**Asamera Oil (U.S.) Inc. *and* Dan Hazard, Petitioner and Oil, Chemical & Atomic Workers, Local No. 2-477, AFL-CIO.** Case 27-UD-53

August 27, 1980

## DECISION AND ORDER

BY CHAIRMAN FANNING AND MEMBERS JENKINS AND TRUESDALE

Upon a union deauthorization (UD) petition duly filed under Section 9(e)[1] of the National Labor Relations Act, as amended, herein called NLRA, a hearing was held before Hearing Officer John F. Sayre of the National Labor Relations Board, herein called NLRB. Following the hearing, the Employer and the Union filed briefs. On April 9, 1980, the Regional Director for Region 27 transferred this case to the Board for decision.

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.

Upon the entire record in this case, the Board finds:

The Employer is engaged in commerce within the meaning of the NLRA.

The Union, which was certified by the NLRB on July 10, 1979, as the bargaining representative of the employees in the appropriate unit (Case 27-RC-5849),[2] thereafter filed a petition pursuant to the terms of the Colorado Peace Act, herein called CPA, for "approval of an all-union [union-security] agreement election." On August 14, 1979, the State conducted such an election at which 14 of the 15 qualified voters in the unit cast ballots and voted for an all-union agreement. On September 7, 1979, the State issued a certificate which found that, pursuant to the requirements of CPA, an all-union agreement was permitted by the State because a majority of all the employees eligible to vote and 75 percent of the employees voting favored such a provision.

Thereafter, the Employer and the Union executed a collective-bargaining agreement covering the period October 22, 1979-January 7, 1981, which, *inter alia*, contained a union-security clause providing that all employees shall as a condition of employment become members of the Union within 31 days of the signing of the agreement and shall remain in good standing during the life of the agreement.

On March 11, 1980, Dan Hazard, an individual, filed with the NLRB Regional Director for Region 27 a UD petition which alleged that 30 percent or more of the employees in the unit represented by the Union desired the rescission of the union-security agreement contained in the collective-bargaining contract.

As indicated above, Section 9(e)(2) of the NLRA provides that no UD election shall be conducted in a bargaining unit within which, in the preceding 12-month period, a valid election shall have been held. As this provision was intended to preclude the holding of a union deauthorization election sooner than 12 months after a valid union authorization election, we find that the UD petition of March 11, 1980, is barred because it was prematurely filed less than 1 year after the holding of the Colorado State union authorization election on August 14, 1979.[3] Accordingly, we shall dismiss the UD petition herein.

## ORDER

It is hereby ordered that the union deauthorization petition herein be, and it hereby is, dismissed.

CHAIRMAN FANNING, concurring:

I would not dismiss the petition on the basis my colleagues do. In 1951, the Congress amended Section 9(e)(1) to eliminate the requirement of a Board-conducted union shop authorization poll before a union shop legally could be created.[4] That amendment, in my view, necessarily left its mark on the scope of the Section 9(e)(2) proscription. *Gilchrist, supra*, relied upon by my colleagues, of course was decided prior to the amendment. And, while its analysis of the interplay between Section 9(c)(3) and Section 9(e)(2) is still valid, it hardly can be looked to for support for the proposition that Section 9(e)(2) now bars the holding of a union deauthorization election if a State, within the preceding 12 months, has conducted an election the type of which is not provided for in the Act and has not been for 29 years.

I do not mean to suggest that the reference to a "valid election" in both Section 9(c)(3) and 9(e)(2) does not, and should not as a matter of policy, extend to state-conducted elections. Nor need I

[1] Sec. 9(e)(1) and (2) of the Act reads:

> Upon the filing with the Board, by 30 per centum or more of the employees in a bargaining unit covered by an agreement between their employer and a labor organization made pursuant to section 8(a)(3), of a petition alleging they desire that such authority be rescinded, the Board shall take a secret ballot of the employees in such unit and certify the results thereof to such labor organization and to the employer.
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> No election shall be conducted pursuant to this subsection in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held.

[2] All truck operators or drivers and mechanics employed at the Employer's place of business in Commerce City, Colorado, excluding all other employees, guards, and supervisors as defined in the NLRA.

[3] See *Gilchrist Timber Company*, 76 NLRB 1233, 1234 (1948).

[4] P.L. 189, 65 Stat. 601 (1951).

reach here the question whether to be "valid" the state elections necessarily must be of a kind provided for in our statute. I do think, however, that Section 9(e)(2), in light of the amendment, is best read as prohibiting a union-shop deauthorization poll only when a union-shop *de* authorization poll of the same unit, or subdivision of that unit, already has been conducted, within the preceding 12 months, either by a State or by us. In essence, Section 9(e)(2) proscribes, as I see it, the holding of two Section 9(e)(1) elections in the same year and, inasmuch as the only type of election with which Section 9(e)(1) now is concerned—the union shop deauthorization type—has not been conducted within the past 12 months, I do not believe Section 9(e)(2) operates as a bar to the processing of this petition.

What should bar the processing of the petition, in my judgment, is a concern for the legislative process. Under Colorado law,[5] it is an unfair labor practice for an employer to agree to a union-security clause absent a state-conducted secret-ballot election in which either a majority of all unit employees, or 75 percent of unit employees actually voting, vote to authorize the arrangement. It should be obvious that the statutory provision is more restrictive of union-security clauses than Federal law is. And to the specific extent it is more restrictive of union security, Colorado's jurisdiction is exclusive: ". . . the States are left free to pursue their own more restrictive policies in the matter of union security agreements." *Algoma* v. *Wisconsin Employment Relations Board*, 336 U.S. 301, 313–314 (1949).

The statutory scheme adopted by Colorado, however, is not "more restrictive" of union-security agreements in all respects. Under Federal law, a petition for the deauthorization of a union-shop clause may be entertained at any time, subject to the requirements of Section 9(e)(1) and the strictures of Section 9(e)(2) of the Act. See *Great Atlantic & Pacific Tea Company*, 100 NLRB 1494 (1952). Colorado law, on the other hand, requires that a petition to rescind the authority conveyed by its required union-shop authorization referendum be filed only "between one hundred twenty and one hundred five days prior to the expiration of the collective bargaining agreement or prior to a triennial anniversary of the date of such agreement."[6] Inasmuch as this provision does not enable at least an initial challenge to union security for a period of time greater than the one required by Federal law, it fairly can be characterized as "less restrictive" of union-security agreements than Federal law is.

As such, the question arises whether it exceeds the degree of jurisdictional freedom Section 14(b) leaves with the States. Neither the legislative history of 14(b) nor its language can be construed as license to the States to enact any and all labor legislation so long as the legislation concerns, touches upon, relates to, or is couched in terms of, union security. If Colorado law, for example, futher provided for employee referenda on the question of a closed shop, Federal law would preempt it; Section 14(b) is not that large an exception to Federal supremacy.

But, by the same token, I do not read *Algoma* to suggest that Section 14(b) only authorizes the States to enact legislation which is in every single respect "more restrictive" of union security than Federal law is. The Board's interest in ensuring that state regulation of union security does not collide with Federal labor policies left untouched by Section 14(b)—at least from the Board's vantage-point—may justify the "concurrent jurisdiction" approach we have taken to state regulation, as opposed to outright prohibition, of union security.[7] But an appreciation for the legislative process itself should, at a minimum, suggest that there is an obvious and direct relationship between the extent of the restriction imposed on *attaining* union security and the ease with which its *revocation* may be sought. Put in practical terms, that Colorado may require *opponents* of union security to wait, depending upon the length of the contract, 8, 20, or 32 months to file a deauthorization petition logically can be expected to be a function of the fact that, in the first instance, it has required *proponents* of union security to demonstrate a level of support far beyond that required by Federal law. The time limitations and authorization requirements, in this sense, are best viewed as *quid pro quo*.

Merely because time limitations on deauthorization are integrally related to earlier restrictions on attaining a union-security clause does not mean, of course, that they automatically fall within Section 14(b) or, for that matter, are entitled to Federal deference. The terms of the time limitations obviously are relevant. If Colorado restricted, but did not outlaw, union security and then proceeded to outlaw deauthorization petitions entirely, or imposed clearly unreasonable time limitations on their filing, I would not hesitate to entertain a deauthorization petition filed with the Board. Employees have the right, as Section 9(e)(1) evidences, to challenge union-security clauses. But when the right attaches does not seem to me to have been as

[5] See Colo. Rev. Stat. 1973, § 8-3-108(1)(C)(I).
[6] § 8-3-108(1)(C)(II)(B).
[7] See, e.g., *Western Electric Company*, 84 NLRB 1019 (1949); *Cyclone Sales, Inc.*, 155 NLRB 431 (1956).

discernible a Federal concern. "Federal law" establishing when it does is a function of Board decision, not of the statute or its legislative history. *Great Atlantic & Pacific Tea, supra*. There is even substantial support, as the dissenting opinion in *Great Atlantic* suggests, for the proposition that Section 9(e)(1) only permits challenges to the *authority* of a labor organization to *negotiate* union security and not that it permits rescission of an already agreed-upon union-security clause.

What Colorado has done here is, in my judgment, a reasonable exercise of its Section 14(b) license. Although its time limitations on union-shop deauthorization petitions exceed those established by the Board, they are part and parcel of the restrictive regulation of union shops Colorado also has enacted; they do not attempt to negate Federal policy authorizing challenges to union security; and, to the extent they permit such challenges but only at a later date than Federal law would require, they do not involve a subject matter which rises to the level of a Federal labor policy, at least one sufficient to justify upsetting Colorado's regulatory scheme. I would leave the Petitioner to the forum that gave it the right to vote on union security in the first instance and, on that basis alone, join in dismissing the petition.