Supershuttle International Denver, Inc. *and* Communications Workers of America. Case 27–RC–008582

July 18, 2011

DECISION ON REVIEW AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS BECKER AND PEARCE

On February 26, 2010, the Regional Director for Region 27 issued a Decision and Order (pertinent portions are attached as an appendix), in which he dismissed a petition filed by the Communications Workers of America (Union) seeking to represent a unit of the Employer's shuttle van drivers. The Regional Director found, as urged by the Employer, that the Union has a disabling conflict of interest based on the relationship between its affiliate, the Communications Workers of America, Local 7777 (the Local or Local 7777), and the Union Taxi Cooperative (UTC).

Thereafter, in accordance with Section 102.67 of the National Labor Relations Board's Rules and Regulations, the Union filed a timely request for review of the Regional Director's Decision. The Union contends that a disqualifying conflict of interest does not exist because it is not the Employer's competitor, and even assuming that it is, there is no evidence that its competitor status would interfere with its fair and vigorous representation of SuperShuttle employees. On May 5, 2010, the Board granted the Union's request for review.[1]

The Board has delegated its authority in this proceeding to a three-member panel.

Having carefully considered the entire record, including the parties' briefs on review, we conclude, contrary to the Regional Director, that the Employer has failed in its burden of establishing that the Union is disqualified from representing the Employer's employees because of a conflict of interest. Accordingly, we reinstate the petition and remand this case to the Regional Director for further appropriate action.

Facts

The Employer, a subsidiary of SuperShuttle International, is engaged in the transportation of passengers and their baggage. It entered into a license agreement with SuperShuttle International and SuperShuttle Franchise Corporation for the use of the SuperShuttle trademarks within a designated territory. SuperShuttle Denver is licensed to serve Denver International Airport (DIA) from the Denver metropolitan area. In order to service that area, the Employer has entered into sublicense franchise agreements with shuttle van drivers to use the SuperShuttle systems and trademarks and to provide transportation services in the applicable market. The van drivers are called "unit franchisees."

SuperShuttle Denver is subject to regulation by the Colorado Public Utilities Commission (CPUC). CPUC issues certificate numbers to SuperShuttle Denver, authorizing it to engage in the "Transportation of Passengers and Baggage." Currently, SuperShuttle Denver is authorized to operate 86 vans, and there are 86 unit franchisees operating under SuperShuttle Denver.

On July 2, 2007, the Professional Taxicab Operators of Colorado Association (ProTAXI) entered into an agreement for affiliation with Local 7777. Under the affiliation agreement, ProTAXI became a division of Local 7777 and agreed to abide by its constitution and bylaws. Local 7777 agreed to provide staff support to ProTAXI regarding matters involving the CPUC, DIA, the city and county of Denver, and area hotels. The Local was also obligated to provide attorneys and lobbyists to advocate for ProTAXI with the Colorado General Assembly. In that capacity, the Local successfully lobbied for a change in the law that then enabled the members of ProTAXI to create the Union Taxi Cooperative (UTC), which operated as a nonprofit taxicab cooperative in the city and county of Denver. The record does not establish whether ProTAXI and Local 7777 formally ended their affiliation agreement, but it appears that ProTAXI was replaced by UTC. UTC and Local 7777 do not have an affiliation agreement in place.[2]

UTC lists its principal office address as the Local's address. It also has a commercial lease with Local 7777 to rent office space and use its parking lot.

Like the Employer, UTC is subject to regulation by the CPUC. Pursuant to its CPUC certificate, UTC is authorized to operate 262 taxicabs, and it has 262 members. In order to join the cooperative, UTC's bylaws require an individual to sign a UTC membership agreement and be accepted into membership by the UTC Board.[3] UTC members pay an unspecified initial membership fee. Once accepted, they begin to pay UTC annual membership dues.

Neither the Union nor Local 7777 has a traditional collective-bargaining relationship or written agreement with UTC to represent UTC members. UTC pays the Local a

[1] In the same Order, the Board denied the Employer's request for review of the Regional Director's finding that the petitioned-for SuperShuttle van drivers were statutory employees rather than independent contractors.

[2] The record is unclear as to whether UTC is now a formal, or in any other manner, part of the Local in the same manner that ProTAXI was a division of the Local.

[3] UTC is overseen by five officers and a four-member board of directors.

monthly per capita fee of $28 per member. The Local categorizes the fee as "dues." UTC members do not pay an initiation fee to the Local. The monthly fees paid by UTC to the Local amount to $7336 per month. The fees are in addition to the monthly rent paid by UTC. The fees are commingled with the dues paid by the traditional union members and are used for the Local's operating expenses. In exchange for the "dues," Local 7777 provides the same services, e.g., legal and lobbying services, to UTC as it previously provided to ProTAXI.

In July 2009, Local 7777 hired then-UTC President Abdi Buni as a paid organizer. Buni is no longer UTC's president, but he is still on the UTC board of directors. The Local's representatives conducted a recent UTC board of directors' meeting and oversaw the election of officers and a board of directors at that meeting.

Since then, the Local has assisted UTC members in a variety of matters. In 2009, it intervened on behalf of UTC members in two disputes at a Hyatt hotel in downtown Denver. The first dispute involved a formal CPUC complaint filed by the hotel against UTC for "bullying other companies out of line." The second involved a UTC complaint regarding the hotel's informal policy of allowing Yellow Cab[4] drivers into the lobby to solicit customers while excluding UTC members from doing the same. The Local has also had meetings with parking enforcement officials on behalf of UTC members, and has met with officials at DIA regarding heating and air conditioning issues in the building made available to Muslim taxi drivers for daily prayers. The Local's representatives have also accompanied UTC members to court to assist them with plea bargaining regarding trespassing tickets. Additionally, UTC sought assistance from the Local after it was informed that a shopping mall intended to grant two competitor cab companies exclusive access to the mall. Local 7777 intervened on behalf of UTC members and organized a demonstration at the mall. The leaflets distributed at the demonstration were displayed on the Local's website. Local 7777 has also assisted UTC in hiring a defensive driving trainer.

Analysis

The Board has long held that a union may not represent the employees of an employer if the union has a conflict of interest. Rather, the union must have the "single minded purpose of protecting and advancing the interests of the employees who have selected it as their bargaining agent, and there must be no ulterior purpose." *Bausch & Lomb Optical Co*., 108 NLRB 1555, 1559 (1954). In order to establish that a union has a disabling conflict of interest, the employer must show a "clear and present" danger that the conflict will prevent the union from vigorously representing the employees in the bargaining process. *Garrison Nursing Home*, 293 NLRB 122 (1989), quoting *Quality Inn Waikiki*, 272 NLRB 1, 6 (1984), enfd. 783 F.2d 1444 (9th Cir. 1986). Because such a finding necessarily restricts the employees' Section 7 rights to freely choose a bargaining representative, the burden on the party seeking to prove a disabling conflict is, appropriately, a heavy one. Id.

A.

Here, the Regional Director found that the relationship between the Union and UTC creates "a disabling conflict of interest with the obligation of the Union as a potential collective-bargaining representative of the SuperShuttle Denver drivers to have [a] single-minded purpose of advancing the interests" of the petitioned-for employees. In so finding, the Regional Director acknowledged that the Union did not have an ownership interest in UTC and that its interest in UTC was not analogous to that of the union in the nurse registry it operated in *St. John's Hospital & Health Center*, 264 NLRB 990 (1982) (discussed infra). Nevertheless, the Regional Director found that a disabling conflict exists because of the inherent likelihood that the Union's bargaining efforts on behalf of the Employer's employees would be influenced by interests other than those of the Employer's employees, based on the Union's relationship with UTC. Specifically, the Regional Director found that "the form of assistance provided by the Union to UTC in exchange for monthly financial remuneration" is inevitably "in direct conflict with the single-minded representational purpose required of a bargaining representative."

Contrary to the Regional Director, we find that the Employer has not met its heavy burden of showing that the Union's relationship with UTC poses a clear and present danger of interfering with its collective-bargaining with the Employer. Accordingly, we reverse the Regional Director.

B.

Even assuming the taxi drivers who are members of UTC are direct competitors of the Employer, we do not believe that that fact would disqualify the Union from representing the Employer's employees. After all, unions commonly represent employees of multiple employers in the same industry, often in the same competitive market. See, e.g., *Commercial Workers Local 951 (Meijer, Inc.*), 329 NLRB 730, 733–736 (1999), enfd. 307 F.3d 760 (9th Cir. 2002) (en banc), cert. denied 537 U.S.

[4] Yellow Cab and the Employer are both owned by the same parent company.

1024 (2002). The fact that expansion of one such employer, and the union's consequent gain of members, may come at the expense of another employer in the same market, does not disqualify the union from representing the employees of both employers. The situation is no different here. The Union is not in the transportation business and its representation of taxi drivers who are not disqualifying, as made clear by the Board in *CMT, Inc*., 333 NLRB 1307, 1308 (2001).

Our conclusion is not altered by the fact that the Local does not represent the drivers who are members of UTC in traditional collective bargaining. Unions often advocate on behalf of their members in forums other than collective bargaining. See *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565–567 (1978). Such advocacy often takes the form of working cooperatively with the employer of the union's members when the employer and its employees have common interests. Such advocacy does not disqualify a union from representing employees of two employers in the same market.

The Union is not profiting from the operation of a transportation business in a manner different from any union that "profits" when an employer whose employees it represents succeeds. Rather, it is collecting per capita fees from UTC, just as every international union collects per capita fees from its affiliated locals. The fact that the Union also rents space to UTC does not alter our conclusion. There is no evidence to suggest that the lease agreement was not an arms-length transaction. Neither the collection of per capita fees based on membership in UTC nor the collection of what is conceded to be reasonable rent represents the acquisition of the type of "special interest" in a competitor employer that the Board found disqualifying in *Bausch & Lomb Optical Co*., 108 NLRB at 1559.

The cases cited by the Regional Director are distinguishable. In *Bausch & Lomb*, supra, the union established a company that engaged in the same business as an employer of employees represented by the union. In contrast, the record here does not demonstrate that the Union invested any monies in UTC or that the Union controls UTC.

The facts here are also distinguishable from those in *St. John's Hospital,* supra, where the union operated a registry that referred nurses to the employer's hospital and received referrals of patients from the employer. The union exercised complete control over the registry, and the employer paid the union for use of the registry's services. Because the employer was the union's customer, the Board found that the union's "financial interests in maintaining and enhancing its 'customer' relationship with the Employer" would cause the union to seek to further its business interest rather than to further the interests of the bargaining unit employees. 264 NLRB at 993. In the present case, by contrast, the Employer is not a customer of the Union, and the Union neither supplies personnel to the Employer nor derives any monies from the Employer. Instead, the Local receives a per capita fee from UTC in return for advocating on behalf of its members. Cf. *Garrison Nursing Home*, 293 NLRB 122 (1989) (conflict exists because of the financial relationship between the employer and the petitioner's executive director as the holder of the employer's promissory note for $220,000).[5]

Thus, even assuming the taxi drivers who are members of UTC are direct competitors of the Employer, we would find no disqualifying conflict of interest.

C.

In any event, we disagree with the Regional Director's finding that the UTC is a direct competitor of the Employer. Specifically, the Regional Director found that the two entities compete to carry passengers to and from Denver International Airport; they are both subject to regulation by the same regulatory agencies; they compete for a finite number of licenses issued for passenger transportation in the Denver metro area; and UTC sought the Local's assistance during the Hyatt disputes, which allegedly involved the Employer.

We agree with the Regional Director's finding that UTC and SuperShuttle Denver are competitors only insofar as they both transport passengers to and from the airport. For the reasons that follow, we find that the Employer and the UTC are not, in fact, direct competitors.

First, there is no record evidence to support the Regional Director's finding that UTC and SuperShuttle Denver compete for a fixed number of licenses. Our review of the CPUC rules and regulations does not show that CPUC issues only a finite number of certificates to all types of common carriers, i.e., to limousine services,

[5] While recognizing that the Board did not ultimately find a conflict of interest in *Alanis Airport Services*, 316 NLRB 1233 (1995), the Regional Director here still found the case to be "instructive" because "the facts regarding [the Machinist's] involvement with [the Miami Airport Skycaps] are similar to CWA's involvement with UTC." We disagree. As the Board in *Alanis* specifically pointed out, there was no evidence that the Machinists, if selected as the Section 9 representative of the employer's employees, would utilize that position to create instability in the employer's labor relations and thereby enhance the chances that MAS would obtain the work. The same is true in respect to the Union and UTC here. Moreover, the facts in *Alanis* are distinguishable for a number of reasons. First, the employer and the entity affiliated with the union would have been direct competitors, unlike the Employer and UTC here. Second, the union's president and secretary-treasurer served on the affiliated entity's five-member board of directors. Thus, the union in *Alanis* had greater control over its affiliate, than is present in the Union's relationship with UTC here.

taxicabs, etc., so that the number of certificates that a limousine service receives would affect the number available to taxicabs. Thus, the Regional Director's theory that the Union's advocacy on behalf of UTC members may limit the Employer's future ability to obtain additional CPUC certificates is purely speculative.

Second, there is no evidence to support the Regional Director's finding that the UTC and the Employer are competitors because the nature of the industry is such that the Union's intervention on behalf of one company results in a loss of business for another. In support of this finding, the Regional Director relied in part on the incident at the Hyatt involving Yellow Cab. We find that such reliance was misplaced. There is one email, without supporting testimony, in the record that refers to this incident. The email, from UTC to Local 7777, states, in part:

> [Y]ellow cab supervisors are all over the hotel talking to Hyatt's front desk personnel and customers inside the hotel lobbying customers to take either super shuttle or yellow cab. The same supervisors were calling yellow cabs from [the] street to load customers while other taxi cabs are waiting on hotel's taxi stand. Yellow cab is claiming they are loading their super shuttle customers into their cabs for free since super shuttle is not handling their customers on time.

A reasonable interpretation of this email is that UTC's dispute was primarily with Yellow Cab, which is in direct competition with other taxicab companies, rather than with SuperShuttle Denver. Thus the email does not help to carry the Employer's burden of establishing a disabling conflict.

Third, the Regional Director erred in finding that the Union's intervention on behalf of UTC members could result in member drivers gaining advantages over the Employer's employees in curbside waiting at DIA or prime locations to park and wait for passengers in the downtown area. The Regional Director found that the Local's efforts to gain such advantages were "precisely the kind of intervention UTC was seeking from the Union in its dispute at the Hyatt." This reasoning is also entirely speculative. The record contains no evidence that the Union or the Local has intervened on behalf of UTC members to gain advantage in relation to curbside waiting or parking at DIA. In fact, there is no evidence that the UTC drivers wait at DIA in the same areas as the SuperShuttle drivers. Moreover, the Employer and the UTC members do not even perform identical services; the Employer provides a type of limousine service, while UTC provides taxicab service. Based on the foregoing, we find that the evidence fails to establish that the UTC and the Employer are direct competitors.

For the reasons stated above, we conclude that the Employer failed to sustain its burden of establishing that the Union's involvement with UTC, by way of the Local, constitutes a clear and present danger of interfering with the collective-bargaining process. Accordingly, the Regional Director's finding that the Union has a disqualifying conflict of interest is reversed, the petition is reinstated, and the case is remanded to the Regional Director for further appropriate action.

ORDER

It is ordered that the Regional Director's finding that the Communications Workers of America has a disqualifying conflict of interest is reversed, the petition is reinstated, and the case is remanded to the Regional Director for further appropriate action.

APPENDIX

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UNION CONFLICT OF INTEREST

SuperShuttle Denver asserts that the petition should be dismissed because CWA has a disabling conflict of interest based on CWA Local 7777's relationship with UTC. Specifically, SuperShuttle Denver contends that it and UTC are competitors in the passenger transportation industry, based on the fact that they are subject to the same CPUC and DIA regulations, have overlapping transportation territories, and compete head-to-head for the highly competitive downtown hotel customer base needing transportation to and from DIA.

A. UTC's Formation

1. UTC's predecessor

On July 2, 2007, CWA entered into an Agreement for Affiliation between the Professional Taxicab Operators of Colorado Association (ProTAXI), and the Communications Workers of America, AFL–CIO, Local 7777. The Agreement for Affiliation provided that ProTAXI would become a division of CWA, Local 7777, and abide by Local 7777's constitution and bylaws. The Affiliation Agreement also stated that the Union would provide staff support to the ProTAXI Division regarding matters involving CPUC, DIA, the City and County of Denver, and area hotels. CWA was also obligated to provide attorneys and lobbyists to advocate for the ProTAXI division with the Colorado General Assembly. The Union's advocacy included successfully lobbying for a change in the law through the Colorado legislature, which permitted the CPUC to lower transportation industry entry standards allowing for the legal formation and certification of UTC to operate as a taxicab cooperative. The change in the law took effect July 1, 2008.

In anticipation of the change in law by the Colorado General Assembly, ProTAXI union members met in January 2008, to formulate plans to form UTC. In April 2008, the 262 ProTAXI members sought and obtained legal advice regarding the requirements for applying to the CPUC for authorization to form a cooperative to provide taxicab service in the City and County of Denver. The record does not establish whether the Union

and ProTAXI ever formally ended their Affiliation Agreement, but it appears that ProTAXI was subsumed by UTC upon UTC's formal legal creation.

2. UTC's incorporation

On June 9, 2008, UTC filed its Articles of Incorporation of a Cooperative with the Colorado Secretary of State. UTC listed the Union's address (2840 S Vallejo, Englewood, Colorado), as its principal office street address. Abdi Buni was named as the registered agent, and incorporator for UTC. Abdi Buni's address was also given as CWA's address. In June 2008, UTC also adopted cooperative bylaws, and entered into a Colorado Commercial Lease with CWA, effective July 1, 2008, to rent office space and use of the parking lot at the union hall. UTC entered into a successor lease effective July 1, 2009, with CWA, Local 7777, increasing the amount of monthly rent, and increasing the size of the office space UTC rents from the Union. That lease also covers all utilities except telephone service and includes the right for the UTC members to park their taxicabs at the union hall when the cabs are not in service.

On July 1, 2008, UTC filed an application to operate as a common carrier by motor vehicle for hire with the CPUC for a permit authorizing the 262 individual UTC members to begin to offer taxi service under the UTC name in the City and County of Denver. This application was granted, and UTC has had 262 cooperative members and corresponding taxicabs since that time.

3. UTC membership

UTC currently has 262 member drivers, which is the maximum number UTC can have based on its current CPUC certification. UTC has an office staff of eight employees, including dispatchers, call takers, a cashier and bookkeeper. The office employees are overseen by general manager Guadata Brasso. In order to join the cooperative, an individual must sign a UTC Membership Agreement and be accepted into membership by the UTC Board. UTC members pay an initial membership fee. Once accepted, they begin to pay annual membership dues which may be paid on a weekly, monthly, quarterly, or annual basis.[10] UTC members are required to become members of CWA, but are not required to pay initiation fees.

UTC is overseen by a four-member board of directors and five official officers. Abdi Buni was the first president of UTC. Buni, however, was hired as a paid organizer for CWA Local 7777 in July 2009. Accordingly, at the August 2009 Board of Director's meeting, Bushra Saido was elected as Buni's successor. At that same meeting, Yousef Salad and Mengistab Desta were elected as Vice Presidents; Million Mengistu was elected as Secretary; and Takele Merse was elected as Treasurer. The current UTC Board Members are: Abdi Buni, Stan Hawton, Cristian Mateescu, and Gamachu Said.

B. Relationship Between CWA and UTC

The documentary evidence regarding a relationship between CWA and UTC initially establishes that they have a formal landlord/tenant relationship based on the lease for the UTC office space. Other aspects of the relationship between CWA and UTC are more difficult to define. While the record does not reflect direct involvement by CWA in the legal formation of UTC, as discussed, the Union was involved in lobbying efforts with the Colorado General Assembly to seek a change in the law to allow for formation of UTC, which resulted in the elimination of ProTAXI, with which the Union did have a formal affiliation agreement. The record also establishes that CWA does not have a traditional collective-bargaining relationship with UTC to represent the interests of the cooperative taxi drivers, vis-à-vis UTC.

The relationship between UTC and CWA is also evidenced by the fact that in July 2009, the Union hired then UTC President Abdi Buni as a paid organizer. While Buni is no longer UTC president, he still holds a position on the UTC board of directors. Buni was involved with the Union as a contact person for ProTAXI, and as such, was regularly copied on e-mail correspondence between UTC and the Union before he was hired as a paid organizer. Buni still is regularly copied on e-mail correspondence between UTC and CWA, and in fact continues to use the same ProTAXI e-mail address he used before the inception of UTC.

Finally, there is evidence that CWA representatives conducted the August UTC Board of Directors meeting at which Buni's successor was elected, and oversaw the election of officers and board of directors members at that meeting.

Notwithstanding the lack of a collective-bargaining relationship, UTC pays a monthly per capita fee of $28 to CWA for each of its 262 members, which UTC and CWA characterize as "dues." There is no evidence that the UTC members submit applications for actual membership in CWA, and testimonial evidence establishes that they are not required to pay union initiation fees. These monthly dues paid directly by UTC to the Union amount to $7336 per month. These monthly per capita dues are in addition to the monthly rent paid by UTC for leasing office and parking lot space and covering utilities. UTC also directly reimburses CWA for such office expenses as the costs of photocopying.

The testimony of CWA, Local 7777's current President, Lisa Bolton, establishes that the monies paid by UTC on behalf of its drivers are mingled with dues from its traditional members, and used for the Union's general operating expenses. The evidence further establishes that in exchange for the monthly "dues" paid to the Union by UTC, the Union provides the same services to UTC that it was obligated to provide ProTAXI pursuant to the written Affiliation Agreement, despite the absence of a written agreement. In this regard, Union President Bolton testified that these services include lobbying for legislation favorable to UTC with the Colorado legislature. Bolton also testified that she has held meetings with "parking enforcement" on behalf of UTC drivers when they believe UTC is being singled out for ticketing. Bolton and other Union officials also meet with government officials regarding the herdic licenses taxi drivers must have to operate, and excise and license plate officials so that the Union can educate UTC drivers regarding issues that arise for renewals. Bolton has also met with officials at DIA regarding heater and air conditioning issues in the

[10] The record does not reflect the amount of the initiation fee or annual membership fee because CWA objected to the Employer's attempt to elicit that evidence.

building made available to Muslim taxi drivers for daily prayers. CWA representatives have also accompanied UTC members to court to assist them with plea bargaining regarding trespassing tickets.

In August 2009, the also Union intervened on behalf of UTC in a dispute at the Hyatt Regency Colorado Convention Center downtown hotel. That dispute involved the Hyatt Regency filing a formal CPUC complaint against UTC for "bullying other companies out of line." In October 2009, UTC sought the Union's assistance in another dispute at the Hyatt Regency Convention Center. Specifically, UTC sought to have the Union assist in forcing the Hyatt Regency to not allow managers affiliated with SuperShuttle Denver to solicit customers in the hotel lobby.

A few days later, UTC sought assistance from the Union after it was informed that the Cherry Creek Mall intended to authorize two competitor cab companies exclusive access to the mall. CWA sought legal advice from its legal counsel regarding the action taken by Cherry Creek Mall; intervened on UTC's behalf with the mayor's office; and attempted to contact a mall official to discuss the dispute. CWA also organized a demonstration at the mall during the Thanksgiving holiday weekend, and created the leaflets used in the Cherry Creek Mall campaign on behalf of UTC. An announcement for the leafleting action at Cherry Creek Mall was put on the CWA Local 7777 website encouraging all drivers and volunteers to meet at the Local at 9:30 a.m., so the Union could put one passenger in each UTC taxi to be transported to the mall where they would leaflet until 12:30 p.m. At that time the Union leafletters would start calling for UTC taxis to come back and pick them up at the Cherry Creek Mall.

Finally, the evidence establishes that CWA was involved in researching obtaining Smith Defensive Driving Training for the taxi drivers, which included investing $5,066 for a Smith Trainer to train up to four Union members to deliver the classes to the UTC drivers. CWA also provides photocopying services to UTC at the rate of 3 cents per page, and provides free advertising on the Union's website.

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B. Disabling Conflict of Interest Issue

At issue is whether the relationship between CWA and UTC conflicts with the obligations of the Union as a potential collective-bargaining representative of the SuperShuttle Denver van drivers, as contended by the Employer.

1. Legal framework

In *St. John's Hospital & Health Center*, 264 NLRB 990 (1982), the Board analyzed the line of cases involving disabling conflicts of interest by unions. It characterized *Bausch & Lomb Optical Co.*, 108 NLRB 1555 (1954), as "the seminal case establishing the conflict-of-interest doctrine." In *Bausch & Lomb*, the Board had found that the employer was no longer obligated to bargain with a union because the union had become a direct business competitor of the employer. The Board in *Bausch & Lomb*, emphasized the important interests of the bargaining unit employees when it stated:

> What is envisioned by the Act is that in attempting to [reach] an agreement, the parties will approach the bargaining table for the purpose of representing their respective interests and having approximately equal economic power. The employer must be present to protect his business interests and the union *must be there with the single-minded purpose of protecting and advancing the interests of the employees who have selected it as their bargaining agent, and there must be no ulterior purpose.* As the Supreme Court has stated: "The bargaining representative, whoever it may be, is responsible to, and owes complete loyalty to, the interests of all whom it represents." [*Ford Motor Co. v. Huffman,* 345 U. S. 330, 338.] . . . In our opinion, the Union's position at the bargaining table as a representative of the Respondent's employees while at the same time enjoying the status of a business competitor renders almost impossible the operation of the collective-bargaining process. *For, the Union has acquired a special interest which may well be at odds with what should be its sole concern--that of representing the interests of the Respondent's employees*. In our opinion, the situation created by the Union's dual status is fraught with potential dangers. [Emphasis added.] *Id*., at 1559.

In *St. John's Hospital*, the Board similarly found that the petitioning union, which operated a nurse registry that dispatched 80 percent of the registered nurses to St. John's Hospital, had an "ulterior purpose" that conflicted with the requirement that a collective-bargaining agent have a "single-minded purpose of protecting and advancing the interests" of unit employees. *St. John's Hospital*, supra, at 993.[13] In reaching this conclusion, the Board also relied on *Sierra Vista Hospital, Inc.,* 241 NLRB 631, 634 (1971), which held that: "[A]n Employer has a right to engage in collective bargaining which is not influenced by interests the bargaining representative may have outside its employee representative capacity."

This line of cases was also discussed in *Western Great Lakes Pilots Association*, 341 NLRB 272 (2004). In that case the Board affirmed the ALJ's finding that no disabling conflict existed where the union's only action had been to support rule making by the Coast Guard which, if enacted, could have put the employer out of business. The judge noted that the union had not instituted or formulated the rule making at issue, but merely had supported one of the proposals before the Coast Guard rule making body. In finding no disabling conflict, the ALJ stated:

> Here, there is no evidence that the Union operates, or ever intends to operate, a pilotage enterprise in competition with Respondent. Nor is there evidence that the Union is either a supplier/customer of Respondent or, beyond that, a creditor of Respondent. Furthermore, there is no evidence that the Union operates any type of enterprise that would naturally give rise to an inability to bargain single-mindedly on behalf of unit employees of Respondent represented by the Union or, in some other fashion, that would naturally compromise the col-

[13] See also *Visiting Nurses Association, Inc. Serving Alameda County*, 254 NLRB 49 (1981).

> lective-bargaining process as contemplated by the Act. *Id*., at 282.
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> Here, there is no other employee-unit, represented by the Union, that would benefit from implementation of the unified pilot management proposal. Moreover, implementation of that proposal cannot be accomplished through the collective-bargaining process. The only way that proposal can be implemented is through action by the Coast Guard or, perhaps, through legislation passed by Congress and signed by the President of the United States. Id. at 282.

In another of the *Bausch & Lomb* line of cases, *Alanis Airport Services, Inc.*, 316 NLRB 1233 (1995), the Board reversed the Regional Director's finding that the intervening union should be disqualified as a potential representative of the unit of baggage handlers because of the union's involvement with a newly-formed company that intended to engage in baggage handling competition with the employer. The intervenor, International Association of Aerospace Workers, District Lodge 40 (IAM), had an exclusive contract with United Airlines that any subcontracted work must be done by an IAM-represented contractor. United Airlines, and several other airlines, had petitioned the Miami Dade Commission to issue the airlines general permits to provide baggage services. At the time of the Board proceedings, commission hearings had been held, but no decision had issued. In anticipation of a favorable commission ruling, IAM was involved in the formation of Miami Airport Skycaps, Inc. (MAS). The objective of forming MAS was to secure United Airlines' baggage handling work for IAM members if the commission granted the permits.

The Board determined that since plans of MAS had not yet, and might never, materialize, IAM's involvement in MAS did not constitute a current conflict, thus, it was premature to make a finding that the union had a disabling conflict of interest. The Board also stated:

> We find it unnecessary to pass on the Intervenor's contention that its involvement with MAS is too limited to warrant a conclusion that the Intervenor controls or has a symbiotic relationship with MAS, because in any event, for the reasons set forth above, there is no showing that MAS is in competition with the Employer. *Id*., at fn 4.

Notwithstanding that the Board did not address the intervenor's contention that its involvement was too limited based on its finding that there was no current competition because MAS had not yet been authorized to handle baggage, the Board's analysis in *Alanis* is instructive because the facts regarding IAM's involvement with MAS are similar to CWA's involvement with UTC. In this regard, the Board listed extensive details of the relationship between IAM and MAS, and also specifically stated that it did not question that the new company would, in fact, compete with Alanis if it obtained a permit allowing it to do so. Id., at fn 3. The Board also stated:

> In sum, there is insufficient evidence that MAS is a competitor of the Employer or that the Intervenor would misuse its Section 9 status as set forth above. If there is a change of circumstance, in either respect, a party may raise the issue at that time through appropriate procedures under the Act. [Emphasis added.] Id., at 1234.

Thus, the Board left open the possibility that if IAM won the election, and MAS commenced operations, certification could be revoked pursuant to the Board's holding in *Bausch & Lomb*.

The facts regarding the relationship between IAM and MAS were as follows. MAS was owned by 55 shareholders, each of whom owned one share of stock. Two of the shareholders were officers of IAM (president and secretary-treasurer), who also served on the five-member MAS board of directors. IAM's lodge president was also one of the two incorporators and served as the registered agent for MAS. The articles of incorporation of MAS provided that the corporation could issue shares only to dues-paying members of the IAM. The MAS shareholder baggage handlers formed a new IAM local, Local 626, with the object of representing MAS' employees. MAS and Local 626 shared office space at a building owned by the IAM and two other IAM locals, and MAS was permitted to use that space rent-free during their initial 6-month formative period.[14]

2. Analysis and conclusions

Based on the above-cited authority, I find that the relationship between CWA and UTC creates a disabling conflict with the obligation of the Union as a potential collective-bargaining representative of the SuperShuttle Denver drivers to have single-minded purpose of advancing the interests of the SuperShuttle Denver employees. In reaching this conclusion, I am mindful that the facts do not establish that CWA has an actual ownership interest in UTC, similar to that present in *Bausch & Lomb*; or that CWA's interests are analogues to the nurse registry operated by the union in *St. John's Hospital*. I am persuaded, nonetheless, that a disabling conflict exists because of the inherent likelihood that CWA's bargaining efforts on behalf of the SuperShuttle Denver employees would be influenced by interests outside its representative capacity based on its relationship with UTC.

a. UTC and SuperShuttle are competitors

In reaching my conclusion that a disabling conflict of interest exists, I initially find that SuperShuttle Denver and UTC are, in fact, competitors. The evidence establishes that they both compete for passenger traffic to and from DIA, throughout the Denver metropolitan area. SuperShuttle Denver and UTC are also both subject to regulation by the same regulatory agencies, and compete for a finite number of licenses issued for passenger transportation in their overlapping Denver metropolitan territories. The fact that UTC and SuperShuttle are in competition is further evidenced by the fact that UTC recently sought CWA's assistance in a dispute between UTC and SuperShuttle Denver at the downtown Hyatt Regency convention center hotel. This dispute arose when UTC contended that SuperShuttle Denver was getting an unfair competitive advantage because it was being allowed by Hyatt management to solicit for pas-

[14] The Union, in its posthearing brief distinguished various other cases in anticipation of the Employer's arguments. I find those cases inapposite to my determination that a disabling conflict exists here.

sengers in the lobby of the hotel, when UTC was not similarly allowed such access.

Based on my finding that UTC and SuperShuttle are competitors, and that UTC, unlike MAS in *Alanis,* supra, is presently in operation as a competitor of SuperShuttle Denver, I must examine the nature of the relationship between CWA and UTC. While this relationship is not easily defined within the framework of the above-cited Board cases, it is vastly different than a traditional collective-bargaining relationship. In this regard, I find that CWA's involvement with UTC is most closely analogous to IAM's involvement with MAS in *Alanis,* supra. As noted above, while the Board declined to address IAM's contention that its involvement with MAS was too limited to establish a disabling conflict of interest, the Board, nonetheless, made specific findings of fact regarding the relationship between IAM and MAS, and stated that if circumstances regarding MAS changed, a party could raise the conflict issue through appropriate procedures under the Act.

b. Relationship between CWA and UTC

I find, based on the record as a whole, that here is no collective-bargaining relationship between CWA and UTC. CWA does not represent UTC drivers *vis-à-vis* UTC in matters such as collective bargaining, or grievance processing. Rather, CWA receives "dues" from the 262 UTC drivers for interests CWA has outside its employee representative capacity. *Sierra Vista Hospital,* supra.

The evidence establishes that like IAM in *Alanis,* supra, CWA was involved with UTC from its inception. Specifically, CWA assisted UTC's predecessor, ProTAXI, in successful lobbying efforts at the Colorado General Assembly for a change in the law. That change in the law allowed the ProTAXI CWA members to form UTC, enabling UTC to gain entry into the passenger transportation industry. Since its inception, UTC has also leased office and parking lot space from CWA, and has been identified with the Union on its website.

According to the Union's Local President, the assistance CWA currently provides to UTC includes legal advice and legal representation; continued lobbying at the State Legislature; representation with certifying and licensing entities including DIA, CPUC, and traffic enforcement agencies; and assistance in competitive disputes involving commercial enterprises served by both UTC and SuperShuttle Denver, such as the dispute at the downtown Hyatt.

These facts establish that the relationship between the Union and UTC is significantly different than the circumstances relied upon by the Union in its posthearing brief involving situations where a union receives dues from members it represents in multiple bargaining units for employers competing in the same industry. In situations where a union represents several different bargaining units of competitors' employees, the dues received are primarily for representational activities involving the bargaining unit members' relationships with their employer, not primarily for legal and lobbying matters with governmental entities, in a situation where no collective-bargaining relationship even exists.

I note also, that this is not a situation like that present in *Western Great Lakes Pilots Assn.,* where the union merely supported a proposal being considered by the regulatory body, which, if enacted, could have resulted in elimination of the employer. Here CWA lobbied for a change at the Colorado General Assembly on behalf of its affiliate ProTAXI, which resulted in the former ProTAXI members forming UTC. But the relationship did not end there, rather, CWA has continued to assist UTC in matters wholly unrelated to collective bargaining, and has a significant financial interest in the success of UTC as discussed immediately below.

c. Disabling financial conflict

The factor I find most critical in the analysis of a disabling conflict, which was not present in *Alanis*, is the financial interest CWA has in the success of UTC by virtue of the per capita monthly fee it pays to the Union. These monthly fees amount to more than $88,000 a year and they are received outside of any representative capacity. There is no dispute that these monies are not used by CWA to defray the costs of traditional collective-bargaining, such as bargaining a contract with UTC, or processing grievances pursuant to a contract. Rather, these monies go into the Union's general fund as payment for services to UTC that are unrelated to any obligation under the Act to represent the UTC drivers in their relationship with UTC. In return for this monthly per capita fee, the evidence establishes that the Union continues to provide UTC with the same kinds of assistance the Union had previously provided to ProTAXI by virtue of the Affiliation Agreement.

Here, the Union, in essence, is the competitor because of the kinds of managerial assistance it provides to UTC for financial remuneration in the form of the per capita "dues." Thus, while the Union does not have a direct financial ownership stake in UTC, it still gains financially when UTC prospers, which is precisely the kind of conflict the Board warned of in *Bausch & Lomb* and *St John's Hospital and Health Center*. Namely, the danger that CWA's bargaining efforts on behalf of the SuperShuttle Denver employees would be influenced by its financial interests outside its representative capacity because of its relationship with UTC.

In this regard, I conclude that everything the Union does to assist UTC in return for the monthly fees it receives could have a significant impact on the Union's representational capacity for the SuperShuttle Denver employees. The nature of the industry in which UTC and SuperShuttle Denver compete is such that intervention on behalf of one entity can result in a loss of business for another entity. This could take the form of one company gaining vehicle certificates, while the other entity loses them because CPUC issues a finite number of certificates. This is particularly troubling since UTC has a 3 to 1 advantage in that its cooperative members hold 262 certificates, and SuperShuttle Denver has 86. Intervention by the Union on behalf of UTC could also take the form of one entity gaining a time advantage for curbside waiting at DIA, or for locations to park and wait for passengers in the downtown area, which is precisely the kind of intervention UTC was seeking from the Union in its dispute at the Hyatt.

Accordingly, I find that the form of assistance provided by the Union to UTC in exchange for monthly financial remuneration is in direct conflict with the single-minded representational

purpose required of a bargaining representative, since the Union's advocacy on behalf of UTC could have direct, adverse effects on the SuperShuttle Denver bargaining unit.

ORDER

IT IS HEREBY ORDERED that the petition filed in this case is dismissed.

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