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

Advice Memorandum

DATE: November 26, 2004

TO : Richard L. Ahearn, Regional Director
Region 19

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

SUBJECT: Kindred Healthcare, Inc. d/b/a
Mountain Valley Care
and Rehabilitation Center
Case 19-CA-29390

177-3975
177-3987
339-2531
385-2525-5075
530-4090-6000
530-5400
530-8081-6900

The Region submitted this Section 8(a)(5) case for advice as to whether the Employer unlawfully refused to recognize United Steelworkers of America, Local 5114 after United Steelworkers of America, Local 5089 merged with Local 5114.

We agree with the Region that Local 5114 is the successor to Local 5089 because there is substantial continuity of representation between the two locals. Therefore, the Employer's refusal to recognize and bargain with Local 5114 violated Section 8(a)(5). [*FOIA Exemptions 2 and 5*

] the complaint also should allege that the Employer violated Section 8(a)(5) and (1) by implementing unilateral changes to the employees' terms and conditions of employment.

FACTS

In the 1980's, when a majority of the Employer's approximately 40 service and maintenance employees chose to be represented by the USWA, the International created Local 9052 to represent only that unit. Thereafter, the International started a program of merging smaller locals into larger locals, and in 2000, USWA District 11, which has jurisdiction over all USWA locals in the Northwest, merged Local 9052 with Local 5089. At that time, Local

5089 represented a large unit of employees at the Sunshine Mine Company and, pursuant to the International's policy of designating separate bargaining units with suffixes, the Employer's unit became Local 5089-04.

Two years later, the Employer executed a collective-bargaining agreement, effective from March 1, 2002, through February 28, 2005, with "United Steelworkers of America, AFL-CIO, CLC, on behalf of Local 5089-04." The individuals signing that contract for the Union included Steve Powers, an International Staff Representative assigned to District 11; District 11's director, David A. Foster; and various International officials. No one specifically designated as an official of Local 5089 signed the contract. At that time, approximately 8 of the Employer's 40 unit employees were members of the Union, and none of Local 5089's officers were employed by the Employer.

The Sunshine Mine closed in February 2004,[1] terminating all of Local 5089's leadership and most of its members. Staff Representative Powers then decided to merge Locals 5089 and 5114, which represented larger units of employees at two other mines. Powers discussed the merger at a Local 5114 membership meeting in late February or early March, and although no vote was taken, Local 5114's leadership and members did not object. District 11 Director Foster then approved Powers' decision, and requested the International to cancel Local 5089's charter and merge the Employer's unit employees into Local 5114. The International approved the merger on March 25, and by letter dated April 1, International Secretary-Treasurer James D. English informed the Employer "that the members of USWA Local Union 5089 Unit 04 have become members of USWA Local Union 5114 Unit 06." That letter also requested the Employer to continue sending the members' dues and initiation fees to the International's Chicago office, and to send a copy of the associated paperwork to Local 5114. No officials of the International or Local 5114 discussed the merger with the Employer's employees, and Local 5089 did not vote on the matter.

Locals 5089 and 5114 did not have local bylaws. Instead, like many USWA Locals, they were governed by the International's constitution and bylaws. In addition, the current collective-bargaining agreement provides that only International officers and representatives have authority with respect to initiating arbitration proceedings and changing dues, initiation fees, and assessments. The contract also requires the Employer to submit dues withheld

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[1] All dates hereafter are 2004, unless otherwise indicated.

from members' paychecks to the International. The International's practice is to then remit a portion of the dues to the appropriate local union.

After receiving the International's April 1 letter, the Employer stopped forwarding the members' withheld dues to the International. During roughly the same period, starting before April 1 and continuing through late May, the Employer's attorney and International Staff Representative Powers communicated with each other concerning an employee's grievance. The Union did not raise the subject of the withheld dues with the Employer.

By letter dated July 8 the Employer's attorney informed International Secretary-Treasurer English that it did not recognize Local 5114 because it lacked objective evidence that its employees desired such representation. The July 8 letter also described English's April 1 letter as a disclaimer of interest with respect to Local 5089.

Powers replied to the Employer's July 8 letter on August 2. Powers noted that the Employer did not object when Local 9052 was merged with Local 5089, and asserted that "we" continued to have a collective-bargaining agreement with the Employer through February 28, 2005. Since that time, the Employer has abolished the grievance/arbitration system and discontinued deducting dues from members' paychecks, but has not otherwise altered the unit employees' terms and conditions of employment.

ACTION

Initially, we conclude that if Local 5089 is the Section 9(a) representative of the Employer's employees then Local 5114 is the successor bargaining representative to Local 5089 because there is continuity of representation between them. Therefore, absent settlement, complaint should issue alleging that the Employer's refusal to recognize and bargain with Local 5114, and its implementation of unilateral changes, violated Section 8(a)(5) and (1) of the Act. [*FOIA Exemptions 2 and 5*

] complaint should issue alleging that the Employer violated Section 8(a)(5) and (1) by withdrawing recognition from the International, without regard to any continuity

between Locals 5089 and 5114 or lack of due process in the merger, and by implementing unilateral changes.

With respect to the allegation that Local 5114 is the successor to Local 5089, the Region should argue, consistent with the General Counsel's Motion for Reconsideration and Brief in Support in Allied Mechanical Services, Inc., Cases 7-CA-40907 and 7-CA-41390, that the continuity between the two locals is sufficient, and that any alleged lack of due process, including the lack of a membership vote, is irrelevant.

As explained more fully in the General Counsel's Allied Mechanical Motion for Reconsideration, under the framework established in Seattle-First,[2] an employer is obligated to continue recognizing and bargaining with a representative that has merged or affiliated with another union.[3] Traditionally, the Board has stated that generally it would relieve an employer of that bargaining obligation only if the employer proved that the merger or affiliation was accomplished without minimal due process, and/or that it resulted in a discontinuity of representation between the old and new bargaining representatives.[4] Although most union mergers/affiliations result in some degree of change to the union's organizational structure, the Board will intervene in such "internal union matters" only where it finds that the merger/affiliation raises a question concerning representation (QCR).[5] The existence of a QCR is therefore a prerequisite for Board intervention in union

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[2] NLRB v. Financial Institution Employees of America (Seattle-First National Bank), 475 U.S. 192 (1986).

[3] See Minn-Dak Farmers Coop., 311 NLRB 942, 944 (1993), enfd. 32 F.3d 390 (8th Cir. 1994).

[4] See, e.g., Mike Basil Chevrolet, 331 NLRB 1044, 1044, 1045 (2000); CPS Chemical Co., 324 NLRB 1018, 1019-25 & n.7 (1997), enfd. 160 F.3d 150 (3d Cir. 1998); Western Commercial Transport, 288 NLRB 214, 217 (1988).

[5] Sullivan Bros. Printers, 317 NLRB 561, 562 (1995), enfd. 99 F.3d 1217 (1st Cir. 1996); Minn-Dak Farmers Coop., 311 NLRB at 945. Cf. Western Commercial Transport, 288 NLRB at 217, 218 ("[t]he Board's role in affiliation cases is to determine whether the affiliation raises a question concerning representation .... [O]nce a question concerning representation is raised as a result of dramatic changes in the bargaining representative, an affiliation vote cannot be used as a substitute for a representation proceeding before the Board....").

merger/affiliation matters. Consistent with this approach, the Board will interject itself, "only in the most limited of circumstances involving such internal changes."[6]

By definition, a QCR exists after a merger/affiliation only where there has been a change in representation, "sufficiently dramatic to alter the union's identity."[7] Conversely, substantial continuity exists when the merged/affiliated union is the same union, in substantial part, as that selected by the unit employees initially to be their bargaining representative. Indeed, "the significant factor is whether there is an identity change as a result of the [merger or] affiliation."[8]

Because substantial continuity depends solely on the identity of the representative remaining the same, it is evaluated in each case by a factual comparison between the "old" and "new" bargaining representatives. The Board examines several factors to determine whether the essential nature of a bargaining representative as it affects the employees has been altered, including continued leadership responsibilities for existing union officials; extension of membership rights and duties in the new union to former members of the old union; authority to change provisions in the governing documents; changes in dues structure; frequency of membership meetings; continuity in the manner in which contract negotiation, administration, and grievance processing are effectuated; and the preservation of physical facilities, books, and assets.[9] No single factor is determinative, and the Board evaluates the totality of these factors to determine whether substantial continuity has been maintained.[10]

Because the due process prong of the Board's test has no impact on the identity of the employees' representative,

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[6] Sullivan Bros. Printers, 317 NLRB at 562.

[7] May Department Stores Co., 289 NLRB 661, 665 (1988), enfd. 897 F.2d 221 (7th Cir.), cert. denied 498 U.S. 895 (1990) (emphasis and citations omitted).

[8] Mike Basil Chevrolet, 331 NLRB at 1044.

[9] See Western Commercial Transport, 288 NLRB at 217.

[10] See, e.g., ibid.; Mike Basil Chevrolet, 331 NLRB at 1044 (citation omitted) ("[i]n assessing continuity questions we consider the totality of the circumstances, eschewing the tendency toward a 'mechanistic approach' or the use of a 'strict checklist'").

an alleged lack of due process cannot alone raise a QCR.[11] As such, an alleged lack of due process, including the lack of a membership vote, is irrelevant to the existence of a QCR and to the Board's analysis. Accordingly, while the Employer's unit employees who belonged to Local 5089 did not receive any input into the merger, the relevant inquiry is whether there is sufficient continuity between Locals 5089 and 5114.

A comparison between Local 5089 and Local 5114, using the above-mentioned well-established criteria, establishes sufficient continuity to preclude the existence of a QCR. With respect to the continued leadership responsibilities of existing union officials, International Staff Representative Powers handled grievances, communicated with the Employer, and signed the collective-bargaining agreement when the unit employees belonged to Local 5089.[12] He reported to District 11 Director Foster, who also signed the contract. There is no evidence that the roles of Powers and Foster will be different with respect to Local 5114's dealings with the Employer. In addition, International Secretary-Treasurer English signed the contract, handled the Employer's submissions of dues when its employees belonged to Local 5089, and communicated directly with the Employer concerning the merger. The Employer has submitted no evidence that it or its unit employees dealt with any officer or representative of Local 5089, or with any Union representative other than Powers, Foster, or English. Accordingly, there is continuity with respect to leadership.

As for the extension of membership rights and duties in Local 5114 to former members of Local 5089; the unit employees' authority to change provisions in the governing documents; changes in dues structures following the merger; frequency of membership meetings; and continuity in the manner in which contract negotiation, administration, and grievance processing are effectuated, the evidence indicates that there have been no significant changes.

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[11] Cf. Seattle-First, 475 U.S. at 205-206 ("[w]e repeat, dissatisfaction with the decisions union members make may be tested by a Board-conducted representation election only if it is unclear whether the reorganized union retains majority support").

[12] See Central Washington Hospital, 303 NLRB 404, 404 (1991) (finding significant that the same labor relations professional who carried out predecessor union's bargaining and grievance-handling responsibilities continued to function in same role after affiliation.)

Thus, all unit employees who were members of Local 5089 became members of Local 5114. Their rights as Local 5114 members are governed by the same International constitution and bylaws that applied when they belonged to Local 5089, and there is no evidence of changes in dues structures or the frequency of membership meetings. Also, although contract negotiations have not begun, there is no evidence that Powers' role will change in that regard, and his continued handling of contract administration and grievance processing is shown by his representation of a grievant during the period immediately preceding and following the merger.[13]

In sum, the Region should argue that Local 5114 is the successor bargaining representative to Local 5089 as there is substantial continuity of representation between the locals. Whether viewed from the Employer's or the employees' perspective, the merger has not brought significant changes to the collective-bargaining relationship. Thus, Local 5089 was a Steelworkers Local within Steelworkers District 11, and was affiliated with the International. After the merger, the members employed by the Employer still belong to a Steelworkers Local within District 11 that is affiliated with the International. Similarly, if the Employer had recognized Local 5114 after the merger, it would have continued dealing with a Steelworkers Local represented by the same individuals who had signed the collective-bargaining agreement and handled grievances and dues in the past. "Consequently, the changes which occurred here are more in the nature of administrative changes and are not the kind of substantial changes which result in the creation of a different representative."[14]

[*FOIA Exemptions 2 and 5*

.] Despite the lack of evidence as to the origins of the collective bargaining relationship with the Employer there are strong indications that the International is the Section 9(a) representative. Thus, we note that the collective-bargaining agreement was executed by the International on behalf of Local 5089-04;

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[13] Although there is no evidence concerning the preservation of Local 5089's physical facilities, books, and assets, the Board gives those factors "little weight." CPS Chemical Co., 324 NLRB at 1024.

[14] Service America Corp., 307 NLRB 57, 61 (1992).

the agreement gives certain authority to International representatives and officers; and the Employer appears to have dealt exclusively with representatives of the International and District 11.

[*FOIA Exemptions 2 and 5*

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B.J.K.