

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 13

MICHAEL J. VORKAPIC, INC.¹

Employer-Petitioner

and

NATIONAL PRODUCTION WORKERS UNION, LOCAL 707

Union

and

LABORERS' LOCAL 582, AFFILIATED WITH THE LABORERS INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO

Union

Case 13-RM-1687

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board; hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record² in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.³

3. The labor organizations involved claim to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act for the following reasons:

5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:⁴

All laborers and production workers employed by the Employer at its facility currently located at P.O. Box 818, Batavia, Illinois; but excluding all masons, office clerical employees of the Employer, guards, and supervisors as defined in the Act.

DIRECTION OF ELECTION*

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility

Michael J. Vorkapic, Inc.

13-RM-1687

period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by **National Production Workers Union, Local 707, by Laborers' Local 582, affiliated with the Laborers International Union of North America, AFL-CIO, or by neither organization.**

LIST OF VOTERS

In order to insure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *N.L.R.B. v. Wyman-Gordon Company*, 394 U.S. 759 (1969); *North Macon Health Care Facility*, 315 NLRB No. 50, fn. 17 (1994). Accordingly, it is hereby directed that within 7 days of the date of this Decision 3 copies of an election eligibility list, containing the names and addresses of all of the eligible voters, shall be filed by the Employer with the undersigned Regional Director who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in **Suite 800, 200 West Adams Street, Chicago, Illinois 60606** on or before May 2, 2000. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the **Executive Secretary, Franklin Court Building, 1099-14th Street, N.W., Washington, D.C. 20570**. This request must be received by the Board in Washington by May 9, 2000.

DATED April 25, 2000 at Chicago, Illinois.

/s/Harvey A. Roth
Acting Regional Director, Region 13

*/ The National Labor Relations Board provides the following rule with respect to the posting of election notices:

(a) Employers shall post copies of the Board's official Notice of Election in conspicuous places at least 3 full working days prior to 12:01 a.m. of the day of the election. In elections involving mail ballots, the election shall be deemed to have commenced the day the ballots are deposited by the Regional Director in the mail. In all cases, the notices shall remain posted until the end of the election.

(b) The term "working day" shall mean an entire 24-hour period excluding Saturdays, Sundays, and holidays.

(c) A party shall be estopped from objection to nonposting of notices if it is responsible for the nonposting. An employer shall be conclusively deemed to have received copies of the election notice for posting unless it notifies the Regional Director at least 5 working days prior to the commencement of the election that it has not received copies of the election notice.

- 1/ The names of the parties appear as amended at the hearing.
- 2/ The arguments advanced by the parties at the hearing and in post-hearing briefs have been carefully considered.
- 3/ The Employer is a contractor engaged primarily in the construction industry.
- 4/ Michael J. Vorkapic, Inc. (hereafter the “Employer”) filed the petition claiming that one or more labor organizations had presented a claim to the Employer to be recognized as the representative of a unit of all laborers and production workers employed by the Employer; but excluding all masons and office clerical employees.

Laborers' Local 582, Affiliated with the Laborers International Union of North America, AFL-CIO (hereafter “Local 582”) argues that the instant petition is barred by its collective-bargaining agreement with the Employer. Local 582 claims it entered into an agreement with the Employer as the Section 9(a) representative of the laborers employed by the Employer within the territorial jurisdiction of Local 582. In addition, Local 582 contends that the Employer’s challenge to its 9(a) status is barred as untimely. Finally, Local 582 asserts that the instant petition must be dismissed under *Douglas-Randall*, 320 NLRB 431 (1995) insofar as the Employer engaged in unfair labor practices (hereafter a “ULP”) prior to the filing of the petition.

The Employer argues that its agreement with Local 582 is pursuant to Section 8(f) of the Act and therefore, under *John Deklewa & Sons*, 282 NLRB 1375 (1987) the contract does not serve as a bar to processing the instant petition. The Employer also argues that based on the showing of interest presented to it by the National Production Workers Union Local 707 (hereafter “Local 707”) and its subsequent recognition of Local 707, a bargaining order should be entered directing the Employer to negotiate with Local 707 as the representative of its laborer employees.

FACTS

The Employer, located in Batavia, Illinois, generally employs four laborers. In February 1999, Local 582 picketed the River North construction project in Geneva, Illinois, where the Employer was working. Thereafter, the Employer was removed from the job-site and subsequent negotiations with Dennis Johnson, the President and Business Manager of Local 582 concerning how the Employer could return to work culminated in the Employer entering into an Independent Construction Industry Collective Bargaining Agreement (hereinafter the “Local 582 Agreement”) in late February or early March, 1999. Although the exact date of the agreement’s execution is unclear, Michael Vorkapic, the president of the Employer, testified that he signed the agreement during the first or second week of March, 1999. Dennis Johnson, however, testified that the agreement was signed on February 24, 1999. However, for the ease of future reference, the date of the execution will hereafter be referred to as February 24, since it is the earliest date at which any witness testified the parties signed the agreement. The Local 582 Agreement bound the Employer to the Joint Agreement between Local 582 and several contractors’ associations effective by their terms from June 1, 1998 until May 31, 2001.

Because of the potential economic hardship of immediately being bound to the Local 582 Agreement would have had on the Employer, Johnson and Vorkapic agreed to post date it to April 1, 1999. Paragraph 1 of the Local 582 Agreement states in relevant part that the Employer, “in response to [Local 582’s] claim that it represents an uncoerced majority of [its] laborer employees, acknowledges and agrees that there is no good faith doubt that [Local 582] has been authorized to and in fact does represent such majority of laborers.”

Both Vorkapic and Johnson testified that Vorkapic never requested proof that Local 582 actually represented a majority of its laborer employees, nor did Johnson offer such a showing. Johnson also testified that although he had spoken to a “couple” of the Employer’s laborers the previous fall and told them that they “should have a union”, he never requested that the men (nor *did* any of the men), sign anything for Local 582. Thus, Local 582 did not have any evidence that it had the support of a majority of the Employer’s laborers when the Employer agreed to extend 9(a) recognition to Local 582 by executing the Local 582 Agreement. This fact is further supported by Johnson’s testimony that he visited one of the Employer’s job sites after April 1, 1999, with the intention of “signing up the men”. However, since the workers did not know what was going on and because it was the first time Johnson had ever met one of the them, Johnson simply left the job site without having them sign anything.

On March 12, 1999, Vorkapic met with Humberto Giraldo, a representative of Local 707, at the Local 707 office, at Giraldo’s request. Giraldo showed Vorkapic authorization cards signed by 3 of his 4 laborer employees and then explained to Vorkapic that he needed Vorkapic to sign a letter recognizing Local 707 as the bargaining representative of his employees. On March 18, 1999, Vorkapic sent a letter to Local 707 referencing the card check, granting Local 707 recognition as the representative of its laborers and agreeing to sit down and bargain for a contract.

The Employer, despite its apparent obligation to both unions, never gave effect to the Local 582 Agreement or participated in negotiations with Local 707. On August 23, 1999, the Employer filed the instant petition seeking to determine whether Local 707 or Local 582 represents its laborer employees. A hearing was held on the matter on September 7, 1999. Further processing of the petition was thereafter blocked by the unfair labor practice charge filed by Local 582 against the Employer in Case 13-CA-38066. That Charge was ultimately settled, with the Employer agreeing, *inter alia*, to give effect to the Local 582 Agreement, retroactive to April 1, 1999.

ANALYSIS

In *John Deklewa & Sons*, 282 NLRB. 1375, 1385, (1987) the Board stated that parties in the construction industry are presumed to intend their relationship to be pursuant to Section 8(f), and that collective-bargaining agreements entered into under Section 8(f) would not bar petitions pursuant to Section 9(c) or (e) of the Act. However, in *Deklewa*, the Board also noted that unions having agreements with construction industry employers would not be treated less favorably than their non-construction industry counterparts. *Deklewa*, 282 NLRB at 1387 n. 53. Thus, *Deklewa* explained that a party asserting a 9(a) relationship could overcome the 8(f) presumption by either of two ways: by showing that a construction industry employer voluntarily recognized a union based on a clear showing of majority support, (*Id.*) or through a Board-certified election. *Id.* 282 NLRB at 1385 see also *Golden West Elec.*, 307 NLRB 1494, 1495 (1992). If a construction industry union establishes the existence of a 9(a) relationship, it is afforded the “full panoply of Section 9 rights and obligations;” *Deklewa*, 282 NLRB at 1385. In other words, a contract entered into under Section 9(a) in the construction industry will bar representation petitions in the same manner as 9(a) agreements outside the construction industry.

To satisfy the voluntary recognition option, the party asserting the 9(a) relationship must show (1) a clear and unequivocal demand to be recognized as a 9(a) representative, (2) a voluntary and unequivocal grant of such recognition, and (3) a contemporaneous showing of majority support among the appropriate unit of employees. *Golden West Elec.*, 307 NLRB at 1495. Local 582 contends that the language contained in Paragraph 1 of its agreement with the Employer noted above satisfies the burden of proving a 9(a) relationship.

In *Golden West Elec., supra*, like here, the employer filed an RM petition asserting that despite the clear language of the collective-bargaining agreement, the union did not represent the majority of its employees at the time recognition was granted. The Board held that the language of a voluntary recognition clause was sufficient to demonstrate a 9(a) relationship, even though the employer disputed whether the union had presented evidence of majority support. *Id.* at 1495. Subsequently, in *Casale Industries, Inc.*, 311 NLRB 951, 953 (1993), the Board held that it would not entertain challenges to the majority status of a union more than six months after an employer in the construction industry extended 9(a) recognition, see also, *Oklahoma Installation Co.*, 325 NLRB 741 (1998). To hold otherwise, according to the Board, would mean long-standing relationships could be belatedly challenged, thereby undermining stable labor relations. *Casale Industries*, 311 NLRB at 953.

Local 582 argues in its brief, however, that since the hearing did not occur until September 7, 1999, more than 6 months elapsed before the Employer attempted to produce any evidence that Local 582 did not represent a majority of its laborers. Local 582 concedes, however, that the petition herein was filed within six months from February 24, 1999, the date Johnson claimed the Local 582 Agreement was signed. Moreover, according to Local 582, the Employer failed to produce sufficient evidence that Local 582 did not represent a majority of its employees at the hearing because the Employer failed to present a showing of interest that Local 707 represented a majority of its employees.

Both of these arguments lack merit. First, in *Casale Industries, Inc.*, *supra*, the Board noted that a petition or charge must be filed within 6 months of the granting of 9(a) recognition to make a timely challenge to the majority status of a union. Significantly, the Board did not hold that for the challenge to be timely, a pre-election hearing must occur within six months (in the case of a petition) or that the Board must receive the Employer's evidence or hold the trial within the 10(b) period (in the case of an unfair labor practice charge). Indeed, such a construction of the Board's holding to require the affirmative presentation of evidence on substantive allegations within the applicable statute of limitations period would be a significant departure from long-established Board practice in both representation and unfair labor practice cases. Therefore, despite Local 582's argument to the contrary, the fact that the hearing did not occur until after the 10(b) period had elapsed is irrelevant. It is undisputed that the instant petition was filed within 6 months of the earliest date at which it was contended that Local 582 and the Employer executed the Local 582 Agreement. It follows, therefore, that the instant petition is timely.

Second, contrary to Local 582's assertion, *Oklahoma Installation Co.*, *supra*, does not hold that an employer challenging majority status must produce a showing of interest. Rather, the Board in *Oklahoma Installation* merely recites the rule that to challenge majority status, the Employer must produce "affirmative evidence" of the union's lack of majority status at the time recognition was granted. *Oklahoma Installation Co.*, 325 NLRB at 742. Here, however, the record establishes through affirmative evidence, namely, the testimony Local 582's president Johnson that none of the Employer's employees were ever asked to sign authorization cards for Local 582 and, indeed, never did sign authorization cards before the Employer extended recognition to Local 582. Accordingly, the Employer has met its burden of demonstrating that Local 582 did not represent a majority of its laborer employees at the time 9(a) recognition was extended.

With respect to Local 582's assertion that the instant petition should be dismissed under *Douglas Randall*, 320 NLRB 431 (1995), I find that dismissal under the facts of this case is unwarranted. In *Douglas Randall*, the Board affirmed the dismissal of a decertification petition that was filed subsequent to the company's unlawful withdrawal of recognition but prior to the company's agreement to settle the

Michael J. Vorkapic, Inc.

13-RM-1687

ULP charge by recognizing and bargaining with the union. *Id.* at 435. The Board reasoned that, *inter alia*, allowing the petition to be processed in light of the ULP is inappropriate when there is an issue as to whether employer's misconduct may have led to the employees dissatisfaction with the union. *Id.* at fn 5. However, there is no evidence that the unfair labor practice that the Employer engaged in by recognizing Local 707 in any way led to the filing of the instant petition. Consequently, *Douglas Randall*, does not mandate dismissal of the petition herein.

Finally, the Employer's request for the entry of a bargaining order directing it to bargain with Local 707 is denied. The Employer has cited no supporting cases for entry of such an order under these circumstances. In any event, I find that a Board conducted election would best effectuate policies and purposes of the Act by allowing the employees to chose which, if any, union they wish to have as their bargaining representative.

In sum, the Employer filed the instant petition less than 6 months after it extended 9(a) recognition to Local 582. Thus, the petition is timely under *Casale Industries, Inc. supra*. In addition, as noted above, Local 582's President and Business Manager, Dennis Johnson testified that he never asked any of the Employer's laborer employees to sign anything. As such, through the testimony of Johnson, the Employer produced evidence that Local 582 did not represent a majority of the Employer's laborers at the time it extended 9(a) recognition to Local 582. Consequently, based on the foregoing, I find that Local 582 was an 8(f) representative of the Employer's laborer employees and, therefore, pursuant to *Delklewa, supra*, the Local 582 Agreement does not act as a bar to the Petition herein.

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