

Chicago Health and Tennis Clubs, Inc. and Crystal Grizzel, Petitioner, and Retail Clerks Union Local 1540, chartered by United Food and Commercial Workers International Union, AFL-CIO.¹ Case 13-RD-1211

August 13, 1980

RULING ON ADMINISTRATIVE APPEAL

BY CHAIRMAN FANNING AND MEMBERS JENKINS AND PENELLO

On March 7, 1979, the Regional Director dismissed the instant petition on the ground that it was untimely filed. Employer and Petitioner, respectively, filed a request for review of such action. The National Labor Relations Board granted the requests for review and thereafter the Employer filed a brief and the Union filed a response.

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.

On the basis of the Regional Director's investigation, prior proceedings involving the Employer, and the submissions of the parties, the Board finds as follows:

The Union was duly certified by the Board on April 15, 1976. In Case 13-CA-1574, reported at 226 NLRB 1202, and dated November 26, 1976, involving the Employer's refusal to honor the Board certification of the Union's majority status, the Board, *inter alia*, ordered the Employer to bargain upon request with the Union and extended the initial period of certification of the Union so as to begin on the date that the Employer commenced to bargain in good faith with the Union. On January 17, 1978,² the Board's Order was enforced by the Court of Appeals for the Seventh Circuit.

Although the Employer intended to appeal the enforcement of this order to the Supreme Court of the United States, on February 9, it made an oral offer to bargain with the Union subject to its right to pursue its appeal. In a letter to the Union dated February 15, the Employer confirmed the oral offer that it was willing to begin bargaining with the Union subject to:

1. The agreement of the general counsel of the NLRB to permit the company's Petition for Certiorari to be filed and to be bound by the eventual outcome of that Petition. A copy

¹ The name of the Union, formerly Retail Clerks Union Local 1540, chartered by Retail Clerks International Association, AFL-CIO, is amended to reflect the change resulting from the merging of Retail Clerks International Union and Amalgamated Meatcutters and Butcher Workmen of North America on June 7, 1979.

² All dates hereafter refer to 1978, unless otherwise specified.

of the general counsel's letter agreeing to that condition is enclosed.³

2. The union's agreement to be bound by the decision of the Supreme Court should it be adverse to the union notwithstanding the company's agreement to bargain with the union or the existence of a contract should such be then completed.

The Union responded that if the Employer would agree to post a notice of a union meeting on its bulletin board, the Union "will be happy to bargain with you on the basis which we have discussed." On February 17, the Employer replied stating that, as the company bulletin board is not available for noncompany matters, it would be inappropriate to post the union notice, but again renewing its offer to bargain pursuant to the terms orally outlined on February 9 and set forth in the Employer's letter of February 15.

There was no further communication between the parties until after the Supreme Court denied the Employer's writ of certiorari on June 19. Several days later, the Union requested the Employer commence bargaining and furnish the names and addresses of all unit employees. The Employer furnished the information requested and, on October 9, 1978, the Union requested the Employer to set a date for commencement of negotiations.

The first bargaining session was held on November 2 and was followed by five additional meetings, the last occurring on February 21, 1979.

The instant petition, seeking to decertify the Union as the representative of the employees in the unit involved in the Board bargaining order, was filed on February 20, 1979.

The Regional Director recognized, and we agree, that the pivotal issue in this case is whether the Employer made a proper offer to bargain on either February 9 or 15, so that the certification year started at one of those points. If that query is answered in the affirmative, the petition was timely; otherwise it was not.

The Regional Director dismissed the petition as untimely and we agree with his conclusion. The Employer's offer to bargain was not only conditioned upon an action by the General Counsel but also required the Union to agree to be bound by a decision of the Supreme Court adverse to its claim that it was the certified representative of employees

³ In a letter dated January 24, the General Counsel agreed that bargaining by the Employer and the Union "would not moot the Company's petition for certiorari and that any agreement reached between the Company and the Union could be made subject to termination should the Supreme Court ultimately decide that the Company was not obligated to bargain with the Union. Cf. *United Aircraft Corporation v. N.L.R.B.*, 434 F.2d 1198, 1200-1201 (C.A. 2, 1970), cert. denied 401 U.S. 993."

in the unit. The preconditions attendant to the Employer's offer involved nonmandatory subjects of bargaining and the Union was free to reject them.⁴

Thus, the Employer's conditional offer to bargain and the Union's refusal did not in any way affect the Board's Order that the certification year would begin on the date the Employer commenced to bargain in good faith with the Union as "the recognized bargaining representative in the appropriate unit";⁵ namely, on November 2, 1978. Accordingly, the petition filed on February 20, 1979, was untimely and was properly dismissed.

MEMBER JENKINS, dissenting:

I disagree with my colleagues' finding that the Employer made a conditional offer to bargain in February 1978 that delayed the commencement of the certification year under the Board's Order in 226 NLRB 1202. Hence, I also disagree with their conclusion that the petition filed on February 20, 1978, was untimely and was properly dismissed.

The key background facts are not in dispute. The Union was certified by the Board on April 15, 1976. Thereafter, the Board found that the Employer violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union, and the Board, *inter alia*, ordered the Employer to bargain upon request with the Union and extended the initial period of certification of the Union to begin the date the Employer commenced to bargain in good faith with the Union.⁶ The Board's Order was enforced by the Court of Appeals for the Seventh Circuit on January 17, 1978.

The Employer decided to appeal the enforcement of the Seventh Circuit's order to the Supreme Court. Nevertheless, the Employer made an oral offer on February 9, 1978, and a written offer on February 15, 1978, to bargain with the Union subject to:

1. The agreement of the general counsel of the NLRB to permit the company's Petition

⁴ Our dissenting colleague asserts that the proposal that the Union agree to be bound by a Supreme Court decision is no impediment to the commencement of bargaining, because the Union would be bound by the Court's decision anyway. However, it does not necessarily follow that, merely because the Union was asked to affirm its obligation to be bound by Supreme Court decisions, it is required to agree to the demand as a precondition to commencement of negotiations, regardless of whether or not the demand has anything to do with a mandatory subject of bargaining. Under our colleague's reasoning, the Employer could have demanded that the Union agree to obey the law, bargain in good faith, or, for that matter, agree that the sky is blue and the grass green, and the Union would be obligated to agree lest it be accused of impeding negotiations. We do not believe that a party may properly precondition negotiations upon the other party's agreement to such matters as are not mandatory subjects of bargaining.

In finding that the Union was not obligated to accept the Employer's conditions we do not, of course, imply that the Union was not free to accept them. See *United Aircraft Corporation v. N.L.R.B.*, *supra*, fn. 3.

⁵ 226 NLRB at 1204.

⁶ 226 NLRB 1202 (1976).

for Certiorari to be filed and to be bound by the eventual outcome of that Petition. A copy of the general counsel's letter agreeing to that condition is enclosed.

2. The union's agreement to be bound by the decision of the Supreme Court should it be adverse to the union notwithstanding the company's agreement to bargain with the union or the existence of a contract should such be then completed.

No serious argument can be made that item 1 was a precondition or impediment to the commencement of bargaining after February 9 or February 15. Thus item 1 had already been complied with: the General Counsel had agreed to item 1 by letter dated January 24, 1978, and the Employer provided a copy of that letter to the Union on February 15.

The sole issue is, therefore, whether the Employer's effort to have the Union agree to be bound by a decision of the Supreme Court adverse to the Union's claim that it was the certified representative of the unit employees constituted an improper precondition to good-faith bargaining. I think not.

A proposal that the Union agreed to be bound by a Supreme Court decision is no impediment to the commencement of good-faith bargaining. Indeed, the Union would be bound by the Supreme Court's decision on the Employer's writ of certiorari⁷ regardless of whether it agreed with the Employer to be bound. It also is clear that the Employer and the Union could agree to a collective-bargaining agreement containing a savings proviso that the agreement would terminate should the Supreme Court ultimately decide that the Employer was not obligated to bargain with the Union.⁸ It follows, therefore, that a proposal to this same effect is neither evidence of bad faith nor an impediment to the commencement of bargaining.

Although the Union may not have to agree with the Employer to be bound by the Supreme Court's decision, it cannot rely on the Employer's proposal and itself delay the commencement of bargaining. Where the Union has done so, it cannot expect that the certification year will be extended beyond the Employer's offer to bargain.

But that is precisely what my colleagues allow the Union to do here. Thus, the record before us does not show that bargaining failed to begin in February 1978 because of the Employer's so-called preconditions. Instead the evidence before us

⁷ A Supreme Court decision denying enforcement of the Board's Order reported at 226 NLRB 1202 would eliminate the certification as the foundation for the Employer's obligation to bargain with the Union.

⁸ Cf. *United Aircraft Corporation v. N.L.R.B.*, 434 F.2d 1198 (2d Cir. 1970), cert. denied 401 U.S. 993.

strongly suggests that bargaining did not begin in February 1978 because the Employer refused to agree to the Union's request to post a notice of a union meeting on the Employer's bulletin board.⁹ This view is predicated on the Union's letter to the Employer dated February 15, 1978, which states in pertinent part: "Should you agree to the posting of

⁹ There is no contention before us that the Employer's rejection of the notice posting violated the Act.

the notice, we will be happy to bargain with you on the basis which we have discussed." In short, the evidence strongly suggests that the "precondition" that delayed the commencement of bargaining in February 1978 was initiated by the Union rather than the Employer.

I dissent from my colleagues' finding that the RD petition filed on February 20, 1979, was untimely and properly dismissed.