Sunray Ltd. *and* International Union of Operating Engineers, Local 12, AFL-CIO *and* Laborers' International Union of North America, Local 1184, affiliated with the Laborers International Union of North America, AFL-CIO, CLC. Cases 21-RM-2064 and 21-RM-2065

September 30, 1981

DECISION ON REVIEW AND DIRECTION OF ELECTION

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

Upon petitions 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. On December 19, 1980, the Acting Regional Director for Region 21 issued a Decision and Direction of Election in which he found appropriate in Case 21-RM-2064 a bargaining unit consisting of all employees performing work within the recognized jurisdiction of International Union of Operating Engineers, Local 12, AFL-CIO, employed by Sunray Ltd. in southern California; excluding all other employees, guards, and supervisors as defined in the Act. In Case 21-RM-2065 he found appropriate a unit of all employees performing work within the recognized jurisdiction of Laborers' International Union of North America, Local 1184, affiliated with the Laborers International Union of North America, AFL-CIO, CLC, employed by Sunray Ltd. in southern California; excluding all other employees, guards, and supervisors as defined in the Act. The Acting Regional Director also found that all the employees of Sunray were dual-function employees who did work which came under the jurisdiction of both Local 12 and Local 1148 and that those five employees made up both units. He therefore ordered an election in each unit.

In ordering the elections, the Acting Regional Director rejected the claims of both Unions that they currently had collective-bargaining agreements with the Employer which acted as a bar to the election.

Thereafter, Local 12 and Local 1184 filed requests for review with the Board in which they excepted to the Acting Regional Director's failure to find that their contracts with the Employer acted as a bar to an election.

On January 15, 1981, the Board by telegraphic order granted the requests for review.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the entire record in this case, including the briefs of the Unions, and it hereby affirms the Acting Regional Director's Decision and Direction of Election to the extent consistent herewith.

The Petitioner-Employer (Sunray) is engaged in business as a construction subcontractor in the installation of water and sewer pipes. As found by the Acting Regional Director, and uncontested by the parties here, Sunray, operating as a partnership, is the *alter ego* of two previous companies owned by Sunray's general partner, Ray Bartlett. Also uncontested is the finding that the other partners in Sunray, Conn, Wagoner, DeWalt, Michael Bartlett, and Harvey are in fact employees of Sunray within the meaning of the National Labor Relations Act.

The question presented is whether contracts entered into in compliance with Section 8(f) of the Act between Ray Bartlett, as owner of Ray's Septic Tanks (hereinafter Ray's) and as owner of Construction Concrete Products (hereinafter CCP), with the two Unions, act as contract bars to the instant petitions. In agreement with the Acting Regional Director, we find that they do not.

In January 1978, Ray's employed one employee, Conn, when it entered into an 8(f) agreement with Local 12 covering employees performing work over which that Union had jurisdiction. Shortly thereafter, Conn joined Local 12.

In September 1978, Ray Bartlett, as owner of CCP,[1] signed contracts with both Local 12 and Local 1184 covering employees performing work over which the respective Unions had jurisdiction. CCP employed Conn, Wagoner, DeWalt, Harvey, and Michael Bartlett. Harvey at some time became a member of Local 12 and Wagoner and Michael Bartlett became members of Local 1184. DeWalt belonged to neither Union.

In July 1979, Ray Bartlett, as general partner of Sunray,[2] executed a collective-bargaining contract with Local 12 identical to the previous contracts between Ray Bartlett and Local 12. At the time of entering this contract, Sunray employed the same five employees employed by CCP.

The Unions contend that there are two distinct craft units employed by Sunray, each consisting of two or three individuals (with DeWalt as the swingman). With two employees being members of each Union, the Unions enjoy majority status, and thus their previous 8(f) relationships with Barlett have become 9(a) relationships, and the contracts are a bar to the election. Local 12 also claims that

[1] The record does not show when Ray's ceased doing business and CCP was established.

[2] Around April 1979, CCP ceased operations and Sunray was established.

it gained status as a 9(a) representative when Ray's single employee, Conn, joined that Union.

The Acting Regional Director found, and the record supports the finding, that all five of CCP's and then Sunray's employees perform the identical work of operating machines such as backhoes, loaders, and cranes, drive trucks, lay pipe, weld, and do general laborers' duties such as digging ditches. Some of this work falls within the jurisdiction of each of the Unions involved here, and some perhaps falls within the jurisdiction of unions representing other crafts. None of the employees have been employed or work strictly as machine operators or laborers. Thus, we agree with the Acting Regional Director that the appropriate unit for collective bargaining includes the five employees of Sunray. It is clear that neither Union has ever represented a majority in that unit, and thus their 8(f) relationships did not mature into 9(a) relationships.

We also agree with the Acting Regional Director that Local 12 did not become a 9(a) representative when Conn, then the only employee of Ray's, joined Local 12. As noted by the Acting Regional Director, the Board will not enforce a contract covering a single-person unit. Nor will we certify or find appropriate a single-person unit in a representation proceeding.[3] This is a matter of long-standing Board policy. As we would not find a single-person unit appropriate, we will not consider a contract covering such a unit a bar to an election petition. Moreover, the unit is now five times the size it was when the 1978 contract was executed and, as the Union has never enjoyed majority status in the larger unit found appropriate here, we would not hold such contract to be a bar to an election petition.[4] Thus, neither Union's contract is a bar to the petitions filed here.

Although we agree with the Acting Regional Director that Sunray's five employees make up an appropriate unit, we do not agree that the same employees make up two separate units. The Acting Regional Director found all five employees to be dual-function employees because they perform work subject to the jurisdiction of both Unions and, citing *Berea Publishing Company*, 140 NLRB 516 (1963), found that there were two units consisting of Sunray's five employees. In *Berea*, the Board reestablished the *Oscala Star Banner* rule[5] allowing a dual-function employee who does a sufficient amount of work within a unit and has sufficient interest in the unit's conditions of employment to vote in an election in that unit. This rule does not, and was never intended to, create more than one unit consisting of an entire work force just because all employees perform several craft functions. To do so could cause a situation where an appropriate unit of all of the Employer's employees elected separate unions to be their exclusive collective-bargaining representative in two or more separate units—a result we find incongruous with the policies of the Act. We therefore find that one unit of all of the Employer's employees is an appropriate unit, and we will direct an election in that unit, giving the employees a choice to be represented by Local 12, Local 1184, or no union.

Although each Union contends that its unit consists of two or three employees, the collective-bargaining contracts they entered into with the Employer call for the representation of all employees doing work under their jurisdictions. As all of the employees perform work covered under the jurisdiction of each Union, we construe this as a claim to represent all of the Employer's employees.

The unit found appropriate here consists of all employees employed by Sunray Ltd. in southern California; excluding all office personnel, guards and supervisors as defined in the Act.

[Direction of Election and *Excelsior* footnote omitted from publication].

[3] *Roman Catholic Orphan Asylum of San Francisco, d/b/a Mount St. Joseph's Home for Girls*, 227 NLRB 251 (1976); *Virginia-Carolina Chemical Corporation*, 104 NLRB 69 (1953).

[4] *United Service Company d/b/a A-1 Linen Service*, 227 NLRB 1469 (1977).

[5] 97 NLRB 384 (1951).