H.Y. Floors and Gameline Painting, Inc. *and* Fernando Moreno and Carpenters 46 Northern California Counties Conference Board. Case 20–RD–2244

May 31, 2000

DECISION ON REVIEW AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX, LIEBMAN, HURTGEN, AND BRAME

On December 22, 1997, the Regional Director for Region 20 issued a Decision and Direction of Election in the above-entitled matter in which he found that the memorandum agreement between the Employer and the Union was an 8(f) agreement and therefore did not bar processing the petition filed by an individual, Fernando Moreno. Pursuant to Section 102.67 of the National Labor Relations Board's Rules and Regulations, the Union filed a timely request for review of the Regional Director's Decision, and the Employer filed a brief on review. An election was held on January 16, 1998, and the ballots were impounded, pending the Board's ruling on the request for review. On March 17, 1998, the Board granted the Union's request for review as it raised substantial issues warranting review.

On careful consideration of the entire record, we find, contrary to the Regional Director, that the Employer and the Union have a collective-bargaining agreement that constitutes a 9(a) contract vis-a-vis each other. However, it is not binding on Fernando Moreno, the individual petitioner, in this case. We therefore remand this case to the Regional Director to reopen the record with respect to the Union's evidentiary burden of showing it represented a majority of employees in the bargaining unit at the time the Employer extended 9(a) recognition to it.

The Employer installs and repairs basketball floors, and paints gamelines on them. On September 3, 1996,[1] 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, effective from June 16–30, 2000. The memorandum agreement specifically states:

> The individual employer expressly acknowledges that it has satisfied itself that the Union represents a majority of its employees employed to perform bargaining unit work and that the Union is the collective bargaining representative of such employees. The individual employer specifically agrees it is establishing or has established a collective bargaining relationship within the meaning of Section 9 of the National Labor Relations Act of 1947, as amended, by this Agreement and/or by the execution of previous Memorandum Agreement(s).

On October 22, Fernando Moreno filed the petition in this case.

The Regional Director noted the elements necessary for establishing a 9(a) relationship—the union must unequivocally demand recognition as the employees' 9(a) representative; the employer must unequivocally accept the union as such; and this recognition must be based on a contemporaneous showing of union support among a majority of the employees in an appropriate unit.[2] The Regional Director then noted the testimony of the Employer's witness, i.e., that the Union never discussed, with the Employer, the subject of union support among employees at the time of the Employer's execution of the memorandum agreement. The Regional Director also noted that the Union presented no evidence at the hearing that the Union had, at any time, presented authorization cards from a majority of the unit employees to the Employer. Finally, the Regional Director found that the statement in the memorandum agreement concerning a 9(a) relationship was insufficient to overcome these inadequacies. The Regional Director therefore concluded that the memorandum agreement was an 8(f) contract and did not bar the petition in the instant case.

We disagree. The Employer is an employer engaged in the construction industry. In the construction industry, parties may create a relationship pursuant to either Section 9(a) or Section 8(f). In the absence of evidence to the contrary, the Board presumes that the parties intend their relationship to be governed by Section 8(f), rather than Section 9(a), and imposes the burden of proving the existence of a 9(a) relationship on the party asserting that such a relationship exists.[3] To establish voluntary recognition pursuant to Section 9(a) in the construction industry, the Board requires evidence that the union unequivocally demanded recognition as the employees' 9(a) representative, and that the employer unequivocally accepted it as such.[4] The Board also requires a contemporaneous showing of majority support for the Union at the time 9(a) recognition is granted.[5] As to this last factor, the Board has held that an employer acknowledgement of such support is sufficient to preclude the employer from challenging majority status.[6]

The requisite elements are present here. First, the language of the September 3 memorandum agreement stating that the Employer is specifically establishing a collective-bargaining relationship within the meaning of

[1] All dates are in 1996 unless otherwise indicated.

[2] The Regional Director cited *J & R Tile,* 291 NLRB 1034, 1036 (1988). See also *James Julian, Inc.,* 310 NLRB 1247, 1252 (1993); *Brannan Sand & Gravel Co*., 289 NLRB 977, 979–980 (1988); and *American Thoro-Clean,* 283 NLRB 1107, 1108–1109 (1987).

[3] *John Deklewa & Sons*, 282 NLRB 1375 (1987), enfd. sub nom. *Iron Workers Local 3 v. NLRB,* 843 F.2d 770 (3d Cir. 1988), cert. denied 488 U.S. 889 (1988).

[4] Compare *Golden West Electric*, 307 NLRB 1494 (1992); *J & R Tile*, supra at 1034.

[5] *Golden West Electric,* supra at 1495.

[6] See *Oklahoma Installation Co.,* 325 NLRB 741 (1998) (language in the recognition agreement stated that the union has submitted, and the employer was satisfied, that the union represented a majority of its employees in an appropriate unit).

Section 9 of the National Labor Relations Act evinces both the Union's unequivocal demand for such a relationship and the Employer's unequivocal acceptance of it. Second, the agreement's language stating that the Employer has satisfied itself that the Union represents a majority of its employees employed to perform bargaining unit work and that the Union is their representative evinces the Union's contemporaneous showing of majority employee support. Hence, the Employer and the Union established a relationship based on Section 9(a) and not Section 8(f) of the Act.[7] Thus, the Employer is bound by the September 3 memorandum agreement and cannot repudiate it during its term. Accordingly, had the Employer filed the petition here, the agreement would have barred the petition.

However, that same September 3 memorandum agreement between the Employer and the Union cannot bar the October 22 decertification petition filed here by an individual. Unlike the Employer, the decertification petitioner was not a party to the Memorandum Agreement and is thus not estopped from timely challenging the 9(a) recognition. This petition, filed 7 weeks after the Memorandum Agreement is undoubtedly timely.

Our dissenting colleagues argue that by allowing, in this representation case, litigation of the Union's majority status, we are "acting contrary to the statutory scheme" which allows this issue to be raised only in an unfair labor practice setting. Contrary to our dissenting colleagues' assertion, the filing of an unfair labor practice charge is not the only means of challenging majority status in circumstances, as here, in which a former 8(f) union has been voluntarily granted 9(a) recognition. As the Board stated in *Casale Industries,* 311 NLRB 951, 953 (1993), a union's majority status may also be challenged by filing a timely representation petition. That was done in this case.[8]

In taking the position that the *only* avenue available to attack the union's majority status is an 8(a)(2) charge, the dissenters would overrule *Casale* to the extent that it permits a challenge to the union's majority status by the filing of a petition. In their view, that portion of *Casale* creates tension with the Board's practice, which is set forth in *Texas Meat Packers,* 130 NLRB 279 (1961), not to litigate unfair labor practice matters in a representation proceeding. We disagree and find no inconsistency. The Board in *Texas Meat Packers* speaks in terms of what is the "gravamen" of the contention being raised in the R-case setting as a key question for determining the forum. According to *Texas Meat Packers*, if the gravamen of the contention is an unfair labor practice, then the appropriate forum is the unfair labor practice proceeding. However, here, the gravamen of the decertification petitioner's contention is not that an unfair labor practice was committed when the Employer initially recognized the Union. There is no attempt on the part of the decertification petitioner to seek a remedy for unlawful recognition if it is determined that the Union only had minority status when recognition was extended on September 3. Rather, our inquiry into whether the Union had majority status here is to determine if an election can presently be conducted to ascertain current employee support. We believe that this inquiry, which is akin to the procedural question of standing, is properly before us now.

Consequently, in view of the foregoing, we shall remand this case to the Regional Director to open the hearing and adduce evidence with respect to the Union's majority status on September 3, and its effect, if any, on the bar quality of the September 3 memorandum agreement. Thereafter, the Regional Director shall issue a Supplemental Decision.[9]

ORDER

The Regional Director's Decision and Direction of Election is reversed with respect to his finding that the September 3 memorandum agreement between the Employer and the Union was not a 9(a) contract that could operate as a bar to the petition. The case is remanded to the Regional Director with directions to reopen the hearing solely with respect to whether the Union represented a majority of employees on September 3 when the Employer established a 9(a) relationship with the Union, and, consequently, whether the individual's petition here may be processed.

The Regional Director shall thereafter issue a Supplemental Decision and take further appropriate action.

MEMBERS FOX AND LIEBMAN, dissenting.

Contrary to our colleagues, we would not allow litigation in this representation proceeding of the Union's majority status at the time the Employer entered into the collective-bargaining agreement with the Union. The record is clear, and indeed our colleagues find, that the Employer, a construction industry employer, voluntarily recognized the Union as the 9(a) representative of its employees when it signed the memorandum agreement on September 3, 1996. Nevertheless, they have directed the Regional Director to reopen the representation hearing and take evidence on what is in essence an unfair labor practice issue—that is, whether the Employer recognized the Union as a 9(a) representative at a time when

[7] *MFP Fire Protection,* 318 NLRB 840 (1995); *Decorative Floors*, 315 NLRB 188 (1994).

[8] However, we do not pass on whether such a petition must be filed within 6 months of the recognition as discussed in *Casale.* In this regard, we note that the petition was filed 7 weeks after the recognition was extended. Thus, we find it unnecessary to pass on *Casale's* filing requirement in this case.

[9] Member Hurtgen would not find, on this record, that the Employer is bound to a *Sec. 9* contract. See his dissent in *Oklahoma Installation,* supra. However, he agrees with his colleagues that, in any event, the petitioner-employee is not foreclosed from challenging the Sec. 9 basis for that contract.

the Union did not, in fact, represent a majority of the employees in the relevant unit.

The Board's well-established practice is to exclude from representation proceedings matters related to unfair labor practices. *Texas Meat Packers,* supra; *Clarostat Mfg. Co.,* 88 NLRB 723 fn. 2 (1950); and *New England Fish Co*., 83 NLRB 656 (1949). Consistent with that principle, under longstanding Board precedent, the Board's general practice in representation cases is "to presume the regularity and legality of a collective bargaining contract and to refuse to admit evidence on the question whether or not a majority of employees covered by such a contract had actually designated the contracting union as their representative at the time the contract was made." *U.S. Rubber Co*., 62 NLRB 795, 797 fn. 1 (1945). Accord: *Dale's Super Valu, Inc*., 181 NLRB 698 (1970). The majority status of the union may of course be challenged, but only through the filing of a timely charge and the issuance of a complaint in an unfair labor practice proceeding.[1] Id. at 699.

By allowing litigation of the unfair labor practice issue in this proceeding, the majority is acting contrary to the statutory scheme, which vests the General Counsel with final authority as to the issuance and prosecution of unfair labor practice complaints. See *Texas Meat Packers,* supra. It is also disregarding the Board's statement in *John Deklewa & Sons,* 282 NLRB 1375, 1387 fn. 53 (1987), that, with respect to the normal presumptions flowing from voluntary recognition of a union by an employer, unions in the construction industry should not be treated less favorably than those in nonconstruction industries. We see neither the logic nor the wisdom in our colleagues' decision to depart from those principles in this case. Accordingly, we dissent.

[1] We acknowledge that the Board's decision in *Casale Industries,* 311 NLRB 951, 953 (1993), cited by the majority, implies that in construction industry cases, the union's majority status at the time it was initially recognized may be challenged by the filing of a timely charge *or petition*. We note, however, that the *Casale* decision makes no mention of the *Texas Meat Packers* line of cases cited above and provides no rationale for why the principles set forth in those decisions were not applied. We note further that because *Casale* otherwise stresses that 9(a) bargaining relationships in the construction industry are entitled to no less protection than 9(a) bargaining relationships in other industries, the logic of the decision argues against rather than for the position taken by the majority here. Thus, to the extent that *Casale* can be read to hold that notwithstanding *Texas Meat Packers* and its progeny, a construction union's alleged lack of majority status at the time of recognition can be litigated in a representation proceeding, we find it to be of questionable validity and would overrule it.

We additionally express our concern that at the same time they are citing *Casale* for the proposition that the union's majority status may be challenged through the filing of an election petition, our colleagues have also, without explanation, called into question *Casale's* clear holding that any such petition must be filed within 6 months of the employer's grant of recognition to the union. Abandoning the timeliness requirement compounds the problems created by allowing what is essentially an unfair labor practice to be litigated in a representation case. Moreover, since the majority has neither explained its rationale for abandoning the 6-month requirement nor announced what rule it would apply in its place, the effect is to leave both practitioners and Agency employees without guidance as to what legal and procedural rules apply in this important area.