

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

Advice Memorandum

DATE: February 20, 2003

TO : Frederick J. Calatrello, Regional Director
John Kollar, Regional Attorney
Donald A. Knowlton, Assistant to the Regional Director
Region 8

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

SUBJECT: Suburban Pavilion, Inc. 530-6033-4270
Case 8-CA-33560 712-5042-5000
712-5042-6700
725-6783-1400
725-6783-2800
725-6783-4200
725-6783-5600
725-6783-7000

The Region submitted this Section 8(a)(5) case for advice as to whether the Employer unlawfully refused to deal with a labor organization as the Union's designated agent.

We agree with the Region that the Union has not transferred its representational rights, but rather validly delegated another union as its agent to serve the bargaining unit. Therefore, the Employer's refusal to recognize and bargain with the agent violated Section 8(a)(5).

FACTS

Suburban Pavilion, Inc. (Suburban or the Employer) employs approximately 80 people at its Cleveland, Ohio nursing home and residential care facility. For approximately 30 years, Hotel Employees & Restaurant Employees Local 10 (Local 10 or the Union) has represented Suburban's employees. The current collective-bargaining agreement between Local 10 and the Employer is effective by its terms from April 5, 2002 through April 4, 2005.¹

Approximately two years ago, International representatives from HERE and the Service Employees International Union (SEIU) entered into an organizing agreement designed to capitalize upon their respective expertise in the hospitality and health care industries.

¹ Local 10 represents approximately 3000 employees in 59 bargaining units in Greater Cleveland. Although most Local 10 units are in the hospitality industry, some, like the Suburban unit, are in the health care industry.

Ultimately, the two Internationals plan to transfer representational responsibilities for HERE's health care units to SEIU, and representational responsibilities for SEIU's hospitality units to HERE.

Local 10 President Ilg learned of the organizing agreement from HERE President Wilhelm at HERE's July 2001 convention. Ilg met with Wilhelm to request that an International representative with health care experience be assigned to assist with Local 10's health care units, because one of the two representatives previously assigned to do so had transferred and the other was scheduled to transfer shortly. Wilhelm told Ilg that the International wanted Local 10 to transfer representational responsibilities over its health care units to SEIU. Wilhelm explained that pursuant to the organizing agreement, in late 2000 SEIU had successfully transferred a Disney World maintenance unit to HERE, with the employer's consent. Wilhelm did not indicate how or when Local 10 should effectuate a transfer.

On November 17, 2001, Ilg arranged a conference call with Suburban attorneys Giotto and Britton-Carter. Ilg explained that the International had instructed Local 10 to transfer the representational rights of its health care units to SEIU District 1199 (District 1199). Ilg discussed the HERE-SEIU organizing agreement, and cited the Disney World unit as an example. When Giotto and Britton-Carter reacted angrily, Ilg explained that he had lost his International representatives who had assisted with health care units, suggested that a transfer would benefit Suburban's employees, and pointed out that St. Vincent Charity Hospital had agreed to a transfer of the Union's representational rights to SEIU Local 47.² Because of the attorneys' continued resistance to a transfer, Ilg then suggested that Local 10 execute a servicing agreement with District 1199 by which Local 10 would designate District 1199 as its agent. Giotto responded that he would contact Ilg after speaking with the Employer.

By fax dated November 28, 2001, Britton-Carter informed Local 10 that the Employer would not "recognize or bargain with SEIU," but that it would "fulfill its collective-bargaining obligations with HERE." That same day, Ilg faxed a letter to Britton-Carter stating that at least until Local 10 and the Employer finalized their new contract, District

² [FOIA Exemptions 6, 7(c) and (d)] Local 10 has servicing agreements in place at four other health care units it represents. Only Suburban has resisted both a transfer or servicing arrangement.

1199 would not attempt to organize or communicate with Suburban's employees; that Local 10 would prohibit District 1199 from doing so; and that HERE would not communicate with Suburban employees about this issue. Ilg specifically reserved Local 10's right to revisit the issue with Suburban in the future, adding that he understood doing so would "not obligate [Suburban] in any way to agree to a change in representation as a result of future discussions."

Suburban and Local 10 tentatively agreed on a successor contract on March 29, 2002.³ Before the contract was signed, and without Ilg's knowledge, District 1199 administrative organizer Jackson visited Suburban on April 1 to meet with the Local 10 stewards. Jackson admitted that she may have identified herself as a District 1199 employee to Suburban Administrator McCoy, but made clear that she was there as Local 10's servicing agent. McCoy refused to allow her to meet with the stewards and Jackson left the facility.

Ilg learned of Jackson's visit during a telephone call from Britton-Carter, who repeated that the Employer would not voluntarily recognize District 1199. Ilg replied that "this [is] the way that HERE [is] heading" and that while Local 10 had tabled the transfer issue during contract negotiations, it had reserved the right to revisit the matter at a future date.

After that call, Ilg told Jackson to "back off" because he did not have a signed contract in place and needed time to "massage" the situation. Ilg later met with Jackson and advised her that he needed advance notice of any unit meetings or facility visits; prior approval of any correspondence she sent; regular updates on the status of any grievances; and sufficient input on grievances to decide which ones to refer to arbitration. Ilg also told her to contact Local 10 representative Hall if he was unavailable.

Local 10 and District 1199 executed a Servicing Agreement (the Agreement) on May 28 and June 12, respectively, effective by its terms from June 1 through April 4, 2005 (the expiration date of the extant Local 10-Suburban contract).⁴ The Agreement designates District 1199's staff to act as agents of Local 10, providing Suburban's unit employees with representation at grievance proceedings and arbitration hearings; representation at

³ All dates hereafter are 2002, unless otherwise indicated.

⁴ The Agreement's term may be extended, altered, or amended by the parties' mutual consent, and either party may terminate it on three months' notice.

labor management meetings; and assistance in appearances before the Board "on behalf of the Local 10 Chapter at Suburban...." During the Agreement's initial term, District 1199 will provide these services at no cost to Local 10. If the term of the Agreement is extended, Local 10 will pay District 1199 an amount equal to District 1199's then-existing dues structure each month.

The Agreement also provides that the individual appointed to act as District 1199's servicing agent

will meet on a regular basis with the President of Local 10 to review the status of representation matters within the unit. The parties acknowledge that Local 10 has the ultimate responsibility for collective-bargaining matters....

Local 10 will continue to collect membership dues; will have access to and the right to assist with all membership meetings; and will have access to all records associated with the unit. The unit will maintain its Local 10 officers and employee representatives, who will operate under the Union's internal structure in place prior to the Agreement's implementation. The Agreement states both that bargaining unit members "will be offered Associate Member status in District 1199,"⁵ and that Suburban's employees will remain

full members of Local 10, with the right to vote in Local 10 elections and otherwise participate in Local 10's affairs, [and will retain] whatever membership rights are accorded them under the Local 10 bylaws and the HERE International Union constitution[.]

Finally, the Agreement provides that should the Employer challenge or refuse to accept District 1199's agency status, the parties will cooperate in bringing legal action to enforce the Agreement, and that pending such proceedings, Local 10 staff will provide representation and administer all aspects of the collective-bargaining agreement.

On June 18, Ilg sent Giotto a copy of the executed Agreement, and informed him that he had appointed Jackson as Local 10's primary servicing representative. By letter dated June 24, the Employer refused to recognize Jackson's appointment, asserting that the Agreement was of no legal effect, but added that Suburban would continue to recognize

⁵ It is unclear what entitlements, if any, District 1199 associate membership includes. There is no evidence that unit employees have availed themselves of this offer.

and deal with Local 10 as its employees' exclusive bargaining representative. On July 11, Local 10 responded by offering legal support for its position and explaining that despite having delegated certain duties to District 1199, Local 10 retained ultimate responsibility for representational matters. On July 25 the Employer repeated its refusal to recognize Jackson, and on July 29 Local 10 filed the instant charge.

Local 10 officials have continued to service the unit directly. For example, Ilg has corresponded with the Employer concerning contract administration matters, and Hall successfully grieved a unit employee's termination.

ACTION

We conclude that Local 10's designation of District 1199 as its servicing agent for the Suburban unit was a valid delegation of duties rather than a transfer of representational responsibilities. Therefore, absent settlement, complaint should issue alleging that the Employer's refusal to recognize and bargain with Jackson violated Section 8(a)(5).

It is well settled that an employer is obligated to bargain solely with a statutory representative and no other person or group.⁶ It is equally well settled that a bargaining representative may confer upon an agent authority to bargain on its behalf,⁷ and that one labor organization may act as the agent of another.⁸ However, while a certified representative may delegate its duties under a contract, it cannot delegate its responsibilities.⁹

⁶ Rath Packing Co., 275 NLRB 255, 256 (1985), citing Medo Photo Supply Corp. v. NLRB, 321 U.S. 678 (1944).

⁷ Id. at 256, citing Spriggs Distributing Co., 219 NLRB 1046, 1049 (1975); and Independent Stave Co., 148 NLRB 431 (1964), enfd. 352 F.2d 553 (8th Cir. 1965), cert. denied 384 U.S. 962 (1966).

⁸ See, e.g., Mine Workers Local 17 (Joshua Industries), 315 NLRB 1052, 1064 (1994), enfd. 85 F.3d 616 (4th Cir. 1996) (Table); Kodiak Island Hospital, 244 NLRB 929, 929-30 (1979).

⁹ Mine Workers Local 17, 315 NLRB at 1063-1064, quoting United Mine Workers (Garland Coal), 258 NLRB 56, 59 (1981), enfd. 727 F.2d 954 (10th Cir. 1984). See also Reading Anthracite Co., 326 NLRB 1370, 1371 (1998) (citations omitted).

These agency principles apply when evaluating servicing agreements like the one at issue here. The Board has found such agreements invalid under the circumstances of the few cases where the Board has considered them. However, those cases are significantly distinguishable from the instant case. For instance, in Goad Co.,¹⁰ the Board applied the foregoing principles and affirmed the ALJ's finding that the Section 9(a) union had not simply appointed a second union as its agent, but had transferred its representational responsibilities to the asserted agent, and therefore the employer had lawfully refused to bargain with the union's purported agent.

The service agreement provisions themselves, along with the circumstances under which the agreement was executed, were critical to the decision in Goad. In that case, the Section 9(a) representative, Philadelphia-based Teamsters Local 420, attempted to transfer jurisdiction over a Missouri bargaining unit to St. Louis-based Teamsters Local 562. The employer refused to bargain with Local 562, asserting that the exclusive bargaining representative continued to be Local 420. Local 562 and the international filed a charge alleging, *inter alia*, that the employer's refusal to bargain violated the Act. The Regional Director dismissed that aspect of the charge, and the Office of Appeals denied the appeal.

The two locals then entered into an agreement designating Local 562 as the agent of Local 420 to negotiate a new contract and service the Goad employees. The agreement contained an indemnification clause, providing that Local 562 would hold Local 420 harmless for any asserted breach of the duty of fair representation and that, as consideration, Local 420 would pay to Local 562 "any and all membership initiation fees and dues received directly or indirectly from...employees." The agreement also specifically acknowledged that it was more convenient for the Goad employees to be represented by Local 562 and that it was driven by the Board's determination that the employer lawfully refused to recognize Local 562.¹¹

On these facts the ALJ concluded that Local 420 had not merely enlisted the aid of an agent, but had transferred its representational duties and responsibilities, privileging the employer's refusal to deal with the purported agent. Id., slip op. at 4. In particular, the ALJ found the

¹⁰ 333 NLRB No. 82, slip op. at 1, n.1 (2001).

¹¹ Id., slip op. at 2.

indemnification clause -- characterized as "stand[ing] the law of agency on its head" -- confirmed that Local 420 was "bowing out" as the collective-bargaining representative and that Local 562 was in fact the principal. Id., slip op. at 3, 4. The provision concerning initiation fees and dues further confirmed that Local 420 sought to substitute Local 562 as the bargaining representative, a conclusion made evident by the preamble which stated that, "[i]t is more convenient for these employees to be represented by Local 562." Id., slip op. at 4. Finally, the ALJ concluded that the servicing agreement was devised to circumvent the prior decision of the Regional Director. Ibid.

Goad relied heavily upon Sherwood Ford,¹² another case where the Board found an employer had lawfully refused to bargain with a union's purported agent. In Sherwood Ford the Section 9(a) representative, Automobile Salesmen's Local 1, sought to affiliate with Teamsters Local 604. Refusal to bargain charges were dismissed because the affiliation vote failed to satisfy due process requirements. Unit employees subsequently signed Local 604 cards, which contained both a membership application and a formal designation of Local 604 as exclusive representative. The employees then ratified a resolution designating Local 604 as their duly constituted representative to appear on their behalf in all matters relating to collective-bargaining. In consideration for its services Local 604 was to receive dues according to its own dues schedule, which were double the amount of Local 1's dues. Finally, Local 1's officers were instructed to review all collective-bargaining matters with Local 604 and "to follow and carry out all instructions received from...Local 604." The employer again refused to bargain with Local 604.

The Board upheld the Trial Examiner, who found that the resolution was

a patent attempt to substitute Local 604 as the bargaining agent in place of Local 1 and...a device, subterfuge, or stratagem by which the two locals sought to circumvent earlier rulings of the Regional Director.

188 NLRB at 133-134. The Trial Examiner relied on the evidence of unit employees having signed cards for Local 604, and the dues structure. Id. at 134. More significantly, and contrary to elementary principles of agency law, the purported principal, Local 1, was directed to carry out instructions from its supposed agent. Ibid. Thus, the Trial Examiner found that the locals were

¹² 188 NLRB 131 (1971).

attempting an outright substitution of representatives, and not merely a delegation of duties from principal to agent. Ibid.

The servicing agreement at issue in the present case is significantly distinguishable from those in Goad and Sherwood Ford in that under the agency principles set forth above, it constituted a valid delegation of authority from Local 10 to District 1199. Most notably, Local 10 clearly retains responsibility for the bargaining unit even though it delegated various duties to District 1199. Unlike Goad, the Agreement does not contain an indemnification clause benefiting Local 10, nor is there evidence, as in Sherwood Ford, that Local 10 is acting at the direction of District 1199. To the contrary, the Agreement requires District 1199 to meet with Local 10 "on a regular basis...to review the status of representation matters within the unit," and provides that "Local 10 has the ultimate responsibility for collective-bargaining matters...." The Agreement also provides that Local 10 will have access to and can assist with unit meetings; that it will have continued access to all records concerning the unit; and that Local 10 officers and stewards will continue to serve in those capacities under the same internal structures in place before the Agreement took effect.¹³ We further note that unit employees retain their Local 10 membership status, and all attendant rights and privileges under Local 10's bylaws and the HERE constitution.¹⁴ And, unlike both Goad and Sherwood Ford, where the arrangements concerning dues payments were questionable, here District 1199 provides its services to Local 10 at no cost for the initial term of the Agreement and the employees' dues payments remain the same. Although

¹³ Cf. Goad, 333 NLRB No. 82, slip op. at 2, noting that Appeals characterized the unions' actions as lacking "a 'continuity of representation.'" Although dictum, this is a further distinction between Goad and the instant case.

¹⁴ In this regard, we find it irrelevant that unit employees have been offered District 1199 associate memberships. First, whatever an associate membership may entail, it is clearly not a designation of District 1199 as exclusive bargaining representative. Second, there is no showing that any unit employee has in fact become a District 1199 associate member, or that any unit employee has signed an authorization card for District 1199. Cf. Goad, 333 NLRB No. 82, slip op. at 2 (evidence that a majority of employees favored representation by Local 562, and that Local 562 sought to obtain authorization cards from them); Sherwood Ford, 188 NLRB at 132, 135 (all unit employees signed cards for Local 604).

the Agreement provides that Local 10 will pay District 1199 an amount equal to District 1199's then-existing dues rate in the event the Agreement's term is extended beyond April 4, 2005, this clause is not yet operable, and may well never be. Therefore, it is premature to rely on a future change in dues structure as evidence of an attempt to make District 1199 the unit's bargaining representative.

Moreover, Local 10's conduct is entirely consistent with a finding that Local 10 has retained responsibility over the bargaining unit. For example, immediately after learning of Jackson's unannounced visit to the Employer's facility, Ilg admonished her not to do so again. And, prior to executing the Agreement, Ilg met with Jackson and advised her that she should give him advance notice of any unit meetings or facility visits; obtain his prior approval concerning any correspondence she sent; provide him with regular updates on the status of grievances; and apprise him about grievance matters so that he could decide which ones to refer to arbitration. Ilg's designation of Hall as an alternate Local 10 contact for Jackson is further evidence that she was not authorized to act without Local 10's prior consent or knowledge, even in Ilg's absence.

Although HERE ultimately hopes to transfer representational responsibility for the Suburban unit to SEIU, unlike Goad and Sherwood Ford, the unions here did not execute the Agreement to circumvent an adverse Board determination, nor have they actually executed such a transfer.¹⁵ Rather, until such time as a lawful transfer can be accomplished, Local 10 merely delegated certain duties to District 1199, and unquestionably retained ultimate authority for representing the Suburban unit employees.¹⁶

¹⁵ We recognize that Local 10's earlier request that the Employer consent to a transfer can arguably be construed as an attempt to transfer representational responsibility that privileged the Employer's refusal to deal with District 1199. However, Local 10's actions are clearly unlike the union's in Goad, where the "service agreement" arose from a failed prior attempt to force the Employer, through Board procedures, to abide by an attempted transfer. Local 10's mere request, together with the significant differences in the terms of its Agreement from the one in Goad, distinguishes this case from Goad and supports our rejection of an argument that its statement is legally significant in analyzing whether the Agreement actually effected a transfer of representational rights.

¹⁶ The Region should not rely on Ilg's and Hall's continued involvement in unit affairs as an indication that Local 10

In all these circumstances, we conclude that although the Union delegated certain of its duties to District 1199, it has plainly retained responsibility and control over the bargaining unit. Both the terms of the Agreement and Local 10's conduct demonstrate that it has at all times remained the principal in its relationship with District 1199. Since Local 10 has legitimately authorized District 1199 to act as its agent, the Employer was obligated to honor that delegation.¹⁷ The Employer's refusal to deal with Jackson as the appointed agent of Local 10 therefore violated Section 8(a)(5) of the Act, and an appropriate complaint should issue, absent settlement.

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retained responsibility for the unit. Rather, it appears that their ongoing involvement is a result of the Employer's refusal to recognize District 1199 as Local 10's agent, in which case the Agreement specifically provides that Local 10 will continue to administer the contract and service the unit. Nevertheless, even without that involvement, for the reasons articulated above, we conclude that Local 10 has retained responsibility for the unit.

¹⁷ See The Prudential Insurance Co., 124 NLRB 1390, 1391 (1959), *enfd.* as modified 278 F.2d 181 (3rd Cir. 1960).