

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19**

BASEBALL CLUB OF SEATTLE, LP d/b/a
SEATTLE MARINERS

Employer

and

Case 19-RD-3424

GERALD BERGEN, an Individual

Petitioner

and

TEAMSTERS UNION LOCAL 117, affiliated with
INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, AFL-CIO

Intervenor

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 record 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. The labor organization involved claims 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.
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:

All event staff employees employed by the Employer at Safeco Field or Safeco Field Garage, Seattle, Washington, in the following classifications: parking cashier, parking attendant, gate attendant/greeter, seating host/usher, team captain (including gate and host captains, elevator captains and seating captains), suite hosts, elevator/escalator host, groundskeepers and grounds crew, novelty and programs sales from stands, kiosks or

hawking, wardrobe attendants; but excluding security guards, control room employees, ticket sales employees, team store employees, announcers and audio/visual employees, guest services employees (including navigators), head groundskeeper and assistant head groundskeeper, employees of the food and beverage concessionaire, field personnel (including players, umpires, mascots, batboys, ballgirls, Mariners Fielders, supervisors, year-round employees and all others.¹

Facts

The parties have stipulated to all material issues, except for the existence of a QCR, i.e. the existence of a recognition bar. This issue breaks down into two sub-issues: 1. Was a recognition bar created? and 2. If so, had a reasonable time to bargain for a new agreement elapsed, thereby ending the bar? The Union contends there is a recognition bar, the Employer and Petitioner assert that an election should be conducted.

The Employer is a major league baseball club. Prior to July 1999, it played its home games at the Kingdome in Seattle, Washington. The persons at Kingdome who performed the functions now performed by those in the Mariners Unit ("Unit") were generally employees of King County, as were other persons. The Kingdome unit was represented by the Union. In July 1999 the newly constructed Mariners Stadium opened, and the Employer moved its operations to that new facility, which had different ownership from the Kingdome. The Employer hired the Unit, as its own employees. Some of the Mariners Unit employees had been employed in the King County unit at the Kingdome, but a majority had not. It does not appear that any had previously worked for the Mariners. The Kingdome continued to operate after July 1 for a period of time, using its own employees, for non-baseball functions.

Teamsters Local 117 had represented the King County employees in the Kingdome unit. A written agreement (Neutrality Agreement) was reached between the Mariners and the Union on April 1, 1999 concerning the representation of the Unit employees. The Employer would take a neutral position during organizing, neither promoting nor resisting representation by the Union. The Union would be provided a list of eligible employees, and be given access to the ballpark and garage to carry out its organizational activities. The Agreement called for a card check at the Union's request within a certain time frame, and named a local arbitrator (Michael Beck) to conduct any check.

Pursuant to the Neutrality Agreement, the Union presented cards to Beck; the Employer presented an eligibility list and signature samples. The record herein does not indicate the exact date of presentation, but it was sometime before September 22. Meanwhile, a group of Unit employees heard of the Neutrality Agreement and did not welcome such representation. They began collecting signatures against representation, soliciting signatures on September 8, 17 and 18. On September 22, to-be-Petitioner Bergen drafted a letter to Beck, reciting that he was enclosing a copy of a petition with 186 signatures of employees that they did not want representation by the Union. He asked that the signers not be included in any count by Beck in favor of representation. A copy of this letter was presented by Bergen to the Employer about this same time, perhaps as late as September 24, but the Employer did not review it, other than to notice it was some kind of petition. The Human Relations Director gave the document to its attorney. The letter showed on its face that it was being sent to Beck; the Employer did nothing with the petition.

¹ The event housekeeping staff and the event cleaning supervisor are employees of a sub-contractor.

Beck received the Bergen petition and letter, but not until after he had completed his card check. Beck, in fact, had completed the card check and certified that the Union had 229 cards of a unit of 453, i.e. a majority, by a letter dated September 24. He replied to Bergen on September 28, stating that he had already completed his “duties,” and returned the petition to him.

I take administrative notice that the Petitioner had a 30%+ showing of disinterest in representation as of the September 24 certification.²

On September 27, Bergen filed a Section 8(a)(2) unfair labor practice charge with the Region, alleging that the recognition created by Beck’s certification was unlawful. That charge was dismissed, and the appeal to the General Counsel was denied on April 13, 2000.

After the card check certification on September 24, received by the Union a few days later, the Union circulated a questionnaire among the Unit, due back October 29. During November the questionnaires were tabulated, and on December 6, a “demand meeting” with employees was held by the Union to discuss the results of the polling and to initiate selection of an employee bargaining committee. In this time frame, the Union also sent an information request to the Employer, with which the latter complied. The Union’s bargaining committee was selected in early December.

The first bargaining meeting was held December 21. A meeting had also been pre-set for the next day, but was canceled, in order for the Employer to draft an initial proposal. By the next, January 6, 2000 meeting date, the draft was not complete, so the meeting was canceled. The parties met January 11; the Union didn’t like the proposal generally, and the Employer agreed to go back to the drafting screen and come up with a different kind of proposal, without economics. The Union canceled the January 13 meeting and the Employer canceled the January 25 meeting, because of schedule conflicts and non-completion of the new draft.

The parties met on January 27; the Employer proposal was incomplete. The Union met with its bargaining committee on February 7. The Employer presented a full, non-economic proposal on February 11, which the Union discussed with its committee on February 14. The committee prepared a counter, which was presented to management on February 16.

“Small table” negotiations, consisting of a core group of Union and Employer representatives, were held on February 18 and March 8. A session of just the chief executive of the Union and of the Employer was held on March 15. Additional, full-complement meetings were held on March 22 and April 12. By this time the matters in dispute had been reduced to economics and union security/checkoff, plus several other relatively minor points. At this meeting the Union moved from a demand for a “union shop” to an “agency shop”.³

² The Hearing Officer announced at the hearing that the Region had administratively determined that the Petitioner had a 30% showing as of the time of recognition. The Union objected to that ruling at hearing on the grounds that, unlike the usual showing of interest, the showing issue herein is not a simple administrative determination, made for the Board’s administrative convenience. Rather, it is an element of proof of the case, which the Union should be entitled to litigate, something which the Board should not be privileged to determine short of a hearing. No offer of proof was made. I rely on the Board’s statement in *Smiths Food & Drug Centers, Inc.*, 320 NLRB 844, fn. 4 (1996), concededly dicta, that the existence of a 30% competing showing in connection with a recognition bar determination, will be administratively determined by the Board.

³ This change, if the testimony is accurate, could not be much of a movement, since agency shop is the maximum that can be required under the Act in any event.

Another employee update was held on April 27, and on April 28 the employer presented a proposal by mail, which showed some apparent movement by the Employer. However, as of the May 3 hearing, no new negotiating date had been set to discuss this latest proposal.

The Employer and Union were in agreement at hearing that negotiations had been professionally conducted by each and productive. However, they were in disagreement about the prospects for an agreement, the Employer suggesting that they were close to impasse, while the Union expressed optimism about reaching an agreement, soon.

Was There a Recognition Bar?

As a general proposition, when an employer recognizes a union voluntarily, a recognition bar is created. Essentially, the parties are given a “reasonable period” to attempt to negotiate an agreement without needing to be concerned about any intervening representation issues, such as a raid by another union, or a change of heart by the unit.

Prior to 1996, the Board had held that no recognition bar would be created if another union had conducted an “active organizing campaign simultaneously” with the to-be-recognized union. See *Rollins Transportation System*, 296 NLRB 793 (1989). However, in *Smith’s Food & Drug Centers, Inc.*, 320 NLRB 844 (1996), the Board restricted the application of the no-bar exception to those circumstances where the “other” union demonstrated that it had a 30-percent showing of interest at the time of recognition. In such circumstances, an election could be held, notwithstanding the recognition.

In the instant case, we are presented with an unusual variant of the *Smith’s* scenario, i.e., a circumstance where no second labor organization had a simultaneous 30% showing, but instead a group of employees had a simultaneous 30% showing that they did *not* want representation by the to-be-recognized union. The parties to this proceeding were alerted to the possible applicability of *Smith’s*, but neither they nor the region has found any case discussing the *Smith’s* no-bar rationale in an RD context.

In *Smith’s*, the Board reasoned that the *Rollins* policy was “intended to protect the right of employees to select their own collective-bargaining representative and to minimize the role of the employer or pure chance in the selection process.” *Smith’s* at 845. However, the Board said, the *Rollins* denial of a bar was perhaps too broad because it “unnecessarily discourages employers” from voluntary recognition and “disrupts the nascent relationship.” Resolution of the bar issue may “entail significant delay” and “may even encourage unions with little or no employee support ...to frustrate the establishment of new collective-bargaining relationships by their rivals. *Smith’s* at 845, 846. “By attempting to eliminate all ambiguity regarding employees desires as well as any possibility of collusive, ‘sweetheart’ deals between employers and unions, the *Rollins* policy may defeat” the policy goal of employee free choice. *Id.*, at 846.

On the other hand, the Board noted, requiring a full 30% showing to defeat a recognition bar, instead of mere simultaneous organizing, would better balance competing interests by effectuating employee free choice, while still promoting the worthy goal of voluntary recognition. “Thus, we ensure that a union capable of filing a petition at the time of recognition is not denied the opportunity for an election because it underestimated a competing union’s support, or it simply arrived at the Board’s office a little too late.” *Ibid.* Balancing these competing interests, mere activity would not create a bar, but when a 30%, predating interest is shown, “an election is warranted in order to guarantee employees an opportunity to express their desires in a definitive manner. *Ibid.*”

The Board also noted that its policy shift was consistent with its policy under *Bruckner Nursing Home*, 262 NLRB 955 (1982), which presented the same kind of issue, in a ULP context. It noted that the results need not be identical in ULP and R contexts. In the former the issue was whether the recognition was lawful. In the latter, the recognition *was* lawful, and the issue was “whether the circumstances of such a lawful recognition are sufficient to dismiss the competing union’s petition.” *Ibid.*

This new, *Smith’s* policy would tolerate “a very limited degree of uncertainty” about a recognition“ in order to give effect to employee desires and guarantee them free choice.” *Ibid.* This new policy “would permit unions A and B to vie in an election, rather than freeze out union B for the duration of the recognition-bar period” and for any resulting contract bar as well. *Ibid.* Moreover, it “will prevent the employer from co-opting employee free choice by extending recognition to a less effective union in an attempt to freeze out a stronger union with whom it may not wish to deal.” This reduces “the potential for undue influence by employers and ensures that the genuine desires of the employees in selecting their collective-bargaining representative are carried out.” *Id.*, at 847. Finally, the 30% figure was not arbitrary, but was “the traditional figure for a showing of interest that is sufficient to raise” a QCR. *Ibid.*

In summary then, the *Smith’s* rationale can be reduced to several basics: It is necessary to balance the interest in industrial stability and the interest in giving employees their right to choose. The *Smith’s* 30% rule reduces the possibility of Union B playing “dog in the manger” and thwarting Union A by a token or spite petition. It reduces the possibility of the employer interference of cutting “sweetheart deals” with a weak union in order to stymie a strong union. It allows employees to have a clear choice when another union has garnered a 30% showing of support. Rather than letting random or fortuitous circumstances factors - such as Union B’s delay in getting to the Board office to file a petition ahead of the recognition or its mere misjudgment of the strength of Union B - freeze out Union B, the Board would entertain a petition.

Obviously, we are not presented with a second-union situation here. Instead, we are presented with a recognition of Union A when a group of employees has simultaneously generated a 30% showing of disinterest in representation by that same union. If the RD petitioner had structured the anti-Union campaign as an RC petition with the intent of substituting an ad hoc group of employees as representative, instead of as an RD, *Smith’s* would clearly apply, and an election directed. Since we have a novel issue, we must examine how analogous the circumstances are to extant law, and whether the reasons for the Board’s decision in *Smith’s* would apply equally well to the instant circumstances.

In my judgment, all of the reasons that prompted the Board in *Smith’s* to reject a recognition bar and permit an election when Union B had a 30% showing, support the application of *Smith’s* to an RD situation as well. There are still the competing goals of fostering industrial stability and finality, and the that of fostering and protecting employee free choice. There is still the same concern about possible game-playing collusion by the employer and Union A, or by Union B, which could undermine any of these goals.

First, the *Smith’s* and the RD situation are indeed closely analogous. In the first case, there is concrete support for another union; in the instant case there is equally strong and concrete support for an alternative, except that here the alternative is “non-representation.”

As to the Board’s concern of potential employer interference, in the instant context an employer could shoehorn a weak or “sweetheart” union into place.⁴ The reason could be to secure protection from

⁴ I want to make it clear that I am not suggesting that anything unlawful or improper transpired in the instant case. I am speaking merely of the class of unions and the class of employers, in connection with discussion of a general rule.

an unknown, stronger union down the road, or to protect itself from organizing tactics – perhaps a public campaign or picketing - to buy labor peace notwithstanding the budding objections of the unit. The fact of a neutrality agreement further limits free choice, since the employer is committed to not present the “other side” to its employees, or even not to file an RC instead of going through the card check.

As to the concern for industrial stability and certainty, the facts herein would threaten neither interest any more than they might in the analogous, *Smith's* context. The loss of the bar would arise only in the limited circumstance of the presence of the 30% showing.

As for the protection of the right to self-determination, and the right to a vote, it seems even more appropriate to reject a successorship bar generally in the instant context. Unlike the usual two-union situation, where Union B could have filed its own petition pre-recognition, *here the employees have no pre-recognition opportunity to file*, since they cannot not file an RD until there has been a recognition. They can't pre-empt the recognition. Even if they go to their employer, it can't hold out for an election, because it has agreed to the card check process, and has further agreed not to oppose organizing.

It might be said that *Smith's* should not be expanded to RD contexts, because there are always many employees who don't want a particular union – seldom does a union have unanimous support. In fact, it is not at all uncommon where a successful union obtained support from only, say, 55% of the voters. Yet that possibility of substantial opposition doesn't preclude a recognition bar following ordinary voluntary recognitions. No one would suggest that the fact that a union almost surely lacks 100% support, and very possibly lacks the support of 30% or more of the Unit, means that there should be no recognition bar. However, in those ordinary situations, we know nothing specific about the wishes of the balance of the Unit; there is no “showing” to contradict the union's tangible majority showing. The missing 49% who didn't sign a card could have missed the opportunity to sign, or have been undecided, or simply didn't care. Their lack of direct support would be an insufficient basis to routinely reject a recognition bar. However, in the instant case, the opposite is true. We have 30% of the Unit directly, concertedly, unambiguously, tangibly protesting that they do not want to be represented by the soon-to-be incumbent, just as in *Smith's*.

I conclude that it is appropriate to apply the *Smith's* rationale to the fairly unique situation where there is demonstrated 30% opposition to an impending recognition. All of the rationale cited above for the Board's *Smith's* policy can easily be cited for application in the instant setting. The employees did everything they could to have an election – gathered signatures, presented them to the Employer, presented them to the neutral, filed a ULP charge, filed an RD. They deserve to be heard. This is an unusual circumstance; application of *Smith's* would not upset the goals of industrial stability, or add uncertainty to recognitions, or undercut expressed employee choice any more than in a *Smith's* situation. In fact, it will enhance employee choice even more than in *Smith's*, since the employees can initiate nothing until it's “too late.” As in *Smith's*, when it's “this close”, the Board should opt for an election. As noted above, the fact that a ULP charge was filed and dismissed, does not mean that the recognition cannot be challenged by a petition.

Accordingly, I shall direct an election in the stipulated Unit.

Reasonable Time

Recognizing that this is a case of first impression and that the Board may well disagree with me, I shall address the issue of whether, if there was a recognition bar at the outset, a reasonable period of time had passed to permit the parties to negotiate a first agreement, and the bar was extinguished.

A recognition bar does not last forever. Rather, it extends only for a “reasonable period” of time, to give the parties a reasonable period to agree to a contract, without outside hindrance. The Board has said repeatedly that “reasonable time” is assessed as of the time of the filing of the petition. “We agree that a reasonable period of time had not passed by the time each of the three petitions was filed.” *MGM Grand Hotel, Inc.*, 329 NLRB No. 50 (1999).“ ...[A] reasonable time for bargaining had not elapsed at the time the petition was filed.” *Ford Center for the Performing Arts*, 328 NLRB No. 1 (1999), slip op. 1.⁵ Here, the petition was filed a mere month after the recognition. No case would suggest that such a short period of time is “reasonable”, even though reasonableness is not to be measured purely in calendar terms. The Board examines what transpired and what was accomplished in the sessions, the degree of progress made, whether impasse has been reached or not, and whether the contract is an initial contract.

Here, there clearly had not been a reasonable period of time in that month between recognition and filing of the petition. This was a totally new relationship. Neither party had yet geared up for negotiations. The preliminaries had just begun: information request, employee polls, assembling of a committee. The parties were not working off the “old” Kingdome contract; they were drafting a new one “from scratch.”

Accordingly, I would not direct an election if there were an initial recognition bar.

Conclusion

I conclude that no recognition bar attached in the circumstance of this case. Accordingly, I shall direct an election in the Unit agreed upon by the parties.

There are approximately 475 employees in the Unit.

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 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 TEAMSTERS UNION LOCAL 117, affiliated with INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL-CIO.

⁵ The Board often discusses the negotiations that transpired after the filing of the petition, as did I, but I find the later developments irrelevant.

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). Accordingly, it is hereby directed that within 7 days of the date of this Decision 4 copies of an election eligibility list, containing the alphabetized full names and addresses of all the eligible voters must be filed with the undersigned who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the Seattle Regional Office, 2948 Jackson Federal Building, 915 Second Avenue, Seattle, Washington, on or before June 14, 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.

NOTICE POSTING OBLIGATIONS

According to Board Rules and Regulations, Section 103.20, Notices of Election must be posted in areas conspicuous to potential voters for a minimum of three working days prior to the date of election. Failure to follow the posting requirement may result in additional litigation should proper objections to the election be filed. Section 103.20(c) of the Board's Rules and Regulations requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

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, 1099 - 14th Street N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by June 21, 2000.

DATED at Seattle, Washington, this 7th day of June, 2000.

/s/ PAUL EGGERT

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347-2067