

Carr-Gottstein Foods Company, Inc., Employer-Petitioner and Hotel Employees and Restaurant Employees International Union, Local 879, AFL-CIO. Cases 19-RM-2125 and 19-UC-533

July 16, 1992

DECISION ON REVIEW AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS OVIATT
AND RAUDABAUGH

On June 12, 1992, the Regional Director for Region 19 issued a Decision and Direction of Election in which he directed a self-determination election for a voting group consisting of all food service personnel employed by the Employer in its Orient Express department (OE employees) at its Fairbanks, Alaska grocery store. The Regional Director permitted the OE employees to choose whether they wished to be represented by the Union and, if so, whether they wished to be added to the existing unit of deli department employees already represented by the Union, or represented by the Union in a separate unit. Thereafter, in accordance with Section 102.67 of the Board's Rules and Regulations, the Union filed a timely request for review in which it opposed the election and argued that the OE employees should be accreted to the existing unit of deli department employees. We grant the Union's request for review.

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

The issues presented in this case are whether the Regional Director erred in directing a self-determination election and, if not, whether he erred by allowing the OE employees to choose whether they wished to be represented by the Union in the existing deli department unit or whether they wished to be represented by the Union in a separate unit. We find that the Regional Director properly directed a self-determination election but erred in permitting the OE employees the choice to be represented in a separate unit.

The Employer operates several grocery stores in Alaska. At all stores except the Fairbanks store involved in this proceeding, all employees, including deli and OE employees, are represented by the United Food and Commercial Workers (UFCW) in wall-to-wall units. In Fairbanks, deli employees historically have been represented by the Union (Hotel Employees and Restaurant Employees International Union, Local 879), while the remaining employees have been represented by the UFCW. The Employer opened the Orient Express (Asian carryout) department at its Fairbanks store in 1991, and recognized the UFCW as the collective-bargaining representative of the OE employees as part of the existing unit. The Union then filed an internal union grievance with the AFL-CIO alleging a viola-

tion of article XX of the AFL-CIO constitution, and filed several contractual grievances over the Employer's failure to recognize and bargain with it regarding the OE employees and the Employer's failure to apply the Union's contract to these employees. In February 1992, an umpire for the AFL-CIO ruled that the Union's collective-bargaining agreement with the Employer covered the OE employees. Thereafter, the UFCW notified the Employer that it disclaimed any interest in representing the OE employees at Fairbanks. The Employer then filed the instant UC and RM petitions.

The Employer argued in its UC petition that the OE employees were an accretion to the unit represented by the UFCW. As the UFCW had disclaimed any interest in representing the OE employees, and, as the 15 OE employees outnumbered the 11 deli department employees represented by the Union, the Regional Director found that accreting these employees into any unit would be inappropriate. He therefore dismissed the UC petition. The Regional Director further found that the disputed OE employees could constitute a separate appropriate unit, or, because they worked in close proximity with the deli employees and shared similar equipment and working conditions, they also appropriately could be included in the existing unit of deli department employees. The Regional Director concluded that a self-determination election was proper to enable the OE employees to express their representational desires, and, by Erratum dated June 16, 1992, set forth the following questions on the ballot: "1) Do you wish to be represented for purposes of collective bargaining by the Union? 2) Do you wish to be represented for purposes of collective bargaining as part of the deli bargaining unit or as part of a separate OE unit?"

The Union at no time sought a separate unit of OE employees; opposes any election; and continues to argue that OE employees constitute an accretion to its existing unit of deli department employees.

We agree with the Regional Director that accreting the OE employees into the UFCW unit would be inappropriate because UFCW has disclaimed any interest in representing the OE employees, and accreting them into the deli department unit would also be inappropriate because the approximately 15 OE employees outnumber the approximately 11 employees in the existing unit. When the unrepresented group sought to be accreted numerically overshadows the existing unit, the Board will not accrete the larger number of unrepresented employees without giving them a chance to express their representational desires. *Geo. V. Hamilton, Inc.*, 289 NLRB 1335, 1338-1339 (1988); *Central Soya Co.*, 281 NLRB 1308 (1986); *Renaissance Center Partnership*, 239 NLRB 1247 (1979). Thus, the UC petition was properly dismissed.

With respect to the Regional Director's direction of a self-determination election, as a general rule an employer's RM petition must be predicated upon a union's claim to be the Section 9(a) representative of certain of the employer's employees, and the voting unit is generally the unit claimed by the union to be appropriate. See *Sonic Knitting Industries*, 228 NLRB 1319, 1320 (1977). Thus, Section 102.61 of the Board's Rules requires that an employer's RM petition contain a brief statement that the union has presented to the employer a claim to be recognized as the exclusive representative of the employees in the unit claimed to be appropriate. Absent a demand for recognition in the petitioned-for unit, the Board will normally dismiss an RM petition on the ground that no question concerning representation exists. *Woolwich, Inc.*, 185 NLRB 783, 784 (1970).

In the instant case, the Employer asserts that the OE employees constitute a separate appropriate unit and should be permitted to vote whether they wish to be represented by the UFCW or the Union. As noted above, however, the UFCW has disclaimed any interest in representing the OE employees. In addition, the Union never has claimed any interest in representing a separate unit of OE employees, and opposes any election; the Union merely seeks to accrete the OE employees to the existing unit. Thus, under these circumstances, we would normally dismiss the Employer's RM petition as there is no demand by the Union to represent a separate unit of OE employees and, therefore, no basis for the RM petition. *United Hospitals*, 249 NLRB 562, 563 (1980); *Woolwich, Inc.*, above.

Here, however, there is an outstanding decision in which an AFL-CIO umpire ruled that the OE employees are covered by the Union's collective-bargaining agreement with the Employer. In effect, the umpire deemed the OE employees to be an accretion to the existing deli department unit, an accretion which we have found to be inappropriate. Moreover, the Union opposes an election, and has filed a grievance and has requested arbitration, advocating its interpretation of its contract and arguing that the Board should be bound by the article XX proceeding. The Board will not defer the determination of questions of representation, accretion, or unit appropriateness to arbitrators, as they involve application of statutory policy and are singularly

within the Board's province. *Williams Transportation Co.*, 233 NLRB 837 (1977). Should the Board dismiss the instant RM petition on the ground that there was no demand by the Union to represent a separate unit of OE employees, then by virtue of the umpire's decision and the pending grievance-arbitration proceeding, those employees may well be effectively "accreted" to the deli unit without being given an opportunity to express their representational desires. To avoid such a result, which clearly would be contrary to Board policy, and to permit the OE employees to express their desires regarding representation, we believe that the best alternative is the holding of a self-determination election. *Phototype, Inc.*, 145 NLRB 1268 (1964).

Consequently, under the circumstances presented here, we agree that a self-determination election is proper in the RM context to enable the OE employees to determine if they wish to be added to the already existing unit of employees represented by the Union. See *Phototype, Inc.*, above. Thus, we affirm the Regional Director's direction of a self-determination election. We further find, however, that as there is no labor organization seeking to represent the OE employees in a separate unit, the Regional Director improperly permitted the OE employees the choice of being represented in a separate unit, as the Board will not force a labor organization to represent employees it does not seek.¹ More appropriately, the employees should only be permitted to vote regarding whether they wish to be represented by the Union as part of the existing deli unit. If a majority of employees in the voting group cast their ballots for the Union, they will be taken to have indicated their desire to be included in the existing deli department unit currently represented by the Union, and the Union may bargain for such employees as part of that unit.² If a majority of valid ballots are not cast for representation, the votes will be taken to have indicated the employees' desire to remain unrepresented. See generally NLRB Casehandling Manual (Part Two), § 11090.1(c)(1).³

¹ "As no union seeks to represent [the OE] employees in a separate unit, we do not pass [on] the appropriateness of such a unit." *Phototype*, supra at 1273.

² See *Federal-Mogul Corp.*, 209 NLRB 343 (1974).

³ The ballot used in this case, as well as the Notice of Election, should clearly state that a vote for the Union indicates that the employee desires to be represented as part of the existing deli unit.

Accordingly, the Regional Director's decision is reversed to the extent that it permits OE employees to choose whether to be represented by the Union as a separate unit, and the Direction of Election is vacated. The case is remanded to the Regional Director to issue

a new Direction of Election in conformity with this opinion.

MEMBER RAUDABAUGH, dissenting.

I would dismiss both petitions.