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

Advice Memorandum

DATE: April 28, 2017

TO: William B. Cowen, Regional Director
Region 21

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

SUBJECT: National EMS Association (NEMSA) (American Medical Response)
Case 21-CB-188416

American Medical Response
Case 21-CA-189469

NAGE SEIU (American Medical Response)
Case 21-CB-189476

332-2520
347-2017-7533-5000
347-4030-3750-0000
536-2581
536-2581-0140-0000

The Region submitted this case for advice on whether NEMSA entered an overbroad servicing agreement with another union; whether it disclaimed interest in representing unit employees; and whether it was defunct. The Region also submitted this case for advice on whether, based on the outcome of these threshold inquiries, the Unions and/or the Employer violated Sections 8(b)(1)(A) and 8(a)(2) of the Act, respectively. We conclude that, while the servicing agreement was overbroad, NEMSA neither disclaimed interest nor rendered itself defunct. Based on these findings and other evidence, we also conclude that neither the Unions nor the Employer violated the Act.

FACTS

Before these proceedings began, NEMSA represented approximately 300 emergency medical service employees in the San Diego, California, area. Its last collective-bargaining agreement with the Employer was effective from 2014 to 2018.

In May 2016,[1] NEMSA filed for Chapter 11 bankruptcy because of outstanding debts. The bankruptcy court ordered the reorganization of NEMSA through a court-appointed Trustee. The Trustee, who acquired control of NEMSA's assets and

[1] All dates hereinafter are in 2016 unless otherwise noted.

business operations, found NEMSA to be financially unsustainable and took steps to reorganize the business by entering a Servicing Agreement with NAGE and, eventually, terminating all NEMSA employees.[2]

The Servicing Agreement, which received approval from the bankruptcy court on November 3 and went into effect on November 21, served as a means for NEMSA to eventually attain financial stability while also ensuring that bargaining-unit employees continued to receive representational services.[3] Under the Agreement's terms, NAGE would "provide all legal, collective bargaining[,] and labor representation services" to NEMSA-represented employees; be responsible for all expenses incurred during the life of the Agreement; indemnify and hold harmless NEMSA for issues and responsibilities concerning the Agreement; and make a one-time payment of $20,000 to NEMSA. In consideration, NEMSA would pay 100% of member dues to NAGE. The Agreement also contained a provision stating, in relevant part, that the Agreement would not "affect, interrupt, impair, interfere with, or change in any way the continuing status or the rights, duties, or obligations of NEMSA as the certified bargaining representative . . . ." Additionally, NEMSA and NAGE (the Unions) argue that the Agreement was only a temporary accord because it was designed to place NAGE in a position to win the next representation election. However, by its terms, the Agreement was indefinite: it would only terminate upon mutual consent of the parties or if NEMSA lost its status as the certified bargaining representative of the unit.

On November 21, the day the Servicing Agreement became effective, all relevant parties were notified of the changes taking place. NEMSA informed the Employer and bargaining-unit employees by letter that NEMSA was still the workers' bargaining representative but that NAGE would be performing representational services on its behalf. NAGE sent its own letters, introducing itself as NEMSA's servicing agent to employees and the Employer.

Shortly after the Agreement went into effect, a question arose as to its interpretion. On November 21, a NEMSA representative emailed the Employer to identify which individuals were authorized by NEMSA to perform steward functions. Within a week, a local NAGE representative contacted the Employer, challenged those steward authorizations, and stated that the Employer should recognize different, NAGE-authorized stewards. Subsequently, the Employer emailed NAGE and NEMSA representatives to clarify who was authorized to serve as a shop

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[2] The Trustee terminated all NEMSA employees by December 31.

[3] In approving the Agreement, the bankruptcy court likened the transaction to a sale of the business. The Unions object to this characterization.

steward. A national NAGE representative responded that NEMSA-authorized stewards had the proper authority to conduct representative functions. In their joint position statement, the Unions contend that the Servicing Agreement did not give NAGE authority to select or authorize stewards.

In December, the Charging Party, an AMR employee and NEMSA steward, filed a representation petition for a third union, the San Diego Emergency Medical Service Association (SDEMSA). NAGE intervened and was listed on the ballot, but SDEMSA won the election and became the certified bargaining representative on February 28, 2017. This effectively terminated the Servicing Agreement.

The Unions maintain that, throughout the life of the Servicing Agreement, they communicated nothing to undermine their position that NEMSA was the exclusive bargaining representative and that NAGE was simply a NEMSA agent. They support their contentions by pointing to the communications they sent to the Employer and the unit employees around November 21.

Similarly, the Employer maintains that it always considered NEMSA to be the exclusive bargaining representative and that NAGE was merely NEMSA's duly authorized agent. It supports its contention by pointing to communications between it and the Unions and to fact that the Employer continued to remit dues to NEMSA throughout the Agreement period.

ACTION

Regarding the three threshold issues, we conclude that NEMSA entered an overbroad servicing agreement but did not disclaim interest or render itself defunct. We also conclude that, notwithstanding the overbroad servicing agreement, NEMSA did not violate Section 8(b)(1)(A) of the Act, because it did not restrain or coerce employees within the meaning of the Act; NAGE did not violate Section 8(b)(1)(A) of the Act, because it did not request or accept recognition, or otherwise act as if it were the exclusive bargaining representative of the unit; and the Employer did not violate Section 8(a)(2), because it did not recognize NAGE as the exclusive bargaining representative.

On the first threshold issue, we conclude that the Servicing Agreement was overbroad. It is well settled that unions may designate agents to represent employees on their behalf and that one labor organization may act as the agent of another.[4] It is

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[4] *See, e.g.*, *Rath Packaging Co.*, 275 NLRB 255, 256 (1985) (citing *Spriggs Distribution Co.*, 219 NLRB 1046, 1049 (1975), and *Independent Stave Co.*, 148 NLRB 431, 436 (1964), *enforced*, 352 F.2d 553 (8th Cir. 1965), *cert. denied*, 384 U.S. 962 (1966)).

also settled, however, that an exclusive bargaining "representative may delegate its duties under a contract . . . [but not] its responsibilities."[5] Applying this rule, the Board has found that a servicing agreement is overbroad when it transfers all representational rights and responsibilities to the servicing union, indemnifies the bargaining representative from defense costs associated with representational responsibilities, and provides for the payment of all unit dues to the servicing union.[6] Here, the Servicing Agreement is overbroad because it transfers all representational duties from NEMSA to NAGE, fully indemnifies NEMSA from defense costs associated with its representational duties, and grants NAGE 100% of unit dues.[7] This conclusion stands despite the Agreement's language that purportedly preserves the "continuing status or rights, duties, or obligations of NEMSA as the certified bargaining representative" because the "substantive reality" is that the Agreement transferred NEMSA's rights and responsibilities.[8] Further, the conclusion is unaffected by evidence that the Unions' actions were well-intended.[9]

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[5] *Goad Co.*, 333 NLRB 677, 680 (2001) (citing *Mine Workers Local 17*, 315 NLRB 1052, 1064 (1994), *enforced mem. per curiam*, 85 F.3d 616 (4th Cir. 1996); and *Reading Anthracite Co.*, 326 NLRB 1370, 1371 (1998)).

[6] *See Goad Co.*, 333 NLRB at 680; *see also Sherwood Ford, Inc.*, 188 NLRB 131, 133-34 (1971).

[7] *See Goad Co.,* 333 NLRB at 680; *National Union of Healthcare Workers (Kaiser Foundation Hospitals, Inc.)*, Cases 31-CB-140496, et al., Advice Memorandum dated June 12, 2015, at 10 (finding overbroad a service agreement that failed to reserve any collective-bargaining or representational duties for certified union, contained an indemnification clause, required the payment of all dues to servicing union, and could only be canceled by both parties' consent); *Arlen Beach Condominium Association*, Case 12-CA-24507, Advice Memorandum dated Nov. 8, 2005 (finding union invalidly transferred authority to another union when it executed a service agreement that shifted virtually all of its representative duties and engaged in conduct that indicated attempts to surrender responsibility for representing unit).

[8] *See Goad Co.*, 333 NLRB at 680 (finding "the substantive reality" of a servicing agreement's hold harmless clause was that it transferred representational duties and responsibilities).

[9] The Unions argue that the Servicing Agreement is valid because it was only executed to appease the bankruptcy court and ensure continued representation of the bargaining unit. While the Board has considered unions' motivations for entering servicing agreements, *see, e.g.*, *Sherwood Ford, Inc.*, 188 NLRB at 133-34, it has never

As for the second threshold issue, we conclude that NEMSA did not disclaim interest in representing the unit. A disclaimer of interest may exist where a union attempts a wholesale transfer of representational duties and responsibilities.[10] Notably, however, disclaimers must be "unequivocal" and will not be effective "if the surrounding circumstances justify an inference to the contrary" or if the union's conduct is "inconsistent" with the alleged disclaimer.[11] For example, in *Goad Co.*, a certified union entered an overbroad servicing agreement with an affiliated local to circumvent a recent Board ruling that found invalid the union's attempt to outright transfer the unit to the affiliated local.[12] For a year after it executed the servicing agreement, the certified union failed to handle a grievance or otherwise communicate with the employer.[13] Based on these circumstances, the Board found that the certified union had disclaimed interest.[14] By comparison, in *Royal Iolani Apartment Owners*, a recently-certified local union—at the behest of the international union—notified the employer that it would be transferring jurisdiction of the unit to an affiliated local.[15] The employer responded by letter that the attempted transfer would constitute a disclaimer of interest.[16] While the certified local did not directly respond to the letter

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held that a wholesale transfer of duties and responsibilities is made valid by good intentions.

[10] *Goad Co.*, 333 NLRB at 680; *Sisters of Mercy Health Corp.*, 277 NLRB 1353, 1354 (1985).

[11] *See Electrical Workers, IBEW (Texlite, Inc.)*, 119 NLRB 1792, 1798-99 (1958), *enforced per curiam*, 266 F.2d 349 (5th Cir. 1959); *Vaughan & Sons*, 281 NLRB 1082, 1084 (1986); *see also Goad Co.*, 333 NLRB at 680 ("[I]n the absence of unusual circumstances such as schism or defunctness, a local union's action in transferring its representational rights to another local constitutes a disclaimer of interest."); *Sisters of Mercy Health Corp.*, 277 NLRB at 1354 (finding certified union disclaimed interest in representing employees when it transferred jurisdiction of bargaining unit and failed to "engage in any action inconsistent with its disclaimer").

[12] *Goad Co.*, 333 NLRB at 678-80.

[13] *Id.* at 680-81.

[14] *Id.*

[15] *Royal Iolani Apartment Owners*, 292 NLRB 107, 107 (1988).

[16] *Id.*

for several months, it conducted a secret ballot vote and learned that the employees wanted it to continue to represent them.[17] The certified local continued to collect dues, filed at least one grievance, and eventually requested to bargain with the employer.[18] Under these circumstances, the Board declined to find an effective disclaimer of interest.[19]

Here, while NEMSA did enter and follow the terms of the overbroad Servicing Agreement, it did not disclaim interest in representing the unit. Unlike the certified union in *Goad Co.*, NEMSA entered the Servicing Agreement not to circumvent a Board ruling but instead to *comply* with a bankruptcy court order.[20] Additionally, unlike the union in *Goad Co.*, and similar to the union in *Royal Iolani Apartment Owners*, NEMSA did not act as though it was no longer the unit's bargaining representative.[21] On November 21, the day the Agreement went into effect and more than two weeks after it was approved by the bankruptcy court, NEMSA asserted its continued involvement by writing to the Employer and identifying which stewards it had authorized to perform representative functions. When these authorizations were challeged, NAGE, NEMSA's agent, clarified that the individuals identified by NEMSA were the only authorized stewards. Such conduct, along with the circumstances under which NEMSA entered the agreement, is inconsistent with the conclusion that NEMSA was a disinterested union.[22]

Regarding the third threshold issue, we conclude that NEMSA was not defunct. The sole inquiry for defunctness is "whether a union is unable or unwilling to

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[17] *Id.*

[18] *Id.*

[19] *Id.* at 108.

[20] *Cf. Goad Co.*, 333 NLRB at 680.

[21] *Compare id.* at 681 (finding no evidence that the union "acted inconsistently with the disclaimer established by the transfer of jurisdiction"), *with Royal Iolani Apartment Owners*, 292 NLRB at 108 (finding that, while the union "acquiesced for a brief period in the prospect of losing its representative status, it is clear that it did not act as if the transfer had been effectuated").

[22] We note that, while NEMSA did not engage in other significant conduct demonstrating its continued interest in representing the unit, it had little chance to do so given the Servicing Agreement's short, three-month lifespan.

represent the employees . . . ."[23] At the outset, we note that, because the Trustee maintained control of NEMSA's assets and operations, NEMSA did not become defunct when it terminated all of its employees.[24] We also find that NEMSA was still able to represent workers throughout the relevant period, because the bankruptcy proceeding was ongoing and the Trustee was only obligated to reorganize NEMSA operations—not cease them altogether. Additionally, we find that NEMSA was willing to represent workers, because, despite its decision to enter the Servicing Agreement, NEMSA has stated its willingness to represent workers during the relevant period and consistently maintained that a primary motivation for its conduct was to provide representative services for the bargaining unit.[25] For these reasons, we conclude that NEMSA was not defunct.

Having concluded that NEMSA entered an overbroad servicing agreement but did not disclaim interest or render itself defunct, we also conclude that none of the charged parties violated the Act.

First, NEMSA did not violate Section 8(b)(1)(A) when it entered the overbroad Servicing Agreement. The Board has never held that a union violates Section 8(b)(1)(A) by merely entering an overbroad servicing agreement. Instead, such agreements have only resulted in a Section 8(b)(1)(A) violation if they are coupled with some coercive act, such as obtaining the recognition of a minority union as exclusive bargaining representative.[26] Here, there is no evidence that NEMSA or

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[23] *Rocky Mountain Hospital*, 289 NLRB 1370, 1370 (1988) (citing *Kent Corp.*, 272 NLRB 735 (1984); *Pioneer Inn*, 228 NLRB 1263 (1977), *enforced*, 578 F.2d 835 (9th Cir. 1978); and *Hershey Chocolate Corp.*, 121 NLRB 901 (1958)).

[24] *See Albany Steel,* 309 NLRB 442, 448-49 (1992) (finding union was not per se defunct when it terminated all staff, because administrator had power and authority to carry out union affairs), *enforced in relevant part*, 17 F.3d 564 (1994).

[25] The Board has indicated that a union's "willingness" to represent employees is a subjective inquiry. *See Kent Corp.*, 272 NLRB at 735-36 (despite being inactive for approximately four years and not having any members, officers, bank accounts, or records, union was not defunct, in part, because union representatives testified to their willingness to continue representing employees).

[26] *See National Union of Healthcare Workers (Kaiser Foundation Hospitals, Inc.)*, Cases 31-CB-140496, et al., Advice Memorandum dated June 12, 2015 (finding no 8(b)(1)(A) violation, notwithstanding overbroad servicing agreement, where employer continued recognizing certified union as exclusive bargaining representative, and employees were not otherwise restrained or coerced); *see also Dycus v. NLRB*, 615

NAGE coerced employees by securing recognition of NAGE as their exclusive bargaining representative or, more broadly, in the exercise of their Section 7 rights. As such, NEMSA did not violate Section 8(b)(1)(A).

Second, NAGE did not violate the Act. The Charging Party asserts that NAGE violated Section 8(b)(1)(A) by accepting exclusive bargaining representative status from the Employer, but no evidence supports this allegation. Instead, NAGE consistently maintained, as evidenced by all its communications and other conduct, that it was merely an agent of NEMSA. Accordingly, NAGE did not violate Section 8(b)(1)(A).

Finally, the Employer did not violate Section 8(a)(2). An employer violates Section 8(a)(2) "when it recognizes a minority union as the exclusive bargaining representative," but "the law permits certain forms of cooperation between employers and minority or unrecognized unions."[27] Here, the Employer cooperated with NAGE as duly authorized agent of NEMSA but never recognized NAGE. Indeed, the Employer continued to transmit dues collected pursuant to the contractual dues-checkoff provision to NEMSA after the servicing agreement went into effect. Additionally, through written communications with NAGE and NEMSA, the Employer made its stance clear: NEMSA retained exclusive bargaining status and NAGE was merely an agent of NEMSA. Accordingly, the Employer did not violate Section 8(a)(2).

For the foregoing reasons, we conclude that none of the charged parties violated the Act by their conduct surrounding the execution and application of the Servicing Agreement. The Region should dismiss the charges, absent withdrawal.

/s/
B.J.K.

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F.2d 820, 826 (9th Cir. 1980) ("We find no support . . . for the proposition that the attempt to substitute a new employee representative constitutes an unfair labor practice in the absence of coercive conduct aimed at compelling an employee to accept the new representative."), *enforcing Joint Council of Teamsters No. 42 (Grinnell Fire Protection Systems Co.)*, 235 NLRB 1168 (1978).

[27] *Dana Corp.*, 356 NLRB 256, 260 (2010), *review denied sub nom. Montague v. NLRB*, 698 F.3d 307 (6th Cir. 2012).