

Carriage Inn of Steubenville, Inc. and United Steelworkers of America, AFL-CIO-CLC. Case 8-CA-24139

October 30, 1992

ORDER DENYING MOTION

BY MEMBERS DEVANEY, OVIATT, AND
RAUDABAUGH

On May 12, 1992, the Acting Regional Director for Region 8 of the National Labor Relations Board issued an amended complaint and notice of hearing in the above-captioned proceeding, alleging that the Respondent had violated Section 8(a)(1) and (3) of the Act in various respects.

Thereafter, on August 10, 1992, the Respondent filed a motion to dismiss complaint with the Board. The Respondent contends that the complaint should be dismissed on the ground that the Regional Director twice unilaterally postponed the hearing without either filing a motion or attempting to ascertain the Respondent's position—the first time on May 20, 1992, within 20 days of the hearing, and the second time on August 3, 1992, the day before the scheduled hearing. The Respondent contends that the Regional Director failed to provide any reasoned grounds for the postponements, that the Regional Director's latter indefinite postponement on the eve of the hearing in particular was contrary to the Board's Casehandling Manual, constituted a blatant abuse of authority, and was instituted with full knowledge of the extraordinary expenses incurred by Respondent in bringing three independent witness from South Carolina to the Ohio hearing, and that the complaint should therefore be dismissed with prejudice.

On August 17, 1992, the General Counsel and the Charging Party Union filed oppositions to the Respondent's motion. Although not disputing the Respondent's contention that the Regional Director issued the two postponements,¹ the General Counsel and the Union submit that the Regional Director's action was appropriate and justified under the circumstances and that the Respondent was not prejudiced. Accordingly, the General Counsel and the Union contend that the Respondent's motion should be denied.

Having duly considered the matter, we deny the Respondent's motion. First, the Casehandling Manual provision cited by the Respondent (Sec. 10294.2) clearly applies only to requests for postponement filed

by the private parties. Under Section 102.16 of the Board's Rules and Regulations, as revised 54 Fed.Reg. 52506 (Dec. 21, 1989), 29 CFR § 102.16 (1991), a Regional Director may extend the date of hearing on his or her own motion. While the circumstances under which a Regional Director may do so are limited under Section 102.16,² the Respondent does not specifically contend that the Regional Director violated that section.

In any event, even assuming for arguments sake that the Regional Director did violate Section 102.16 of the Board's rules by issuing the two postponements without ascertaining the Respondent's position or filing a motion for postponement with the Chief Administrative Law Judge,³ this would not warrant dismissing the complaint. Aside from the costs the Respondent may have regrettably and unnecessarily incurred in bringing its three out-of-state witnesses to Ohio, the Respondent has not alleged or shown any prejudice resulting from the postponements. Thus, even if the Regional Director did disregard or misconstrue Section 102.16 of the

²Sec. 102.16(a) provides that a Regional Director's authority to extend the date of hearing is limited to the following circumstances: (1) where all parties agree or no party objects to extension of the date of hearing; (2) where a new charge or charges have been filed which, if meritorious, might be appropriate for consolidation with the pending complaint; (3) where negotiations which could lead to settlement of all or a portion of the complaint are in progress; (4) where issues related to the complaint are pending before the General Counsel's Division of Advice or Office of Appeals; or (5) where more than 21 days remain before the scheduled date of hearing. Sec. 102.16(b) provides that in all circumstances other than those listed in Sec. 102.16(a), motions to reschedule the hearing should be filed with the Division of Judges in accordance with Sec. 102.24(a) of the Board's Rules, 54 Fed.Reg. 38516 (Sept. 19, 1989), 29 CFR § 102.24(a) (1991).

³We note in this regard that the General Counsel's opposition fails to explain the basis for the Regional Director's first postponement 20 days before the hearing. We further note that the General Counsel acknowledges in his opposition that the only basis for the Regional Director's second postponement was that the Charging Party's representative had informed counsel for the General Counsel on the day before the hearing that the Charging Party *intended* to file new additional charges the following morning prior to the start of the hearing. Moreover, the General Counsel further acknowledges that these new charges were not *actually* filed until over a week later.

As indicated above, Sec. 102.16(a)(2) only permits a Regional Director to postpone the hearing where a new charge or charges "have been" filed; it does not specifically allow a Regional Director to postpone the hearing where a charging party merely indicates that he or she *intends* to file a new charge. Further, the primary basis for the Board's 1989 revisions to Sec. 102.16, which set forth the foregoing limitations on the Regional Directors' authority to reschedule hearings, was that there was a public perception that the prior procedure by which the Regional Directors had virtually unlimited authority was unfair. Thus, although we agree that an argument can be made that the Regional Director's action here was justified under the circumstances, we believe that, in light of both the language and the history of Sec. 102.16, the appropriate practice under the rule would have been to request a postponement from the Chief Administrative Law Judge. In that event, the judge could have evaluated the positions of all the parties and there could be no contention now that the Regional Director had acted unilaterally or unfairly.

¹The record also supports the Respondent's contentions as to the timing of the postponements. Thus, the record indicates that the first postponement issued on May 20, 1992, 20 days before the June 9, 1992 hearing (see Sec. 102.111(a) of the Board's Rules and Regulations governing time computation), and that the second postponement issued on August 3, 1992, the day before the August 4, 1992 hearing.

Board's Rules in issuing the two postponements, as no substantive rights of the Respondent have been affected thereby, there is no basis for dismissing the complaint on this ground.⁴

⁴See generally *Olin Industries v. NLRB*, 192 F.2d 799 (5th Cir. 1952); and *Union Starch & Refining Co. v. NLRB*, 186 F.2d 1008, 1013 (7th Cir. 1951). See also *NLRB v. J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 265 (1969). Although we recognize that this result may for all practical purposes leave the Regional Director's alleg-

Accordingly, the Respondent's motion to dismiss complaint is denied.

edly improper postponements unremedied, we note that Sec. 102.26 of the Board's Rules and Regulations affords parties the opportunity to request special permission to appeal such orders directly with the Board. Where such an appeal is timely and properly filed under Sec. 102.114 of the Board's Rules, whether by facsimile transmission or otherwise, the Board will make every effort to expedite its consideration. The Respondent filed no such appeal in this case.