Walt's Broiler *and* Gladys S. Shaffer, Petitioner and Culinary Alliance and Bartenders Union, Local No. 791, Hotel Employees and Restaurant Employees International Union, AFL-CIO

Nordic Inn, Inc. *and* Tony Parker, Petitioner and Culinary Alliance and Bartenders Union, Local No. 791, Hotel Employees and Restaurant Employees International Union, AFL-CIO. Cases 19-RD-2048 and 19-RD-2068

14 May 1984

DECISION ON REVIEW AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

On 25 October 1983 the Acting Regional Director for Region 19 issued a Decision and Order dismissing the instant petitions, finding that Walt's Broiler and Nordic Inn, Inc. (the Employers) had not clearly and unequivocally withdrawn from the multiemployer bargaining unit represented by the Union. Thereafter, in accordance with Section 102.67 of the National Labor Relations Board Rules and Regulations and Statements of Procedures, the Employers filed a timely request for review of the Acting Regional Director's Decision. The Employers contended that the Acting Regional Director erred on substantial factual issues and departed from officially reported Board precedent. Specifically, the Employers argued that they had clearly and unequivocally withdrawn from the multiemployer bargaining unit in a timely fashion, and that the petitions therefore raised a real question concerning representation. By telegraphic order dated 16 December 1983, the National Labor Relations Board granted the Employers' request for review.

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

Having considered the entire record in this case with respect to the issues under review, the Board makes the following.

Walt's Broiler, a sole proprietorship engaged in the operation of a restaurant in Montesaro, Washington, and the Nordic Inn, Inc., a corporation engaged in the operation of a restaurant and hotel in Aberdeen, Washington, were at all material times and are members of the Gray's Harbor Restaurant Association (the Association). The Employers were bound to a contract between the Association and the Union effective from 1 June 1980 to 1 June 1983. The contract applied to various job classifications typical of the restaurant industry and covered approximately 280-300 employees who worked for the 10 member-employers of the Association. In February 1983,[1] at the direction of John Cornyn, a management consultant representing the Association, the member-employers sent identical form letters to the Union which stated in part:

> With reference to the forthcoming negotiations for a new collective bargaining agreement with your union, I wish to inform you that (name and location of Employer) will be a part of the Grays Harbor Restaurant Association which will be represented by John Cornyn and Associates of Portland, Oregon.
>
> It should be expressly understood that (name of Employer) retains the right to accept or reject any part of the contract negotiated. (Name of Employer) will not be bound in any way to follow agreements by the group, but will negotiate any differences separately.

On 24 February the Union sent a response to the member-employers (with a copy to Cornyn) which stated in part:

> You can hire a firm to do your negotiating for you as a group, or you can each negotiate individually, but you cannot have it both ways.

On 2 March Cornyn wrote the Union that "[A]s a simple matter of time economy, it would appear to your advantage to bargain with the group in a not fully bound posture rather than each restaurant separately." Further, he reiterated that his firm had been authorized to represent the members of the Association "as a group and individual members." The Union did not respond to Cornyn's letter. The parties first met on 7 April to begin negotiations. At that meeting, Cornyn indicated he was representing the member-employers of the Association as well certain other employers. The sign-in sheet for that meeting shows that in addition to two union officials, representatives of other restaurants also were in attendance. Cornyn testified that during the 7 April meeting, he gave the union representatives two proposals—one for the Association and one for the other employers he represented.

Cornyn's undisputed testimony[2] shows that he stated repeatedly that he was attempting to negotiate a base contract for the member-employers of the Association, and that after agreement on the base contract the individual member-employers could "go back and work on points of particular concern to them." He also testified that at the 10 May meeting the Union rejected the Association's proposal and the concept that individual member-

[1] All dates are in 1983 unless otherwise noted.

[2] Cornyn was the only witness at the hearing.

employers could address their concerns on an individual basis if necessary. The Union further stated that it saw no reason for any discussion and only wanted the Association to sign a 1-year extension of the current contract.

Negotiations continued with proposals from both parties being exchanged. Some of the proposals were applicable to all members of the Association while others were applicable only to named member-employers. At all times, however, it was understood that "there was a number of issues . . . that would have to be treated separately for individual restaurants." Cornyn explained that "on any number of occasions" he told the Union's negotiators that some issues were "of particular concern to one or more employers." On 16 August four member-employers separately agreed with the Union to execute compliance letters in which they assented to be bound to whatever contract terms were arrived at between the Association and the Union. Negotiations involving all other member-employers were continuing at the time of the hearing in this proceeding.

Based on the foregoing, the Acting Regional Director concluded that the Employers' attempted withdrawal from the multiemployer bargaining unit was not clear and unequivocal, finding that the exchange of letters in February and March may have "understandably" confused the Union, that all written proposals were group proposals, and that no individual written proposals were made. We disagree with the Acting Regional Director's conclusion. Rather, we find that the withdrawals of the Employers were clearly and unequivocally stated to the Union, initially by separate letters from each member-employer and thereafter by Cornyn's reiteration of the member-employers' positions. Although the Union objected to the "individual concern approach" at the 10 May meeting, it continued to negotiate with the Association while Cornyn repeatedly reminded the Union of the member-employers' position. We find no evidence that the member-employers or Cornyn engaged in any inconsistent actions subsequent to the time the member-employers sent their notices of withdrawal to the Union. Indeed, the evidence shows that during negotiations the parties recognized the withdrawals by discussing concerns of individual member-employers. We further find that the fact that four of the member-employers separately agreed with the Union to sign compliance letters supports the Employer's argument that the Union recognized that the member-employers were negotiating in a not fully bound posture.

It is well established that a party's withdrawal from multiemployer bargaining must be timely and unequivocal in order to be effective. *Retail Associates*, 120 NLRB 388 (1958). In the instant case, there is no question that the Employers' February letters to the Union were sent over 3 months prior to the expiration of the existing contract and, therefore, were timely. Moreover, the language of those letters clearly informed the Union of the Employers' intent not to be bound to a multiemployer agreement, but to "retain the right to accept or reject [individually] any part of the contract negotiated." The fact that these Employers had bargained in the past as one unit and had been parties to a contract covering the multiemployer association as a whole, does not, of itself, preclude the Employers from electing not to be bound to group bargaining in future negotiations, particularly when they announced their intention from the outset of negotiations for a renewal of the collective-bargaining agreement. Cf. *Kroger Co.*, 148 NLRB 569 (1964). Rather, the Employers' individual letters, the reiteration of their positions by Cornyn after the Union's response, and the statements by Cornyn at the outset of negotiations and during subsequent bargaining sessions all show the unequivocal desire of all the member-employers to negotiate their individual concerns through Cornyn and to retain the right not to be bound to any agreement as a group. The fact that the Employers did not resign from the multiemployer association does not negate the clear and unequivocal intent expressed by each and every member of the Association.

We find that the facts of this case are in all material respects identical to the facts in *Santa Barbara Distributing Co.*, 172 NLRB 1665 (1968). There, as here, each member-employer of a multiemployer bargaining unit sent the union an individual letter stating that the member-employer would not be bound by the actions of other member-employers, but would be represented individually by a named representative. There, as here, all member-employers elected as their representative one individual. The Board held in *Santa Barbara* that each of the employers involved therein had retained the same representative solely for its own individual convenience and for the added efficiency and probable reduced cost that having one representative was able to offer, and did not thereby intend to participate in any multiemployer bargaining unit. That holding is in all respects applicable to the instant case and controls the disposition of this case. We find that the Employers involved herein clearly and unequivocally withdrew from the multiemployer bargaining unit in a timely fashion and that neither their continued membership in the Association nor their decision to retain the same negotiator to rep-

resent them on a individual basis was inconsistent with that withdrawal. As there is no other evidence in the record which would show that the Employers engaged in any postwithdrawal inconsistent conduct, we conclude that the Employers effectively withdrew from the preexisting multiemployer unit and, therefore, that the Acting Regional Director erred in dismissing the instant petitions.[3]

Accordingly, we shall reinstate the instant petitions and remand the captioned cases to the Regional Director for further appropriate action.[4]

ORDER

It is ordered that the petition in Case 19-RD-2068 be reinstated and remanded to the Regional Director for appropriate action.

IT IS FURTHER ORDERED that the petition in Case 19-RD-2048 be reinstated and remanded for additional findings regarding the Board's assertion of jurisdiction over that Employer, and for further action as is appropriate.

[3] The situation here is distinguishable from that in *Dependable Tile Co.*, 268 NLRB 1147 (1984). There, after the employer gave timely notice of its intention to withdraw from a multiemployer bargaining unit, the employer's president continued to represent the multiemployer unit in negotiations with the union. The Board majority found that the employer's active participation in negotiations on behalf of the multiemployer unit was inconsistent with its stated intent to abandon group bargaining. No such inconsistent action is present in the instant case.

Chairman Dotson adheres to his dissenting opinion in *Dependable*. As he would not have found that the employer engaged in any action inconsistent with its notice of withdrawal, he finds it unnecessary to distinguish that case. Member Dennis did not participate in *Dependable* and does not express an opinion on its holding.

[4] Although the Regional Director's Decision and Order finds that Walt's Broiler does not meet the Board's discretionary standards for assertion of jurisdiction if not part of the multiemployer unit, we note that the record contains contradictory statements as to this issue. The parties stipulated that Walt's Broiler purchased goods, services, and supplies valued at $4,000 from out-of-state suppliers, and the Employer's counsel was willing to stipulate that Walt's Broiler had purchased goods, services, and materials valued at $50,000 or more from in-state suppliers who had purchased such goods directly outside the State, but Petitioner's attorney would not so stipulate. However, a few pages later, the record shows that the Employer's counsel stated, "[W]ith respect to jurisdiction, that has already been covered from our point of view, as to how we would stipulate, that Walt's is probably not within the current standards used by the National Labor Relations Board and The Nordic Inn is in commerce and within the jurisdiction of the National Labor Relations Board." Under these circumstances, we shall remand Case 19-RD-2048 to the Regional Director for further findings as to the Board's jurisdiction over Walt's Broiler.