

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

**TEAMSTERS LOCAL UNION NO.
206,**

Respondent,

and

SAFEWAY, INC.,

Charging Party.

Case Nos.: **19-CB-168283**
19-CB-178098
19-CB-192630

Board Decision:
368 NLRB No. 15 (2019)

**CHARGING PARTY'S MOTION FOR
RECONSIDERATION/CLARIFICATION OF THE
BOARD'S DECISION IN
Teamsters Local Union No. 206 and Safeway, Inc.,
368 NLRB No. 15 (2019)**

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I. INTRODUCTION

Charging Party / Employer Safeway, Inc. (hereinafter “Employer”) hereby moves, pursuant to Board Rule 102.48(c), 29 C.F.R. 102.48(c), for reconsideration/clarification of the Board’s decision in *Teamsters Local Union No. 206 and Safeway, Inc.*, 368 NLRB No. 15 (2019). The Board decision does not directly address one of the major issues in this case, which was extensively addressed by Administrative Law Judge Ariel Sotolongo (“ALJ”) in his decision, leaving some uncertainty as to the possible continued viability of the ALJ’s decision on this issue. The Employer *believes* that the Board holding, reasonably interpreted, disposed of the issue. However, it asks in this Motion for the Board to expressly confirm this point.

II. BRIEF SUMMARY OF FACTS

A. The Regional and ALJ Decisions

The facts in this case are quite complicated, and the Employer will of course not repeat them all here. Briefly, the Employer closed an Oregon warehouse where Respondent Teamsters Local Union No. 206 (“Respondent”) had representation rights in three specific bargaining units, transferred all work to a second, pre-existing Oregon warehouse where Teamsters Local Union No. 305 represented a wall-to-wall unit, and recognized Local 305 as the bargaining representative of all employees at the transferee facility based on a belief it had majority status (additional unions were involved, but that is not germane to this motion). Respondent asserted, through bargaining demands *and a grievance* (GC Ex 46), that its representational rights and collective bargaining agreements must continue at the transferee facility. The Employer alleged that both Respondent’s actions – bargaining demands and the grievance – were in violation of the Act, as Respondent was a minority union at the transferee facility. Region 19 agreed with this Employer position, and issued a complaint. The ALJ did not agree, and held that the Employer should have continued to recognize Respondent and apply the

Respondent's collective bargaining agreements at the transferee facility, pending some resolution of a question concerning representation. He dismissed the charges in question.

B. The Board Decision

The Board, on June 28, 2019, in a 2-1 decision (Members Kaplan and McFerran concurring, Chairman Ring dissenting), upheld the ALJ's dismissal of the charges, *but on the basis of an entirely different and, in fact, entirely contrary legal rationale*. The ALJ had dismissed the complaint against Respondent because he believed the Employer should have continued to recognize Respondent at the transferee facility, and therefore Respondent by seeking to bargain and to arbitrate its grievance on the subject had not violated the Act. The Board majority likewise dismissed the complaint, but based its decision on the conclusion there was no Employer duty to recognize *any* competing union. The Board majority held:

We reject the judge's conclusions regarding the Employer's current bargaining obligation at the PDC [i.e., the transferee facility]. Where, as here, a question concerning representation has been raised because the wholesale addition of a new group of employees has substantially changed the nature of an extant unit, the Board has held that "there can be no accretion ... and no attendant duty to bargain" with a previous representative of a portion of the resultant employee complement. *Nott Company, Equipment Division*, 345 NLRB 396, 401-402 (2005); see also *Geo. V. Hamilton, Inc.*, 289 NLRB 1335, 1338-1339 (1988) (same); *Purolator Products*, 160 NLRB [80], at 82 (same). Accordingly, under the circumstances, the Employer has no duty to recognize and bargain with Local 305, Local 206, or any of the unions involved in this case pending resolution of the question concerning representation of the merged work force at the PDC.

368 NLRB No. 15, Slip Opin at 1, footnote 3 (emphasis added).

III. ARGUMENT

This "no duty to bargain" finding did not specifically address the Respondent's *grievance* demanding contract carryover and continued recognition of Respondent at

the transferee facility. The Employer submits:

1. If there is no legal duty on its part to “recognize or to bargain with” Respondent at the transferee facility, then accordingly there is no duty to carry over the Respondent’s collective bargaining agreements to the transferee facility. A collective bargaining agreement obviously cannot continue to exist and be enforceable when recognition and bargaining rights have been terminated.
2. Any grievance concerning enforcement of collective bargaining agreement language that could be interpreted by an arbitrator to require continued recognition, bargaining, and contract applicability at the transferee facility would be totally inconsistent with the Board’s holding, so such a grievance should not be allowed to remain viable or pursued by Respondent.
3. A Board decision that no recognition or bargaining duty existed logically precludes the Respondent from asking an arbitrator to apply its prior facility collective bargaining agreements at a transferee facility.

The problem is that the Board decision does not specifically make these conclusions, leaving the issue in doubt. It did not address the grievance issue at all in its decision. The Employer believes Respondent may well pursue its grievance seeking contract applicability at the transferee facility, despite the Board’s decision. It has never withdrawn its grievance. Hence the need for clarification of the Board’s decision.

The Respondent’s grievance in question was dated August 3, 2016, and alleged a collective bargaining agreement violation by virtue of the Employer’s refusal to permit Respondent to maintain its contracts and of course representation of transferred employees at the transferee facility. 368 NLRB No. 15, Slip Opin at pp. 10, 17 (ALJ Decision).

The ALJ (*id.* at p. 11) held that this grievance was not unlawful, *specifically based* on his finding that the Employer under the National Labor Relations Act had the legal obligation to continue to recognize Respondent at the transferee facility with respect to employees at the closed facility who were transferred there. *Id.* at p. 13. This predicate has been reversed by the full Board, so the ALJ decision that the arbitration could proceed now has no factual or legal foundation. The ALJ also held that all collective bargaining agreements at the transferor facility must “remain in place” at the transferee facility until the question concerning representation is resolved. *Id.* But again, this holding was specifically premised on the ALJ’s finding that the Employer had a duty to recognize Respondent, *id.*, which finding the full Board rejected.

While the ALJ acknowledged it was “well settled law” that a union may not use a grievance “to force an employer to recognize that union as the representative of employees other than those covered under said agreement,” *id.* at p. 17, he found that Respondent’s grievance did not improperly “undermin[e] ... any Board decision regarding the representational rights of employees at PDC because there is none ...” *Id.* at p. 18. Now, of course, there is such a decision, finding that Respondent did not have representational rights at the PDC.

In order for an arbitrator to find in the Respondent’s favor on its grievance, he or she would necessarily have to impose a recognition duty on the Employer’s part and Respondent’s contract continuation at the transferee facility, a result totally at odds with the Board’s decision. So that decision logically pre-empts any arbitration proceeding.

The ALJ did hold that the “superior authority” of the NLRB could be invoked at any time with respect to an arbitration issue. *Id.* at p. 18. This is exactly what has occurred in this case. No arbitration can proceed in light of the Board’s decision. But again, the Board decision did not specifically say this.

The ALJ also states that Respondent has taken the position that “no remedy” would be sought in arbitration except “vindication of the validity of its claim.” *Id.* at p.

18 n. 60. This is not accurate. The Respondent, through its attorney, stated in a March 20, 2017 email (GC Ex 58) to the Employer's counsel that it was not seeking in arbitration a remedy that would interfere with the recognition of Teamsters Local 305 at the transferee facility, but that it would seek damages for the members of Respondent for the Employer's "breach of contract." The alleged breach of contract in question was the Employer's not carrying over the Respondent's collective bargaining agreements to the transferee facility.

Thus, there was a clear inconsistency in the Respondent's statements it is not seeking recognition but is only seeking damages for breach of contract. No damages – because no breach of contract could occur – could be imposed unless contract carryover and continuation of the Respondent's representational rights were first established by an arbitrator. So the grievance does in fact seek recognition rights despite the Respondent's counsel's clarification about "damages." Whether Respondent's grievance is viewed as asking for "recognition" or asking for damages to be paid based on its contracts applying at the transferee facility, that is still an assertion of representational rights in the grievance and therefore it is in direct conflict with the Board's holding in this case.

Finally, note that the ALJ did hold that his ruling that separate bargaining agreements should remain in place at the transferee facility, as well as their grievance and arbitration procedures, but *only* until the Board resolves representational disputes at the transferee facility. *Id.* at p. 19. This the Board has now done. The ALJ held that once the Board has acted, maintaining or pursuing any grievance that directly or indirectly seeks to undermine the Board's ruling would be unlawful. *Id.* Indeed, Respondent itself repeatedly conceded below that it would be acting unlawfully if it were to ask an arbitrator for a decision on representation that conflicted with a Board ruling. *See, e.g., Respondent's Post-Hearing Brief to ALJ* at p. 3 ("A union has a right to pursue representational issues in arbitration unless and until the Board issues a final decision

on the matter”) and p. 40 (the Board “has concluded the Act prohibits parties from pursuing in arbitration a position inconsistent with a final Board ruling”); *Respondent’s Answering Brief to Exceptions* at pp. 35-36 (“the Act prohibits parties from pursuing in arbitration a position inconsistent with a final Board ruling ...” and “Local 206 ... made clear it will abide by any final determination in this case”) and p. 37 (“Local 206 has disavowed in writing any remedy awarding it representation rights, a disavowal the Employer could readily take to any arbitrator”).

Again, however, since the Board did not address this issue at all in its decision, the Employer requests reconsideration/clarification. There is likewise no guarantee Respondent will not appeal the Board decision, or will consider it “final” if it did not deal specifically with the grievance and arbitration issue.

III. CONCLUSION

The Employer respectfully requests the Board to amend its decision to state:

Our conclusion that the Employer had no duty to recognize or bargain with Respondent Teamsters Local 206 necessarily means that Respondent does not have the right under the Act to pursue a grievance or an arbitration for continued representational rights, or for breach of contract by the Employer, or for damages by virtue of the Employer not applying Respondent’s prior collective bargaining agreements at the transferee facility.

Dated: July 26, 2019

Respectfully submitted,

**OGLETREE, DEAKINS, NASH, SMOAK &
STEWART, P.C.**

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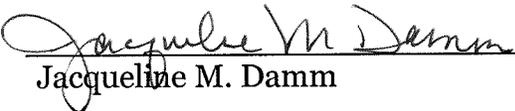
CERTIFICATE OF SERVICE

The undersigned hereby certifies that on July 26, 2019, a copy of the foregoing **CHARGING PARTY'S MOTION FOR RECONSIDERATION/CLARIFICATION OF THE BOARD'S DECISION IN *Teamsters Local Union No. 206 and Safeway, Inc., 368 NLRB No. 15 (2019)*** was served via email upon the following:

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