

Livent Realty, a Division of Livent U.S., Incorporated, d/b/a the Ford Center for the Performing Arts and Service Employees International Union, Local 54, AFL-CIO, Petitioner. Case 2-RC-22021

April 7, 1999

DECISION ON REVIEW AND ORDER DISMISSING PETITION

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

On December 17, 1998, the Regional Director for Region 2 of the National Labor Relations Board issued a Decision and Direction of Election in the above-captioned proceeding in which he found that the Employer's voluntary recognition of the Intervenor¹ did not constitute a bar to the instant petition. Thereafter, in accordance with Section 102.67 of the Board's Rules and Regulations, the Employer filed a timely request for review of the Regional Director's decision.

The National Labor Relations Board, by a three-member panel, has considered the Employer's request for review. The Board grants the request for review as it raises substantial issues warranting review.²

The sole issue presented is whether the Employer's recognition of the Intervenor bars the subsequent petition because a sufficient amount of time for bargaining between the Employer and the Intervenor had not elapsed at the time the Petitioner filed its petition. Having carefully considered the issue on review in light of the uncontested facts, we find, contrary to the Regional Director, that a sufficient time for bargaining had not yet elapsed, and the petition should be dismissed as barred by the Employer's voluntary recognition of the Intervenor.

The facts of the instant case are not in dispute. The Employer is engaged in providing entertainment services. On January 29, 1998, pursuant to a count of authorization cards, an arbitrator found that the Intervenor represented a majority of employees, including the petitioned-for porters and cleaners, as well as ushers, head ushers, front of house door persons, ticket takers, backstage door persons, shipping and receiving employees, bartenders, head bartenders, and coat check employees. Based on this independent authorization card check, the Employer then voluntarily recognized the Intervenor as representative of these employees and the parties commenced negotiations for an initial agreement.

The Intervenor and the Employer agreed to a draft contract on about April 20, 1998. Subsequently,

according to the Employer, the parties operated under the terms of the draft agreement with regard to wages, holidays, and disciplinary procedure. In August 1998, the Employer hired Director of Labor Relations Lieberman to review the draft agreement and finalize the contract language for the initial collective-bargaining agreement. Lieberman then met with the Intervenor's representative several times a day to discuss contract interpretation and specific terms of the draft agreement, such as employee discipline. On September 3, 1998, Lieberman negotiated a special performance and special event side-letter with the Intervenor's representative, and executed contribution agreements with respect to the Intervenor's Pension Fund and Welfare Funds. The Intervenor and the Employer executed their agreement on November 16, 1998, shortly after the Petitioner filed its petition seeking to represent the Employer's porters and cleaners.

Based on the foregoing, we find, contrary to the Regional Director, that the Employer's voluntary recognition of the Intervenor should bar the instant petition because a reasonable time for bargaining had not yet elapsed. In determining whether voluntary recognition of a union should bar a petition by a rival union, the Board seeks to balance the competing interests of effectuating employee free choice, while promoting voluntary recognition and protecting the stability of collective-bargaining relationships. *Smith's Food & Drug Centers*, 320 NLRB 844, 846 (1996). Where an employer has voluntarily recognized a union as the representative of its employees in good faith and based on a demonstrated showing of majority status, that recognition serves as a bar for a reasonable period of time to allow the parties to bargain free from challenge to the union's majority status. *Id.* at 845. "What constitutes a 'reasonable time' is not measured by the number of days or months spent in bargaining, but by what transpired and what was accomplished in the bargaining sessions." *Royal Coach Lines*, 282 NLRB 1037, 1038 (1987). In particular, where the parties are negotiating a first contract, the Board recognizes the attendant problems of establishing initial procedures, rights, wage scales, and benefits in determining whether a reasonable time has elapsed. *N.J. MacDonald & Sons, Inc.*, 155 NLRB 67, 71-72 (1965).³

In the instant case, we conclude that the policies behind the Act are best served by finding that, contrary to the Regional Director, a reasonable time for bargaining had not elapsed at the time the petition was filed. The Employer, in good faith and based on demonstrated showing of majority status, recognized the

¹ International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists, and Allied Crafts of the United States and Canada, AFL-CIO, CLC.

² By Order dated January 14, 1999, the Board summarily reversed the Regional Director's decision and dismissed the petition, and stated that a fully articulated opinion would follow.

³ See also *Blue Valley Machine & Mfg. Co.*, 180 NLRB 298, 304 (1969) (finding that 8 months did not constitute a reasonable time to bargain where the parties were engaged in bargaining for an initial contract "and had no common experience to draw upon for the expeditious resolution of their differences").

Intervenor as representative of its employees and the parties engaged in bargaining. The Employer and the Intervenor reached agreement 4 months later and implemented a number of the contract's terms. Subsequently, the Employer hired a director of labor relations, Lieberman, specifically for the purpose of finalizing and interpreting the collective-bargaining agreement between itself and the Intervenor. Lieberman met frequently with the Intervenor's representative to finalize the agreement, and negotiated additional terms and conditions of employment relating to pension and welfare fund contributions and special performance/event matters just 2 weeks before the instant petition was filed. It is plain that the parties were working diligently to reach a final agreement. That the process took 9 months was clearly not unreasonable especially given the difficulties of initial contract bargaining.

Under the circumstances, we conclude that a reasonable time for bargaining had not elapsed as of November 3, the date of the petition. The parties had a draft agreement by April 20, i.e., within a few months of recognition. The few remaining matters were essentially agreed to in August and September.⁴ In sum, the parties

⁴ The delay between April and August was not attributable to difficulties in bargaining. Rather, it appears that matters were held in abeyance pending the hiring of the Employer's director of labor relations.

were on the verge of complete agreement when the petition was filed. Here, as in *N.J. MacDonald & Sons*, supra, to treat the months during which the parties were engaged in negotiations as having exceeded a reasonable time for bargaining

would be to ignore completely the fruitful negotiations during those months. It would ignore, also, the fact that these were negotiations for an initial contract which usually involve special problems, such as in the formulation of contract language, which are not present if a bargaining relationship has been established over a period of years and one or more contracts have been previously executed. [155 NLRB at 71-72.]

In these circumstances, the policies of the Act are best served by allowing the parties to continue the constructive process of bargaining in which they were engaged. We find that it would frustrate the statutory goal of promoting stable bargaining relationships as well as the free choice of the unit employees (a majority of whom have designated the Intervenor to be their representative) to allow a petition by a rival union seeking to represent a small portion of the recognized unit to negate the parties' good-faith bargaining when the parties' efforts were on the verge of reaching finality. Accordingly, we shall reverse the Regional Director and dismiss the petition.