

Baseball Club of Seattle, LP, d/b/a Seattle Mariners and Gerald Bergen, Petitioner, and Teamsters Union Local 117, affiliated with International Brotherhood of Teamsters, AFL-CIO. Case 19-RD-3424

August 27, 2001

DECISION ON REVIEW AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS
TRUESDALE AND WALSH

On June 7, 2000, the Regional Director for Region 19 issued a Decision and Direction of Election pursuant to the decertification petition filed by the Petitioner. In concluding that an election was appropriate, the Regional Director, relying on the Board's decision in *Smith's Food & Drug Centers*, 320 NLRB 844 (1996), determined that the Employer's voluntary recognition of the Union did not serve as a bar to the petition because the unit employees concurrently had demonstrated a "30-percent showing of disinterest" in the Union. In accordance with Section 102.67 of the Board's Rules and Regulations, the Union filed a timely request for review of the Regional Director's decision, and the Employer filed a timely brief in opposition. On July 21, 2000, the Board granted the Union's request for review. Thereafter, both the Union and the Employer filed briefs on review.

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

Having carefully reviewed the entire record in this proceeding, including the Employer's and Union's briefs on review, we conclude, contrary to the Regional Director, that the principles articulated in *Smith's Food* are inapplicable to this case, and that the Employer's voluntary recognition of the Union bars the processing of the petition.

Facts

The Employer is a major league baseball team based in Seattle, Washington. Prior to July 1999, the Employer played its home baseball games at the Kingdome sports facility. The Union represented a unit consisting of various classifications of groundskeeping, parking, and sales persons working at the Kingdome, all of whom were employed by King County. In July 1999,¹ the Employer moved its operations to the newly constructed Mariners Stadium (also called Safeco Field) and hired about 450 employees—some of whom were previously employed by King County at the Kingdome²—to perform the same

¹ Unless otherwise indicated, all dates herein are in 1999.

² The Regional Director found that only a minority of the employees hired by the Employer was previously employed at the Kingdome by King County. No party asserts that the Employer is a successor employer.

tasks that had been performed by the bargaining unit represented by the Union at the Kingdome.

Prior to the Employer's move to the new stadium, the Employer and Union entered into a written neutrality/card check agreement, pursuant to which the Employer agreed to remain neutral during the Union's campaign to organize its employees. The agreement also provided for a card check to be conducted by a specified neutral arbitrator at the Union's request. In September (on some date apparently prior to September 22), the Union submitted authorization cards to the designated arbitrator pursuant to the agreement.

At the same time the Union was gathering authorization cards, a group of employees was soliciting signatures in opposition to the Union. Accordingly, on September 22, the Petitioner sent to the arbitrator a petition signed by 186 employees indicating that they did not desire representation by the Union, and a letter requesting that the signing employees not be included in any card count by the arbitrator in favor of representation.³ The arbitrator, however, did not receive the Petitioner's letter and petition until after he had completed the card check. By letter dated September 24, the arbitrator certified that the Union possessed majority status among the approximately 453 unit employees. Therefore, on September 28, the arbitrator notified the Petitioner that he had already completed his "duties" under the neutrality agreement/card check agreement and, consequently, he returned the Petitioner's petition to him. Based on these facts, the Regional Director took administrative notice that the Petitioner had garnered a "30-percent showing of disinterest" in representation at the time of the arbitrator's certification of the Union's majority status.

Following the card check certification on September 24, the Union began discussions with the employees and selected a bargaining committee in anticipation of negotiations with the Employer.⁴ The Employer and the Union held their first bargaining session on December 21.

³ The Petitioner also provided a copy of the letter and petition to the Employer. An Employer witness testified that, since it was evident that the petition had been sent to the arbitrator, the Employer assumed that the arbitrator would duly consider it in the performance of his duties and, therefore, the Employer declined to take any action with regard to the petition.

⁴ On September 27, the Petitioner filed an unfair labor practice charge with the Region, alleging that the Employer violated Sec. 8(a)(2) by extending recognition to the Union based on the arbitrator's certification. The charge was subsequently dismissed, and the appeal to the General Counsel was denied on April 13, 2000.

On October 26, the Petitioner filed the instant decertification petition which, according to a letter sent to the Employer by the Petitioner, was supported by more than 50 percent of the unit employees. The petition was held in abeyance, however, pending resolution of the Petitioner's unfair labor practice charge.

From that time to the date of the hearing in this case, the Employer and the Union held approximately eight additional negotiation sessions and reached agreement on most noneconomic issues.

The Regional Director concluded that the Employer's voluntary recognition of the Union pursuant to the arbitrator's certification of the Union's majority status did not create a recognition bar to the processing of the decertification petition. In so concluding, the Regional Director relied on the Board's decision in *Smith's Food & Drug Centers*, 320 NLRB 844 (1996). In *Smith's Food*, the Board held that when two or more unions are simultaneously conducting organizing campaigns, an employer's voluntary recognition of one of the unions will bar the processing of a subsequent petition unless the petitioning union can demonstrate that it had a 30-percent showing of interest that predates the recognition. Although the present case does not involve two rival unions, the Regional Director nevertheless concluded that the reasons underlying the Board's decision in *Smith's Food* are equally applicable to the situation in which a decertification petitioner obtains a 30-percent showing of disinterest at the time the employer voluntarily recognizes the union. For the reasons that follow, we find that *Smith's Food* is inapplicable to this case, and that the Employer's voluntary recognition of the Union constitutes a bar to the processing of the decertification petition.

Analysis

Well-established Board precedent provides that an employer's lawful voluntary recognition of a union will bar a petition for a reasonable period of time. See *Keller Plastics Eastern, Inc.*, 157 NLRB 583 (1966); *Sound Contractors*, 162 NLRB 364 (1966). In *Smith's Food*, however, the Board created an exception to that principle for situations involving simultaneous organizing by two or more rival unions. The Board in *Smith's Food* held that:

in rival union initial organizing situations, a voluntary and good-faith recognition of a union by the employer based on an unassisted and uncoerced showing of interest from a majority of unit employees will bar a petition by a competing union, unless the petitioner demonstrates a 30-percent showing of interest that predates the recognition.⁵

⁵ The Board's holding in *Smith's Food* modified the rule previously articulated by the Board in *Rollins Transportation System*, 296 NLRB 793 (1989). *Rollins* had provided that, notwithstanding an employer's lawful voluntary recognition of a union, there would not be a recognition bar to a subsequent rival union petition if the rival union had been actively and simultaneously organizing the employees (regardless of

Smith's Food, supra at 846. The Board reasoned that such a rule properly emphasized employee free choice in the selection of a bargaining representative as the paramount concern, while at the same time promoting voluntary recognition and reasonably protecting the stability of collective bargaining. Id. at 846.

Contrary to the Regional Director, we find the *Smith's Food* decision inapplicable to this case. As the Board explained in *Smith's Food*, two important statutory policies are potentially in conflict when an employer voluntarily recognizes one of two rival unions simultaneously organizing its employees, both of which enjoy significant employee support—the policy to promote voluntary recognition and the stability of collective-bargaining relationships, and the policy to effectuate employee free choice. The Board, balancing these competing interests, concluded that a limited exception to the recognition bar principles was warranted where two unions are simultaneously organizing an employer's employees and both have garnered at least a 30-percent showing of interest at the time of recognition. The Board stressed that in such situations an election is preferable in order to guarantee employees an opportunity to express their genuine desires in selecting their bargaining representative. The Board noted that an election would prevent the possibility that fortuitous timing or an employer's undue influence could result in a situation in which the union recognized by the employer was not the union that would ultimately have been chosen by the employees if an election had been held.⁶

the rival union's showing of interest) at the time recognition was granted to the first union. The Board in *Smith's Food* determined that the *Rollins* policy had the unintended consequence of protecting employee free choice at the expense of other important objectives. For example, the Board indicated that the *Rollins* rule discouraged employers from voluntarily recognizing unions by leaving the status of such recognition in doubt (based on the possible subsequent filing of a petition by another union) and, additionally, allowed unions with little or no employee support to disrupt the nascent bargaining relationship between the employer and the recognized union. *Smith's Food*, supra at 845–846.

⁶ The Board noted that in *Rollins Transportation* both unions had assertedly secured authorization cards from a majority of the employer's employees at the time the employer granted recognition to one of the unions and that although the union ultimately recognized by the employer had contacted the employer a week earlier to state its claim of majority status, the actual recognition occurred “on the same day, and almost at the same moment,” as the filing of the petition by the other union.

The Board also noted that where a strong union is competing against a less effective one, the employer would be more likely to voluntarily recognize the less effective one if it obtains card majority status, and would be less likely to voluntarily recognize the strong union if it achieves card majority status.

However, when, like here, only one union is organizing the employees and, upon demonstration of the union's majority status, the employer voluntarily recognizes the union, an exception to the recognition bar principles is not warranted. That is, in contrast to the rival union organizing situation presented in *Smith's Food*, where only one union is engaged in organizing an employer's employees, voluntary recognition by the employer of that union upon a demonstration of its majority status only serves to effectuate employee free choice. The possibility that fortuitous timing or undue employer interference, as discussed by the Board in *Smith's Food*, could thwart the employees' choice of their bargaining representative is simply not present.

Since a majority of employees in the instant case have indicated their desire for representation by the Union,⁷ it would be anomalous to deprive that majority of their expressed desire for representation based merely on the contrary opinion of a minority group of employees. Indeed, the Act is premised on the concept of majority rule. As the Supreme Court stated in *International Ladies' Garment Workers Union (Bernhard-Altman) v. NLRB*, 366 U.S. 731 (1961), quoting from *Ray Brooks v. NLRB*, 348 U.S. 96, 103 (1954), "the Act placed 'a nonconsenting minority under the bargaining responsibility of an agency selected by a majority of the workers.'"

In any organizing drive that culminates in certification or voluntary recognition of the union, it is likely that a minority of employees do not favor representation. As asserted by the Union and conceded by the Regional Director here, there will rarely be unanimous support for a union. Indeed, the situation presented by this case is unusual only in the sense that the employees who did not favor the Union opted to visibly record their opposition to the Union in a signed petition.

Under such circumstances, to adopt our dissenting colleague's position and find that an election is required based on the fact that 30 percent of the employees did not support the Union at the time of the recognition

⁷ There is no dispute that, pursuant to the neutrality/card check agreement, the arbitrator determined that the Union enjoyed majority support as of September 24. Indeed, the Employer extended recognition and engaged in bargaining based on the arbitrator's determination. Moreover, as noted above, the Regional Director dismissed the prior unfair labor practice charge filed by the Petitioner alleging that the recognition violated Sec. 8(a)(2), and the General Counsel denied the Petitioner's appeal.

Our dissenting colleague's speculation that three or more of the employees who signed authorization cards also may have been among the employees who signed the petition expressing disinterest in representation by the Union, thereby nullifying the majority status as certified by the arbitrator, is mere conjecture. There simply is no evidence that the employees who signed the petition also signed authorization cards supporting the Union.

would be tantamount to a repudiation of recognition bar principles. Indeed, requiring an election any time there is a considerable minority of employees that opposes union representation would abrogate the "long-established Board policy to promote voluntary recognition and bargaining between employers and labor organizations, as a means of promoting harmony and stability of labor-management relations." *MGM Grand Hotel*, 329 NLRB 464, 466 (1999) (citations omitted).

Under our dissenting colleague's approach, an employer would have little incentive to voluntarily recognize a union if such recognition subsequently could be called into question—perhaps after months of productive bargaining between the parties—by a minority group of employees that disfavors the union. Moreover, assuming the union were to prevail in a decertification election conducted under circumstances such as these, the election nevertheless would have the deleterious consequence of "disrupt[ing] the nascent relationship" between the employer and union pending the outcome of the election and any subsequent proceedings. See *Smith's Food*, supra at 845–846.

Rather, we believe that by dismissing the instant petition, we are both promoting voluntary recognition and effectuating the free choice of the majority of the unit employees. By contrast, the Regional Director's decision promotes neither policy.

Accordingly, we find that the Employer's voluntary recognition of the Union bars the instant petition.⁸ We therefore reverse the decision of the Regional Director and dismiss the petition.

CHAIRMAN HURTGEN, dissenting.

Contrary to the majority, I would adopt the Regional Director's decision to direct an election.

As discussed below, my colleagues have drawn a distinction between the Section 7 right to choose between rival unions and the Section 7 right to choose between a union and no union at all. Clearly, this approach is contrary to the Act and statutory policy.

The Board in *Smith's Food & Drug Centers*, 320 NLRB 844 (1996), held that, in rival union initial-organizing situations, an employer's recognition of one union will not bar a petition by a competing union if the

⁸ The Regional Director also found that, in the event that the Board were to reverse his decision and find that there is a recognition bar to the processing of the petition, a reasonable period of time for bargaining had not elapsed at the time the petition was filed. No party has requested review of that finding. In any event, we agree that a reasonable period of time for bargaining had not elapsed based on the facts that, inter alia: (1) only 1 month had passed at the time the petition was filed; (2) the parties were negotiating an initial contract; and (3) the parties had just begun the preliminary stages of preparation for negotiations.

petitioner union demonstrates a 30-percent showing of interest that predates the recognition.¹ In reaching this decision, the Board sought to balance two competing interests—employee free choice and the stability of collective-bargaining relationships. The Board found that the 30-percent requirement “effectuat[ed] employee free choice, while at the same time promoting voluntary recognition and reasonably protecting the stability of collective-bargaining relationships.” *Smith’s Food*, 320 NLRB at 846.

Those same interests are implicated here. The sole difference is that the competing groups here are a union and no union at all. As the Regional Director noted, prior to recognition, over 30 percent of the unit here “directly, concertedly, unambiguously, tangibly” protested that they did not want to be represented by a union. Thus, the resolution here should be the direction of an election. That course would preserve the right of employees to choose not to be represented by a union, just as *Smith’s Food* preserved the right to choose between rival unions. Further, the stability of voluntary recognition is maintained because the loss of the recognition bar would arise only where the petitioner (whether a union as in *Smith’s Food* or an employee as in this case) demonstrates the requisite showing of interest. Accordingly, I agree with the Regional Director that the reasons for the Board’s decision in *Smith’s Food* apply equally in the instant decertification context. Therefore, I would find that the Employer’s voluntary recognition does not bar the instant petition.

My colleagues argue that the *Smith’s Food* exception to recognition bar principles is necessarily limited to situations where two unions are simultaneously organizing an employer’s employees. However, the very rationale in *Smith’s Food* on which they rely for this limited exception—“to guarantee employees an opportunity to express their genuine desires in selecting their bargaining representative”—is equally as applicable to the instant case. Thus where, as here, a substantial portion of the unit employees have combined to tangibly express their opposition to union representation, the genuine desires of these employees, as well as those of card signers and employees who have not manifested their views regarding representation, would best be served through a fair and free election.

My colleagues view *Smith’s Food* as an exception to the “recognition bar” principle. However, they forget that the “recognition bar” principle is an exception to the general rule that elections are favored as a means of re-

solving questions concerning representation. My position is in keeping with that general rule; my colleagues’ position is not.

I also disagree with the majority that *Smith’s Food* is inapplicable, because (notwithstanding evidence that more than 30 percent of the unit actively oppose union representation) applying a recognition bar “only serves to effectuate employee free choice.” I cannot understand, from either a logical or legal perspective, how employee free choice can be circumscribed where the choice is between representation and nonrepresentation, but not when the choice is as to which union will represent employees.

Nor do I agree with my colleagues that the instant petition must be dismissed because it would improperly “deprive” the alleged majority of their expressed desire for representation. Any “deprivation” is temporary. If the union has majority status, it will prevail in an election. Further, what my colleagues conveniently ignore, is that such purported “deprivation” is precisely what was contemplated in *Smith’s Food*. Thus, in *Smith’s Food*, the Board declined to apply a recognition bar in favor of a voluntarily recognized “majority” representative where a rival union demonstrated that it had at least 30 percent of employee support. In those circumstances, the Board found in *Smith’s Food* that “an election [was] warranted in order to guarantee employees an opportunity to express their desires in a definitive manner.” 320 NLRB at 846. As the Board stated in that case:

[W]e find it appropriate to establish a policy that tolerates a very limited degree of uncertainty regarding the status of a recently granted recognition in order to give effect to employee desires and guarantee them free choice in their selection of a bargaining representative.

Precisely the same rationale is applicable here.

I also reject the majority’s contentions that a recognition bar must attach lest an election be required “*any time* there is a considerable minority of employees that opposes union representation,” and to prevent voluntary recognition being called into question possibly months after productive bargaining has occurred. As in *Smith’s Food*, an election will be required *only* when there is the requisite showing of interest (30 percent and written) and only if it precedes the voluntary recognition. Accordingly, the predicate for the petition must exist before recognition (and hence before any bargaining lawfully can occur). Indeed, what my colleagues fail to note is that the instant petition was filed months before bargaining commenced. Had that petition resulted in a prompt election, the issue of representation would have been conclusively resolved. And, were the Union selected, it could

¹ In *Smith’s*, the Board made clear that it was the 30-percent showing of interest, and not the actual filing of a petition, that warrants an election when there are competing claims of representation.

thereafter have negotiated with the Employer free from any cloud over the bargaining process. Further, even though bargaining occurred here, this does not differ from a situation where bargaining has occurred in the rival-union context. Presumably, my colleagues would not bar the petition in the rival-union case.

Indeed, in both cases (rival union and 30-percent employee opposition to union representation), a balance must be struck between labor stability and employee free choice. While my colleagues opt for employee free choice in the former situation, they decline to do so here. In my view, no differentiation should be made. Consistent with the statutory policy of the Act, I find that employee free choice must prevail.

My colleagues say that *Smith's Food* is designed, in part, to protect against employer undue influence on the choice between two unions. However, employer influence can also be brought to bear in a one-union situation. There can be many reasons for an employer wanting to recognize a particular union. It is as essential to protect employee free choice in this situation as it is in a two-union situation.

Moreover, I find that the facts of this case particularly demonstrate the appropriateness of an election. As the Employer argues, there is a "very serious doubt" about whether the Union actually possessed majority status at the time of recognition. Out of 453 unit employees, 229 employees signed cards for the Union, and 186 employees signed a petition indicating that they did not want representation. It is not clear how many of the 186 were among the 229. However, if only three were in that category, the Union would not have a majority. The employee who put together that petition submitted it to the arbitrator and to the Employer before the arbitrator's card check certification. He requested that none of the indi-

viduals who signed the petition be included, in any count, in favor of representation. Aware that the arbitrator had been served, the Employer assumed the arbitrator would consider the petition in determining whether the Union had achieved majority status. However, because the arbitrator received the petition after his count and certification, he did not consider it and certified the Union. Further, after he received it, he did not reconsider his certification of majority status. He returned the petition and informed the petitioner that he had already completed his duties. As noted above, if only three of the 229 employees had signed the petition, the Union would not have had a majority. The arbitrator's failure to consider the impact of the petition may well have frustrated the intent of employees. The failure to direct an election in view of these uncertainties has undermined employee free choice.²

² In finding that the Union was the majority representative, my colleagues rely on the fact that the arbitrator determined—based on cards he examined—that the Union enjoyed majority support on September 24. However, the arbitrator did not consider the previously mailed petition by employees stating that they did not support the Union, nor did he respond to the petitioning employees' request that no signatories of that petition be included when calculating majority support. My colleagues also rely on the fact that the Employer thereafter bargained with the Union. In their view, this somehow establishes majority status. However, the one has nothing to do with the other. The fact that an employer bargains with a union does not tell us whether *the employees* wish to be represented by the union.

Finally, the fact that the Employer's 8(a)(2) charge was dismissed does not undercut the necessity of processing the instant petition. Of course, except for the fact that the Board cannot find an 8(a)(2) violation, the Board is not bound by the General Counsel's determinations under Sec. 3(d). Further, as in *Smith's Food*, the issue is not the status of the union voluntarily recognized by the employer (which majority status I find is in question here), but whether an election is warranted in order to fully safeguard employee free choice. I find that it is.