Giordano Construction Co., Employer-Petitioner *and* United Brotherhood of Carpenters and Joiners of America Local Union 1205 and San Bernardino, Riverside, Imperial District Council of Carpenters, AFL-CIO.[1] Case 21-RM-2047

May 18, 1981

DECISION ON REVIEW AND ORDER

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before Hearing Officer Laurie D. Halpern of the National Labor Relations Board on August 14, 1980. On September 16, 1980, the Regional Director for Region 21 issued a Decision and Order in which he found that the existing collective-bargaining agreement between Giordano Construction Co. (hereinafter the Employer) and the Union acted as a bar to the Employer's election petition. Accordingly, he dismissed the petition. Thereafter, the Employer, in accordance with Section 102.67 of the National Labor Relations Board Rules and Regulations, Series 8, as amended, filed a request for review of the Regional Director's decision. The Board, by telegraphic order dated December 4, 1980, granted the Employer's request for review.

The Board has considered the entire record in this case with respect to the issues under review and makes the following findings:

The Employer is a sole proprietorship engaged in the construction industry as a framing contractor in Huntington Beach, California. On June 21, 1978, the Employer and the Union became signatories to a memorandum agreement that bound them to the terms of the 1977-80 Southern California Master Labor Agreement (hereinafter master agreement or the contract). The master agreement, by its terms, was effective until July 7, 1980, and provided for renewal on a year-to-year basis absent written notice of termination. The record reveals that no notice of termination was submitted prior to July 7, 1980, thereby resulting in a renewal of the master agreement, effective until July 7, 1981. The master agreement includes, *inter alia*, a lawful union-security clause which requires that employees become union members after 8 days of employment.

The Regional Director found, and we agree, that the June 21, 1978, contract was entered into pursuant to Section 8(f) of the Act inasmuch as there was no showing that the Union represented a majority of the employees of the Employer on the date the contract was signed. *Progressive Construction Corp.*, 218 NLRB 1368 (1975). He found, therefore, that the contract could not initially serve as a bar to the Employer's petition. *S. S. Burford, Inc.*, 130 NLRB 1641 (1961).

The Regional Director further found, however, that the Employer employed a permanent work force of from 7 to 12 employees and that the Union had achieved majority support among such employees during the term of the contract, thereby establishing the Union as the exclusive representative of the Employer's employees within the meaning of Section 9(a) of the Act.[2] Having found the Union to be the Section 9(a) representative, the Regional Director concluded that the contract between the Union and the Employer was no longer within the ambit of Section 8(f) but rather had become "a full-fledged collective-bargaining agreement" to which bar qualities attach. *Amado Electric, Inc.*, 238 NLRB 37 (1978); *VM Construction Co., Inc.*, 241 NLRB 584 (1979); *Custom Sheet Metal & Service Co., Inc.*, 243 NLRB 1102 (1979).

In asserting that the Regional Director erred, the Employer argues that the Union failed to establish that it achieved the status of an exclusive representative of the employees within the meaning of Section 9(a) and, accordingly, it asserts that the contract remains an 8(f) agreement which cannot serve as a bar to the petition. We find merit in the Employer's contentions.

It is well established that a union, originally recognized under Section 8(f), can achieve Section 9(a) status in one of two ways. The first means is for the union to demonstrate that it has achived majority status "among employees who make up a permament and stable work force of the employer." *Precision Stripping, Inc.*, 245 NLRB 169 (1979). Where a permanent and stable work force is not employed by the employer, however, the union can attain Section 9(a) status only by demonstrating majority status of the employees employed at a particular jobsite. *Davis Industries, Inc.; Stag Construction, Inc.; and Add Miles, Inc.*, 232 NLRB 946 (1977); see, generally, *Hageman Underground Construction, et al.*, 253 NLRB 60 (1980).

In the instant case, we note that the second method of establishing Section 9(a) status, i.e., on a jobsite-by-jobsite basis, is unavailable to the Union inasmuch as the Employer has not employed employees on a jobsite since April 1980.[3] As we

[1] Hereinafter the Union.

[2] The Regional Director found that the Union achieved its majority through operation of the contract's union-security clause, by referrals of union members to the Employer from union hiring halls, and by union business agents' periodic verifications of union membership cards of the Employer's employees working on a jobsite.

[3] The Employer's owner testified that he employed employees on a particular project which began in November 1979 and continued until May 1980. His testimony is not, however, supported by the payroll records in evidence which show work ending in April. We find it unnecessary to resolve this inconsistency as it is undisputed that no employees

Continued

stated in *Dee Cee Floor Covering, Inc. and its Alter Ego and/or Successor, Dagin-Akrab Floor Covering, Inc.*, 232 NLRB 421, 422 (1977),[4] it is obvious that a union cannot demonstrate majority status at a time when the employer has no employees. Therefore, to demonstrate Section 9(a) status, the Union here must demonstrate that the Employer employed a permanent and stable work force and that it achieved majority status among the employees of such a work force. *Hageman Underground Construction, supra.*

As noted above, the Regional Director found that the Employer maintained a stable work force of approximately 7 to 12 employees between June 1976 and April 1980. He then determined that the Union had acquired majority status among the employees of that work force.[5] Our review of the record reveals, however, that the Regional Director erred.

The record demonstrates that between June 1978 and April 1980 the Employer was engaged in work on four projects. Work on project one took place from June to September 1978. There followed a hiatus of approximately 11 months with work on project two commencing in August 1979 and ending in September 1979. Another hiatus followed with work on projects three and four commencing in November 1979. Work on project three ended in January 1980 and work on project four was completed in April 1980.[6]

On project one the Employer employed a total of eight employees over a 4-month period. On project two, which commenced approximately 11 months after project one was completed, a total of four employees worked on the 2-month project. Significantly, there was no carryover of any employees from project one to project two.

With respect to projects three and four, some ambiguity exists in that the two projects overlapped for the months of November and December 1979 and January 1980. Because the records in evidence do not, on their face, distinguish between projects, we are unable to tell on which project employees worked during the overlapping months, although we can conclude that employees who worked during February through April 1980 were employed on project four at least during those months. Despite this ambiguity, certain conclusions can be drawn. Thus, as was the case on project two, no employees who were employed on project one were carried over to either project three or four. Three of the employees on project two worked on project four and may also have worked on project three. More importantly, however, a total of 24 employees who worked on project three or four had at no previous time worked for the Employer during the relevant period and at least 8 individuals employed on project four did not work for the Employer on projects one, two, or three.

We note also that even on individual projects there was a lack of stability and continuity to the work force. For example, on project one, which employed eight individuals over a 4-month period, only one employee worked during all 4 months, two worked during 2 of the 4 months, and a majority of five worked during just 1 of the 4 months. Indeed, of the 36 individuals employed on all 4 projects, a clear majority of 20 worked only during 1 month with but 3 of the 36 being employed for more than half of the total number of months in which employees were employed.

Based on the foregoing, we are unable to agree with the Regional Director that the Employer maintained a permanent and stable work force. Accordingly, in the absence of a permanent and stable work force, "the mere fact that the Union might indeed have represented a majority of the employees at [the Employer's] previous jobsites is of no consequence inasmuch as the Union must demonstrate its majority at each new jobsite"[7] in order to establish its representational status under Section 9(a) and thereby convert its contract with the Employer to one that possesses bar qualities. As we have noted, however, the Employer has no ongoing jobsites and has not had one since well prior to the filing of the instant petition. In short, the Union has failed to demonstrate that it has achieved representational status under Section 9(a) of the Act. Since it has not, the existing contract remains an agreement under Section 8(f) which cannot bar an election petition. Accordingly, we shall order the petition reinstated.

ORDER

It is hereby ordered that the petition in Case 21-RM-2047 be, and it hereby is, reinstated.

IT IS FURTHER ORDERED that this proceeding be, and it hereby is, remanded to the Regional Director for Region 21 for further processing consistent herewith.

---

were employed at the time the petition was filed (July 14, 1980) or at the time of the hearing.

[4] Chairman Fanning, who originally dissented in *Dee Cee Floor Covering*, currently adheres to the views set forth therein by the majority. See his concurring opinion in *D'Angelo & Khan, Inc.*, 248 NLRB 396 (1980).

[5] See fn. 2, *supra*.

[6] See fn. 3, *supra*.

[7] *Dee Cee Floor Covering, supra* at 422.