

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

SKILFAB SHEET METAL CO.<sup>1</sup>

Employer

and

Case 19-RD-3482

JOHN SCHONIANS, an Individual

Petitioner

and

SHEET METAL WORKERS LOCAL 66,  
affiliated with SHEET METAL WORKERS  
INTERNATIONAL ASSOCIATION<sup>2</sup>

Union

**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 employees employed by the Employer at its Pacific, Washington, facility, and engaged in: (a) manufacture, fabrication, assembling, handling, erection, installation, dismantling, conditioning, adjustment, alteration, repairing and

---

<sup>1</sup> The name of the Employer appears as corrected at hearing.

<sup>2</sup> The name of the Union appears as corrected at hearing.

servicing of all ferrous or nonferrous metal work and all other materials used in lieu thereof and of all air-veyor systems and air-handling systems regardless of material used including the setting of all equipment and all reinforcements in connection therewith; (b) all lagging over insulation and all duct lining; (c) testing and balancing of all air-handling equipment and duct work; (d) the preparation of all shop and field sketches whether manually drawn or computer assisted used in fabrication and erection, including those taken from original architectural and engineering drawings or sketches; (e) all material and process piping other than plumbing, waste water and fire protection, including all specialty piping and F.R.P.; (f) all HVAC work including all piping associated therewith,<sup>3</sup> but excluding all office clerical employees, guards and supervisors as defined by the Act, and all other employees.

The Employer is engaged in the manufacture and installation of sinks, range hoods, and similar items, and has a stable workforce. Petitioner seeks decertification in a unit of material handlers, welders, and fabricators employed by the Employer. The Union contends that a contract bar exists, and further that the appropriate unit is a multi-employer unit.

On June 1, 1989, the Employer signed a Standard Form of Union Agreement which provided, among other things, that the Employer's employees would be required to become and remain Union members within eight days following the beginning of their employment or the effective date of the Agreement. Further, the Agreement provided that the Employer waived any right to repudiate the Agreement during the term of the Agreement, or during the term of any extension, modification, or amendment to the Agreement. In addition, by executing the Agreement, the Employer authorized Sheet Metal Air Conditioning National Association (SMACNA) to act as its collective bargaining representative, and further agreed that "the Employer will hereafter be a member of the multi-employer bargaining unit represented by said Association unless this authorization is withdrawn by written notice to the Association and the Union at least 150 days prior to the then current expiration date of the Agreement."<sup>4</sup> There is no evidence or contention that at the time the Employer signed the Agreement the Union had offered any showing of majority status among the Employer's employees. There is no evidence in the record that at the time the Employer signed the contract, the Union had made a demand for recognition based on majority support, or even that the Employer had any employees at that time. The agreement had a term of June 1, 1989 to May 31, 1992.

The successor collective bargaining agreement between the Union and SMACNA had a term of June 1, 1992 to May 31, 1997, and, in Article XIII, added a provision not contained in the prior contract:

SECTION 6. The employer executing this Agreement, on the basis of objective and reliable information, confirms that a clear majority of the sheet metal workers in its employ desire representation by the Union for purposes of collective bargaining. The Employer, therefore, unconditionally acknowledges and confirms that the Union is the exclusive bargaining representative of its sheet metal employees pursuant to Section 9 (a) of the National Labor Relations Act.

---

<sup>3</sup> In accordance with Article I of the collective bargaining agreement.

<sup>4</sup> The Employer never became an actual member of SMACNA.

There is no evidence in the record herein as to the basis on which the foregoing acknowledgement of majority support was made, nor any evidence that the Employer participated in any way in the negotiations for the contract in 1992.

On January 6, 1992, the Employer faxed a letter to SMACNA in which it stated that "Skilfab Sheet Metal Company will be bargaining for itself in up coming negotiations."<sup>5</sup> This notification was a few days late under the contractual provision requiring 150-day notice prior to contract expiration. There was no attempt to notify the Union, also a contractual requirement.

On January 31, 1996, the Employer sent a letter to SMACNA saying that since it was not a member of SMACNA, it requested that it be removed from the Association's mailing list. Thereafter, SMACNA sent the Employer no further correspondence, not even correspondence regarding contract negotiations. Nothing further was sent by the Employer after the January 6<sup>th</sup>, 1992 letter to either SMACNA or the Union. The Union and SMACNA entered into a new collective bargaining agreement in May, 1997. The term of the agreement was June 1, 1997 to May 31, 2001.

Sometime in this time frame<sup>6</sup> the Employer set up an alleged alter ego, West Coast Stainless Steel Products, Inc., and allegedly shunted unit work to West Coast without applying any Union/SMACNA agreement to such work or the employees performing the work.

On December 1, 1997, the Employer and West Coast entered into a grievance settlement agreement by the terms of which the Employer agreed to be bound by the "terms" of the "current" 97-01<sup>7</sup> collective bargaining agreement between the Union and SMACNA. There is no mention of the Employer joining SMACNA or the multi-employer bargaining unit. There is no mention of being bound to any modifications or extensions of the "current" agreement. There is no mention of 9(a) or majority status in the grievance settlement. I note that the settlement provides that the Employer, while making contributions to various contractual trust funds, will not make a payment to the "Local Industry Fund", but instead would pay an equivalent extra amount into the "Apprenticeship Fund".

On that same date, four employees were dispatched by the Union to the Employer. The dispatch slips include a statement that the individual signing it authorizes the Union to be his collective bargaining representative, and each of the four employees signed the statement.<sup>8</sup> Daniel McNeely, owner of the Employer, acknowledged that he was given copies of the dispatch slips on or about December 1, 1997, but there is no evidence or contention that the slips were given to him (or even that they existed) prior to the time he signed the grievance settlement, nor any evidence that by signing the settlement agreement the Employer intended to recognize the Union as the 9(a) representative of its employees.

During the early months of 2000, SMACNA and the Union engaged in negotiations for an extension of the existing collective bargaining agreement. On May 1, 2000, they signed an

---

<sup>5</sup> Derr was not pressed to explain why he had noted on the document that it was received in 1997 even though the document clearly was sent by fax five years earlier, in 1992, as demonstrated by the fax cover sheet and the automatic report at the top of the faxed pages. Baron Derr, vice president of SMACNA, testified that he received the fax on January 6, **1997**, as stated in a brief handwritten note which appears at the top of the fax cover sheet and is initialed by him

<sup>6</sup> From the settlement document, it would appear that the time frame began no later than June, 1997.

<sup>7</sup> Denominated "SFVA" in the settlement.

<sup>8</sup> The signatures are not dated by the signers. The dispatch slips each show a dispatch date of December 1, 1997.

agreement which, among other things, extended the term of the collective bargaining agreement to May 31, 2004. The Employer had received no notification of the intent to extend the agreement, nor of the extension itself. In November, 2000, the Employer notified the Union and SMACNA in writing that it was withdrawing its authorization of SMACNA as its collective bargaining representative. Such notice was intended to be timely as to the date on which the Employer believed the collective bargaining agreement was to expire, that is, May 31, 2001.

In *John Deklewa & Sons, Inc.*, 282 NLRB 1375, 1377 (1987), the Board ruled that,

We shall apply the following principles in 8(f) cases: (1) a collective-bargaining agreement permitted by Section 8(f) shall be enforceable through the mechanisms of Section 8(a)(5) and Section 8(b)(3); (2) such agreements will not bar the processing of valid petitions filed pursuant to Section 9(c) and Section 9(e); (3) in processing such petitions, the appropriate unit normally will be the single employer's employees covered by the agreement; and (4) upon the expiration of such agreements, the signatory union will enjoy no presumption of majority status, and either party may repudiate the 8(f) bargaining relationship.

In *Deklewa*, the Board specifically abandoned the "conversion doctrine", by which, previously, an 8(f) relationship/agreement could unintentionally "convert" into a 9(a) relationship/agreement by employment of union members as a majority of a stable workforce at any time.

In *Brannan Sand & Gravel Co.*, 289 NLRB 977 (1988), the Board said:

The party to an 8(f) relationship which asserts the existence of a collective-bargaining relationship under Section 9(a) of the Act would have the burden of affirmatively proving the existence of such a relationship, through either (1) a Board-conducted representation election or (2) a union's express demand for, and an employer's voluntary grant of, recognition to the union as bargaining representative, based on a showing of support for the union among a majority of the employees in an appropriate unit.

The Employer's status as a construction industry employer was not raised as an issue or litigated at hearing. Rather, all parties appear to agree that the Employer is in the industry - a reasonable conclusion. Concluding that the Employer is primarily in the construction industry, I find the collective bargaining agreement ('89-'92) to which the Employer initially became a party was clearly an 8(f) agreement. That is, there is no evidence that the Employer's recognition of the Union was based upon any claim of majority status at the time the Employer agreed to be bound by the contract.

The Union argues that the multi-employer unit, including Skilfab, converted to a 9(a) relationship in 1992 by operation of Article XIII, Section 6, which stated that "the employer executing this Agreement" confirms that a majority of the "Sheet Metal Workers in its employ" desire representation and that the Union is therefore the exclusive 9(a) representative of "its Sheet Metal employees".

The Board had held that where an existing, or nascent, multi-employer association creates an *association-wide*, 9(a) relationship, following proof of majority in the association-wide unit (but not among a particular individual employer-member's employees), AND there has been demand for such recognition AND grant of same, an individual multi-employer member's employees are still entitled to a single-employer election without contract-bar limitations, IF majority was never initially demonstrated among the single-employer's employees and IF a

"reasonable period of time" has not since passed<sup>9</sup>. See *Comtel Systems Technology Inc.*, 305 NLRB 387 (1991) (new association, 5 1/2 months is a "reasonable time" within which to challenge majority at the individual employer) and *Casale Industries, Inc.*, 311 NLRB 951 (1993) (existing association, 6 years not "reasonable time"). If a new employer is thereafter added to the association, *his* employees are still entitled, indefinitely, to an election at any time in the single-employer grouping, *unless* there has been an intent by employer and union to create a 9(a) relationship in that grouping, and there has been a demonstration of majority; *Comtel*, *supra*.

Later cases have demonstrated that any necessary "demonstration of majority" can be accomplished by a mere written acknowledgment of majority or 9(a) status, which acknowledgment is not subject to challenge after the reasonable period, i.e., six months. See, e.g., *H.Y. Floors and Gameline Painting, Inc.*, 331 NLRB No. 44 (2000); *Oklahoma Installation Co.*, 325 NLRB 741 (1998).

Applying *Comtel*, it would appear that the relationship of the association, and Skilfab specifically, converted to a 9(a) relationship not later than 6 months after the signing of the '92-'97 agreement. Each association employer individually, including Skilfab, acknowledged majority status among its own employees, in the process making the Union a 9(a) majority representative at each and every employer, and thus across the entire association. Alternatively, by a different reading of the contract, the Association acknowledged that the Union represented a majority of the combined employees of the combined membership of the Association. In either case, no election in the single employee grouping of Skilfab-only employees would have been permitted after 6 months following the creation of the 9(a) relationship, as there was now one multi-employer unit and - actual majority or not - it was too late to challenge such status.

Skilfab thereafter could have timely withdrawn from multi-employer bargaining and returned to single-employer status, to be effective at the end of the '89-'92 contract, but it did not do so timely. It could have timely done the same thing for the end of the '92-'97 contract, but again it did not. Arguably its tardy 1992 notice to the Association was still operative and carried over to 1997, but that question is academic, since Skilfab never fulfilled the additional requirement of notifying the Union timely. Thus, Skilfab became bound to the '97-'01 contract, as a continuing Association member in a 9(a) relationship with the Union.

However, by June 1997 the Employer was apparently operating as if it had no collective bargaining relationship, including setting up an alter ego. In December 1997 as part of a grievance resolution, the Employer agreed to abide by the terms of the "current" '97-'01 SMACNA/Union agreement, but not by any later versions (such as the '00-'04 extension). This resolution was obviously intended as a single-employer, "me-too" agreement; it does not mandate Association representation or membership in the multi-employer unit. Moreover, there is no mention of 9(a) status, "majority" or anything related; there is merely a naked promise to pay money and to honor the terms of the '97-'01 agreement. From this turn of events, we must conclude:

1. The employer was no longer part of a multi-employer unit; the appropriate unit is single employer.
2. The recognition is 8(f), since there is nothing conclusive to rebut the presumption of such status following the June 1997 (re-)recognition in the building and construction industry. In this regard, it is noteworthy that in settling the matter, the Union and Employer did not exhibit a mutual understanding that there again, or still, was a 9(a) relationship, even though any such

---

<sup>9</sup> In other words, the single employers will still be entitled to an 8(f) election.

contention had been seriously called into question by the Employer's conduct and even though the resolution contained the equivalent of a non-admissions clause.

3. Even if the (re)recognition were somehow deemed to be 9(a), the term of the relevant "current" agreement has now expired, so the petition is timely without regard to the 8(f) no-bar proviso, and the new unit is indisputably single employer. Thus, an election would be warranted in that context, too.

Accordingly, I shall direct an election in the single employer unit.

There are approximately 4 employees in the unit.<sup>10</sup>

### **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, and those in the unit who have been employed for 30 working days or more within the 12 months preceding the eligibility date for the election, or had some employment during those 12 months and have been employed for 45 working days or more within the 24-month period immediately preceding the eligibility date, excluding those who have quit voluntarily or have been terminated for cause prior to the completion of the last job for which they were employed. 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 quit voluntarily or were discharged for cause prior to the completion of the last job for which they were employed, 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 SHEET METAL WORKERS LOCAL 66, affiliated with SHEET METAL WORKERS INTERNATIONAL ASSOCIATION.

### **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.

---

<sup>10</sup> Although the Employer appears to have a stable workforce, I shall still use the standard eligibility formula since the Board mandates that it be used in all building and construction industry elections. *Steiny & Co.*, 308 NLRB 1323 (1992).

## LIST OF VOTERS

In order to assure 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 that may be used to communicate with them. *Excelsior Underwear*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that an election eligibility list, containing the alphabetized full names and addresses of all the eligible voters, must be filed by the Employer with the Regional Director for Region 19 within 7 days of the date of this Decision and Direction of Election. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). The list must be of sufficiently large type to be clearly legible. The Region shall, in turn, make the list available to all parties to the election.

In order to be timely filed, such list must be received in the Regional Office, 915 Second Avenue, 29<sup>th</sup> Floor, Seattle, Washington 98174, on or before April 20<sup>th</sup>, 2001. No extension of time to file this list may be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the filing of such list. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission to (206) 220-6305. Since the list is to be made available to all parties to the election, please furnish a total of 4 copies, unless the list is submitted by facsimile, in which case only one copy need be submitted.

## 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 April 27<sup>th</sup>, 2001.

DATED at Seattle, Washington, this 13<sup>th</sup> day of April, 2001.

\_\_\_\_\_  
Paul Eggert, Regional Director  
National Labor Relations Board, Region 19  
2948 Jackson Federal Building  
915 Second Avenue  
Seattle, Washington 98174

347-4080  
420-9000