

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 20

H.Y. FLOORS AND GAMELINE PAINTING, INC.

Employer

and

Case 20-RD-2241

FERNANDO MORENO, AN INDIVIDUAL,

Petitioner

and

CARPENTERS 46 NORTHERN CALIFORNIA  
COUNTIES CONFERENCE BOARD

Union

SUPPLEMENTAL DECISION AND ORDER

On May 31, 2000, the Board, issued its Decision on Review and Order in this case<sup>1</sup> reversing the finding of the undersigned in the Decision and Direction of Election that issued in this matter on December 22, 1997, that the Memorandum Agreement between the Employer and the Union is an 8(f) agreement and therefore does not bar the processing of the instant decertification petition. In its Decision and Order, the Board held that the Employer and the Union have a 9(a) agreement vis a vis each other but that this agreement is not binding on the Petitioner herein. The Board remanded this case to the undersigned with instructions to reopen the record solely with respect to whether the Union represented a majority of employees in the bargaining unit at the time the

Employer extended recognition to it; the effect of the Union's majority, if any, on the contract bar quality of the Agreement; and issuance a Supplemental Decision.

However, on August 15, 1997, the Acting Regional Director issued an Order reopening the record in the pre-election hearing in this case specifically for the purpose of receiving evidence on, among others, the Union's majority status at the time the Employer extended recognition to it. The record reopened for further hearing on October 7 and closed on October 27, 1997. In these circumstances, on June 30, 2000, the parties were granted until the close of business July 13, 2000, to show cause why, in lieu of reopening the record for further hearing on this issue, the evidence adduced at the reopened hearing on October 7, 1997, should not be used to determine the Union's majority status at the time the Employer extended recognition to it.

In reply, the Union contends that further hearing is necessary to take additional evidence to establish the following facts:

1. the contract entered into between the Employer and the Union in 1996 terminated by its terms on June 30, 2000;
2. the Employer gave timely notice of its desire to reopen the contract and it was reopened for negotiations on July 1, 2000;
3. the parties have met and bargained over a new agreement to become effective July 1, 2000;
4. the Employer as of April 2000 had approximately 15 employees, including the petitioner and that all of said employees were members of or represented by Carpenters 1861, an affiliate of the Union;
5. ordering that an election be held to determine whether a 1996 contract which expired on June 30, 2000, constitutes a bar to the petition

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<sup>1</sup> 331 NLRB No. 44 slip op (May 31, 2000)

herein would be an exercise in futility since that contract if it was a bar is beyond the bar period; and

6. the petition herein should be dismissed as moot and that if a new petition were filed under the contract that became effective as of July 1, 2000, that remains another issue.

However, the establishment of these facts is not within the Board's directive in ordering that the record be reopened for further hearing solely on the issue as to whether at the time the Employer extended recognition to it, the Union demonstrated to the Employer that it represented a majority of bargaining unit employees. In these circumstances, and as the Union has not asserted that it intends to introduce any new evidence on this issue at a reopened hearing, I have concluded that a reopening of the record to take additional evidence is not warranted and I will determine this issue based on the evidence adduced at the reopened hearing on October 7, 1997.

As noted in the underlying Decision and Direction of Election, the evidence establishes that on September 3, 1996, the Employer signed the Carpenters 46 Northern California Counties Memorandum Agreement under which it agreed to be bound by the Carpenters Master Agreement for Northern California, which is effective from June 16, 1996 to and including June 30, 2000. United Brotherhood of Carpenters and Joiners of America, Local 1861, AFL-CIO, herein called Local 1861, was the other signatory to the Memorandum Agreement. The Memorandum Agreement states that the parties are the Employer and the Carpenters 46 Northern California Counties Conference Board, for and on behalf of its affiliated local Unions and District Councils which are collectively designated as the "Union." The Memorandum Agreement further states that the

Employer agrees that it is establishing “a collective bargaining relationship within the meaning of Section 9 of the National Labor Relations Act . . . .” The Union contends that the Memorandum Agreement constitutes a bar to an election in the instant case. The Employer and the Petitioner assert that the Memorandum Agreement is one sanctioned by Section 8(f) of the Act and does not constitute a bar to an election.

As noted in the Decision and Direction of Election, during the hearing on remand, Steven Heller, the Employer’s owner, testified as he had at the initial hearing, that no Union official discussed with him the subject of the Union’s majority support among the Employer’s employees at or before the date the Employer executed the Memorandum Agreement. Further, the Union presented no evidence at the hearing on remand that it or any of its affiliates had provided the Employer evidence of its majority status among the Employer’s employees at or before the time the Employer extended recognition to it. Finally, the Union did not assert it had done so in response to the Order to Show Cause discussed above.

In its Decision on Review, the Board noted that in the construction industry, an employer and a union may create a relationship pursuant to either Section 9(a) or 8(f) of the Act; that in the absence of evidence to the contrary, it will presume that the parties intend their relationship to be governed by Section 8(f), rather than Section 9(a); and that the burden of proving the existence of a 9(a) relationship is on the party asserting the existence of such a relationship *John Deklewa & Sons*, 282 NLRB 1375 (1987), *enfd. sub non. Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3<sup>rd</sup> Cir. 1988), cert. denied 488 U.S. 889 (1988). The Board further noted that to establish voluntary recognition pursuant to

Section 9(a) in the construction industry, it requires evidence that a union unequivocally demanded recognition as the employees' 9(a) representative, that the employer unequivocally accepted it as such; and a contemporaneous showing of majority support for the union at the time 9(a) recognition is granted. The Board went on to say with regard to this last factor, that while an employer's acknowledgement of such support is sufficient to preclude it from challenging a union's majority status, it is not sufficient to preclude an individual, such as the Petitioner, from doing so because he was not a party to the contract. Thus, vis a vis the Petitioner, the statement in the Memorandum Agreement that the parties were establishing a Section 9(a) collective-bargaining relationship is *not* sufficient to meet the requirement for certification or recognition “based on a contemporaneous showing of union support among a majority of the employees in an appropriate unit.” *John Deklewa & Sons*, supra.

As noted above, at the remand hearing on October 7, 1997, the Union did not present any evidence that it provided the Employer with evidence of its majority status at or before the time the Employer extended recognition to it. Further, the Union did not assert that it would do so if the record were reopened for further hearing in response to the Order to Show Cause discussed above. In these circumstances, the Union has not met its burden of establishing that the Memorandum Agreement it executed with the Employer is a Section 9(a) collective-bargaining agreement. Consequently, it must be concluded that this agreement is a Section 8(f) agreement and does not constitute a bar to an election in the instant case, and I so find.

Following issuance of the underlying Decision and Direction of Election on December 27, 1997, an election was held on January 16, 1998, and the ballots were impounded pending the Board's ruling on the Union's request for review. As I have found that the Memorandum Agreement does not constitute a bar to the petition herein, I will order that the ballots be opened at a time and place to be designated hereafter, and that an appropriate certification be issued.

#### ORDER

It is hereby ordered that that the ballots of the election conducted herein on January 16, 1998, be opened at a time and place to be designated hereafter, and that an appropriate certification be issued.

#### RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Supplemental Decision and Order may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099-14th Street, NW Washington, DC 20570-0001. This request must be received by the Board in Washington by August 16, 2000.

Dated at San Francisco, California, this 2<sup>nd</sup> day of August, 2000.

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Robert H. Miller, Regional Director  
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