many ways in which labor organizations alter their structures and alignments in response to changing economic and political conditions."[39] Unions also alter their alignments by shifting their industrial foci. UNITE was the product of a merger between the old apparel and textile workers unions, ACTWU and ILGWU.[40] As their traditional industries declined, UNITE looked elsewhere for workers to organize. Disabilities services employees looked like they needed union representation. But in 2004, merging with HERE, the hospitality employees' union, seemed like a good idea. And this new direction affected the Disabilities Services Joint Board, as it became the Airport Racetrack Joint Board.[41] When the UNITE HERE merger became untenable, most of the UNITE affiliates left to form Workers United, but the disabilities services locals stayed with Airport

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[39] 475 U.S. at 200, n.5, citing Note, Union Affiliations and Collective Bargaining, 128 U. Pa. L. Rev. 430, 431 (1979).
[40] ALJ Decision, 5.
[41] *Id.*, 12-13.

Racetrack and UNITE HERE.[42] Workers United affiliated with SEIU, in which IRI's employees will benefit from SEIU's historic focus on similar employees.[43]

IRI suggests that, when a union responds to perceived challenges and opportunities by shifting its industrial foci, it becomes such a drastically different union that it no longer retains its §9(a) status. But when UNITE merged with HERE, did garment and textile employers have the right to withdraw recognition because of UNITE's shift towards hospitality employees? No.

Rather, the Supreme Court, in *Seafirst*, held that permitting employers to withdraw recognition from reorganized unions would generally undermine statutory policies favoring industrial stability and limiting the times and conditions under which an employer may challenge a union's majority status.[44] An employer similarly acts inconsistently with these policies by refusing to bargain with a union during its first year of certification.[45]

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[42] *Id.*, 14.

[43] *Id.*, 28-30.

[44] 475 U.S. at 202-203 ("the Board's decision must take into account that "[the] industrial stability sought by the Act would unnecessarily be disrupted if every union organizational adjustment were to result in displacement of the employer-bargaining representative relationship").

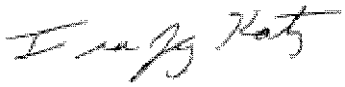
[45] *Brooks v. NLRB*, 348 U.S. 93, 103 (1954).

The IRI employees voted for the union. They have a right to a year during which they can decide whether Workers United can effectively bargain for them.[46]

Conclusion

UNITE merged into UNITE HERE, and then left to form Workers United. Workers United affiliated with SEIU, which represents many disabilities services employees. Through these reorganizations, this union, like other unions, may have shifted its industrial focus. Nonetheless, continuity of representation endured. UNITE and Workers United are the same union. IRI violated §8(a)(5) by refusing to bargain with Workers United.

Respectfully submitted,



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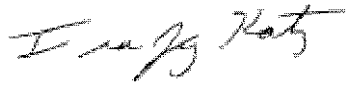
[46] *Id.*, 100 ("A union should be given ample time for carrying out its mandate on behalf of its members").

Certificate of Service

I certify that I served this brief on Emily Cabrera, counsel for general counsel, and Louis P. DiLerenzo, counsel for the employer, by electronic mail on October 5, 2011.



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Dated: October 5, 2011