The Boeing Company, Employer-Petitioner *and* Society of Professional Engineering Employees in Aerospace, IFPTE, Local 2001, AFL–CIO. Case 31–UC–311

April 30, 2007

DECISION ON REVIEW AND ORDER REMANDING

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

The Employer's Request for Review of the Regional Director's Decision and Order is granted as it raises substantial issues warranting review. The Employer's petition seeks to clarify the existing bargaining units encompassing facilities in Washington State and Edwards/Palmdale facilities in California to exclude certain disputed professional and technical employees. The Regional Director dismissed the Employer's petition, finding the evidence was insufficient to resolve the representation issues presented. He also concluded that it was unnecessary to decide whether deferral of those representation issues to pending arbitration proceedings was appropriate.

Having carefully considered the Request for Review and the Union's Statement in Opposition, the Board finds, contrary to the Regional Director, that the representation issues presented pertaining to whether the disputed employees are excluded from or included in the units are matters for resolution by the Board and not by an arbitrator. Further, the Board finds that those issues may best be resolved by remanding the case to the Regional Director for further processing, including reopening the hearing.

Resolution of representation matters is within the province of the Board. Where a dispute involves representation as well as contractual matters, the Board will not defer to arbitration, but will resolve the dispute. *United States Postal Service*, 348 NLRB No. 3 (2006); *Advanced Architectural Metals*, 347 NLRB No. 111 (2006). Here, as found by the Regional Director and contrary to the Union's claim, the instant dispute involves representational as well as contractual issues.[1]

The Union has represented certain professional employees and technical employees of the Employer at facilities in Washington State and at the Edwards facilities since at least 1975, adding facilities at Palmdale in 1989. In 1996, the Employer acquired Rockwell International and in 1997, merged with McDonnell Douglas. The Employer began consolidating and restructuring work at its Edwards/Palmdale facilities. The Union learned that the Employer was hiring and placing or transferring certain professional/technical employees at Edwards/Palmdale outside the units when they allegedly should have been in the units. After unsuccessfully attempting to resolve the issue with the Employer, the Union filed a grievance, which is now pending arbitration. The Employer thereupon filed the instant petition seeking to clarify the bargaining units to exclude employees working at the Edwards/Palmdale facilities whose current job requisitions were not filled through the Seattle, Washington staffing offices.

The Employer, through the instant petition, contends that it is seeking to affirm the exclusion of the disputed employees, who it claims have been historically excluded from the existing units. The Union's grievance seeks recognition by the Employer for employees designated as Union-represented per the parties' collective-bargaining agreements. However, on the evidence before us, it appears that the collective-bargaining agreements never clearly reflected agreement of the parties with respect to the placement of the disputed employees. The parties apparently never agreed on the composition of the unit as they proceeded through negotiations for contracts following merger/acquisition and consolidation. Rather, the parties took conflicting positions about determining unit composition by programs, classifications, and hire dates and continue to do so. Since the agreements themselves do not resolve the issue, community-of-interest factors must be considered. Accordingly, the Board finds that the issues presented are not solely a matter of contract interpretation, but rather, involve representation matters.

Despite his acknowledgement that this case does not solely involve a contractual issue, the Regional Director dismissed the petition. The Regional Director's dismissal, in effect, allows the arbitrator to decide the representational issues, subject only to a deferential Board review. This result clearly conflicts with Board policy. Thus, we find that the Board has the authority to, and should, define the unit in this case. See supra, *United States Postal Service*; *Advanced Architectural Metals*. However, the correct analysis of the representation issues requires examination of evidence which, it appears, is not available in the existing record and, therefore, those issues cannot be resolved without further hearing.

Thus, in clarifying whether the at-issue employees are in or out of the units, the Regional Director and the

[1] We do not believe that the Board's deferral doctrine in unfair labor practice cases necessarily warrants deferral in representation cases. Indeed, the Board has historically eschewed this course. It has done so, inter alia, because of its special role in representation matters, and the need for speed in those matters.

Board need to resolve such issues as whether those employees may be accreted to the existing units, are already included in the units by virtue of their performance of historical unit work functions, or are sufficiently dissimilar to warrant their exclusion. In order to determine whether employees constitute an accretion to the existing unit or may constitute a separate entity, there must be an examination of community of interest factors including employee skills, functions, supervision, interchange, contact, working conditions, and bargaining history. *Towne Ford Sales*, 270 NLRB 311 (1984). In order to determine whether the disputed employees are already covered by the units, the Regional Director and the Board will need to examine bargaining history and the parties' practices, or, where there are new classifications, whether employees are performing the same basic functions historically performed by unit employees. *Premcor, Inc.*, 333 NLRB 1365, 1366 (2001).[2]

It is apparent from the Regional Director's discussion, as well as from the Employer's Request for Review and the Union's Opposition, that there is insufficient evidence in the record regarding critical elements of this case. Thus, the composition of the existing bargaining units themselves is unclear. The evidence with respect to collective-bargaining agreements, side agreements, contract negotiations, and actual practice is insufficient to show which employees have been included in the bargaining units in the past. Moreover, the evidence does not appear to address community of interest factors in a relevant manner. It appears that there is little or no evidence with respect to functions, skills, or working conditions of any Edwards/Palmdale employees. Reference to supervision is with respect to programs, rather than to specific classifications of employees. There is no indication of the extent of interchange or contact between those who may be in the existing units and the disputed employees. The Employer contends that none of the Edwards/Palmdale employees shares a community of interest with the Washington State employees in the bargaining units, but this matter is left unclear by the extant record. In sum, it does not appear that there is sufficient evidence in the record to enable the Board to make a determination on the inclusion or exclusion of the disputed employees based on community-of-interest factors.

Our colleague, citing her dissent in *Tweddle Litho, Inc.*, 337 NLRB 686, 687 (2002), suggests a two-step process, i.e., arbitration and then, if representation issues remain, Board intervention. Consistent with the Board majority in *Tweddle Litho, Inc*., we see no need or warrant in the instant case to adopt this two-step process. That process has at least three defects. First, it permits an arbitrator to resolve representation case issues, subject only to a deferential review by the Board. Secondly, it delays the Board proceeding until after the arbitration proceeding has run its course. Third, it provides for a two-tribunal process, rather than the one process envisaged by the Act.[3]

Our dissenting colleague also asserts that the Employer's rationale for its unit contention is based solely on the fact that some employees were assigned through the Seattle office and some were not. Our colleague then says that we rejected this rationale and then posited our own. Our colleague is incorrect on both points. First, the Employer's rationale was based, at least in part, on bargaining history, i.e., the fact that one group was historically represented by the Union and the other was not. In addition, the Employer argued that each group has a separate identity. Finally, the Employer explicitly argues that each group has its own community of interest. Concededly the record is presently incomplete on that last point, and we are remanding for further evidence on that point. It is ultimately the Board's responsibility to determine those matters, and we want to have all relevant facts before making that determination.

Therefore, we reverse the Regional Director's dismissal of the petition and remand to the Regional Director for further processing of the petition, including reopening the record, focusing particularly on eliciting additional evidence with respect to elements critical to resolving the unit composition issues.

Dated, Washington, D.C. April 30, 2007

Robert J. Battista , Chairman

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER LIEBMAN, dissenting.

In its eagerness to protect the Board's authority to decide representation questions under the Act, the majority today remands a legally-insufficient unit-clarification petition, preempting an arbitration proceeding that might resolve the matter without the need for Board intervention and that would at least conserve the Board's resources. Consistent with my dissenting position in other

[2] This listing of issues is not necessarily exhaustive.

[3] We acknowledge that there are contractual issues relevant to the representation case issue. The Board can consider these issues and resolve all of them in one proceeding.

cases, I would dismiss the Employer's petition and await the arbitrator's ruling.

This case concerns the Employer's unit-clarification petition and the Union's contractual grievance regarding the composition of two bargaining units at the Employer's facilities in Washington State and at Edwards/Palmdale, California. The Employer's petition would include or exclude employees from the two units based on whether or not its Seattle office assigned the employees to work at its Edwards/Palmdale facilities. There is no legal support for determining the composition of a bargaining unit on such a basis. The majority properly rejects the Employer's unit-clarification rationale.

But instead of dismissing the Employer's petition, the majority remands the matter to the Region to reopen the hearing and to take further evidence on alternative legal theories, none of which were asserted by the Employer in its petition as a basis for inclusion or exclusion of employees into or from bargaining units. This approach is necessary, the majority insists, because the "[r]esolution of representation matters is within the province of the Board" and "[w]here a dispute involves representation as well as contractual matters, the Board will not defer to arbitration, but will resolve the dispute."

The majority's approach is unwise, even if not unprecedented. In my dissent in *Tweddle Litho, In*c., 337 NLRB 686, 687 (2002), I advocated a two-step process in cases involving a potential conflict between a unit-clarification petition and a contractual grievance: First, allow the arbitrator to issue an award; second, determine if there are any representation issues requiring Board intervention.[1] The advantage to this approach is that it acknowledges the parties' contractual interests, by allowing their agreed-upon grievance and arbitration to operate, and furthers the possibility of a negotiated accommodation. Even if the Board were to conclude that deferral to the arbitration award was inappropriate, its ultimate disposition of the unit-clarification petition would be aided by allowing the arbitrator to decide any underlying factual and contractual issues, before the Board determined the crucial representation issues.

That approach is particularly appropriate here, given the long and complex course of collective bargaining on this issue between the parties. I am unpersuaded by the majority's summary conclusion that the dispute is not primarily a matter of contract interpretation. Indeed, the recognition clauses of five successive collective-bargaining agreements for each unit clearly refer to persons assigned to Edwards/Palmdale as being part of the unit. The parties also entered into at least two side-agreements seeking to elucidate the composition of the unit.

Permitting the arbitration to proceed would allow the arbitrator to provide a reasoned determination as to whether the parties had, in fact, agreed on the unit placement of the Edwards/Palmdale employees. Either party would be free to file (or re-file) a unit-clarification petition if it took issue with the arbitrator's decision. At that point, the Board could either defer to arbitration (if the dispute involved purely contractual issues) or resolve any representation issues posed.[2] Contrary to the majority's assertion, the Board—not the arbitrator—would have the final say regarding representation issues. As for the majority's argument that a bifurcated process would be inefficient or cause delay, the same could be said of all of the Board's deferral doctrines.[3] And yet for years the Board has seen fit to accord a fair degree of deference to the arbitral process, even to resolve issues involving alleged violations of the statute, in recognition of the favored status in labor policy of dispute resolution methods agreed upon by the parties (e.g., Sec. 203(c) of the Act), and of the arbitrator's presumed expertise in resolving issues that arise out of the collective-bargaining relationship. In fact, proceeding in this way here could very well simplify the Board's handling of the matter, since Regional officials would not have to preside over the litigation of the important legal and factual issues concerning the collective-bargaining agreements.[4]

For these reasons, I believe that the majority errs in jumping the gun here, to preclude the mere possibility that the arbitrator will intrude on the Board's authority to decide representation issues. Accordingly, I dissent.

Dated, Washington, D.C. April 30, 2007

Wilma B. Liebman, Member

NATIONAL LABOR RELATIONS BOARD

[1] See also *Ziegler, Inc.*, 333 NLRB 949, 951 (dissent).

[2] See generally *Marion Power Shovel*, 230 NLRB 576, 577–578 (1977) (propriety of deferral depends on whether representation case can be resolved via contractual interpretation or application of statutory policy, standards, and criteria).

[3] *Olin Corp.*, 268 NLRB 573 (1984); Collyer *Insulated Wire*, 192 NLRB 837 (1971); *Dubo Mfg. Corp.*, 142 NLRB 431 (1963), *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955). See also *Carey v. Westinghouse Electric Corp.*, 375 U.S. 261 (1964) (Court acknowledged that the dispute could be characterized either as a representation dispute or as a jurisdictional or work-assignment dispute; but however the dispute is to be characterized, it may also properly be adjudicated by an arbitrator under the contract).

[4] Presumably, the parties would simply submit the arbitration transcript and the arbitrator's award to be made part of the record of the Board proceeding.