

**American Sunroof Corporation-West Coast, Inc., d/b/a American Sunroof/Customcraft, Inc. and International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, United Auto Workers, Petitioner. Case 20-RC-14700**

August 6, 1979

### DECISION ON REVIEW

BY CHAIRMAN FANNING AND MEMBERS JENKINS,  
PENELLO, AND TRUESDALE

On December 26, 1978, the Acting Regional Director for Region 20 issued a Decision and Direction of Election in which he found, *inter alia*, that a contract between the Employer and Teamsters Automotive Employees Union, Local 665, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (hereinafter Teamsters Local 665) was not a bar to the petitioned-for election. The Acting Regional Director directed an election in a unit of the Employer's production and maintenance employees, including drivers and janitors, but excluding salesmen, office clerical employees, guards, and supervisors as defined in the National Labor Relations Act, as amended.

Thereafter, in accordance with Section 102.67 of the National Labor Relations Board Rules and Regulations, Series 8, as amended, the Employer filed a timely request for review of the Acting Regional Director's decision, alleging, *inter alia*, that, in giving effect to the Teamsters Local 665 disclaimer and by including the drivers in the bargaining unit, the Acting Regional Director made findings of fact which were clearly erroneous and departed from officially reported precedent. By telegraphic order dated February 2, 1979, the Board granted the Employer's request for review. On January 26, 1979, the petitioned-for election was conducted, and the ballots were impounded pending decision on review. Thereafter, Petitioner filed a brief on review.

On May 23, 1979, Teamsters Local 665 filed a motion to intervene and for time to file a brief. On May 24, 1979, the Board granted Teamsters Local 665 permission to file an *amicus* brief. Thereafter, Teamsters Local 665 filed an *amicus* brief and a motion for consideration by the full Board and for oral argument,<sup>1</sup> and the Employer filed a brief in answer to the Teamsters Local 665 *amicus* brief.

<sup>1</sup> Teamsters Local 665's request for oral argument is hereby denied as the record, the request for review, and the briefs adequately present the issues and the positions of the parties. Teamsters Local 665's motion for consideration by the full Board is also hereby denied.

The Board has considered the entire record in this proceeding, including the briefs on review, with respect to the issues under review and makes the following findings:

1. The Employer is engaged in the business of installing sunroofs and vinyl roofs on automobiles and employs approximately 40 employees at its South San Francisco, California, facility. In July 1976, pursuant to a request for recognition, the Employer recognized Teamsters Local 665 as the exclusive bargaining representative of the Employer's production and maintenance employees. Subsequent to this voluntary recognition, the Employer and Teamsters Local 665 entered into a collective-bargaining agreement covering the employees in the recognized unit. The contract provided that it would be effective from November 18, 1976, to November 18, 1979, and from year to year thereafter with the provision that, should either party desire to terminate the agreement or modify any part thereof, it would notify the other party not less than 60 days prior to the end of the appropriate yearly period. The contract also included a reopener provision which provided that the contract could be reopened on October 1, 1977, and on October 1, 1978, for the sole purpose of renegotiating wage rates for the subsequent year. The employees ratified the agreement on November 19, 1976. In July 1977 and July 1978, negotiations on wage rates were conducted, and agreements on increased wage were reached.

On July 31, 1978, employee Melvin Dimich filed a deauthorization petition under Section 9(e)(1) of the Act. This petition, which was signed by 39 of the Employer's employees, requested an election on whether the employees desire to withdraw the union-shop provision of the above-mentioned collective-bargaining agreement. On August 16, 1978, counsel for Teamsters Local 665 notified the Employer that Teamsters Local 665 disclaimed and waived any and all interest in representing, and any right to represent, the Employer's production and maintenance employees. Also on August 16, counsel for Teamsters Local 665 notified the Regional Director for Region 20 of the disclaimer, requesting dismissal of the deauthorization petition and stating, "Local 665 is of the position that the collective bargaining agreement, and particularly Article II (union Security), are no longer operable." On August 23, counsel for the Employer notified Teamsters Local 665 and the Regional Director that the Employer did not accept the disclaimer and intended to honor, and hold Teamsters Local 665 to, the collective-bargaining agreement. By letter dated September 8, 1978, the Regional Director notified all parties that the deauthorization petition had been withdrawn.

Since the date of its disclaimer, Teamsters Local 665 has taken no action inconsistent with the disclaimer. The Employer continued to deduct union dues from its employees' paychecks and forward the dues to Teamsters Local 665. Although Teamsters Local 665 returned the check for August 1978 dues to the Employer, it has held the subsequently remitted dues in escrow pending resolution of its representative status.

On October 2, 1978, Petitioner filed the petition in the instant proceeding, requesting an election among the Employer's production and maintenance employees. Teamsters Local 665 was notified of the hearing on this petition but did not participate.

In its brief in support of its request for review of the Acting Regional Director's Decision and Direction of Election, the Employer asserts that the Acting Regional Director departed from the Board's policy of refusing to permit parties to collective-bargaining agreements to escape their terms through use of Board processes. The Employer's position is that, as evidenced by the filing of the deauthorization petition, its employees were dissatisfied with the terms of the contract and with their representative, and that Teamsters Local 665's disclaimer was made in retaliation for the filing of the petition. Thus, the Employer argues, by giving effect to the disclaimer and finding the contract not to be a bar to an election, the Acting Regional Director sanctioned not only such retaliatory conduct, but also employee and union circumvention of the contract-bar doctrine.

In support of its position that a union cannot avoid the contract-bar doctrine by merely disclaiming interest in the employees covered by the contract, the Employer cites *Mack Trucks, Inc.*, 209 NLRB 1003 (1974), and *Gate City Optical Company, A Division of Cole National Corporation*, 175 NLRB 1059 (1969). In our view, however, these cases are not controlling.<sup>2</sup> As stated by the Acting Regional Director in this case, the essential fact in *Mack Trucks* was that the disclaimer by the contracting union resulted from a collusive agreement between the contracting union and the union which was seeking an election. No such collusive disclaimer is present here. In this regard, the record clearly shows that Petitioner had no contract with Teamsters Local 665 prior to August 16, 1978, the date of the disclaimer. *Gate City Optical* did not involve a disclaimer by a contracting union; rather, it involved a situation in which the parties agreed that the contracting union was defunct. The Board, in refusing to order an election in that case, held that the

contracting union was not defunct in the normal sense, but had merely transferred its affiliation from the contracting international union to the international union seeking the election. Under those circumstances, the Board held, no question concerning representation requiring an election existed. It is clear from the record in the instant case that Teamsters Local 665 has not attempted to transfer its affiliation to Petitioner.

Absent special circumstances, such as those in *Mack Trucks* and *Gate City Optical*, and absent any actions on the part of Teamsters Local 665 inconsistent with its disclaimer, we find no basis for not giving the disclaimer full effect. As we have held in the past, a contract does not bar an election when the contracting union has properly disclaimed interest in the employees covered by the contract.<sup>3</sup> Accordingly, we affirm the Acting Regional Director's finding that the collective-bargaining agreement between the Employer and Teamsters Local 665 is not a bar to the petitioned-for election.<sup>4</sup>

The Employer further asserts that, if the disclaimer removes the contract as a bar and if the results of the election reveal that Petitioner has been selected as bargaining representative of the employees, the Board should order that Petitioner is bound by, and must administer, the collective-bargaining agreement between the Employer and Teamsters Local 665. It is well settled, however, that when a union is decertified,

<sup>3</sup> *Plough, Inc.*, 203 NLRB 121 (1973); *Manitowoc Shipbuilding, Inc. and The Manitowoc Company, Inc.*, 191 NLRB 786 (1971); *National By-Products Company*, 122 NLRB 334 (1958). See also *Amalgamated Meat Cutters and Butcher Workmen of North America, Local 158, AFL-CIO (Eastpoint Seafood Company, etc.)*, 208 NLRB 58 (1974).

Member Truesdale agrees that, in the circumstances of this case, the disclaimer removes the contract as a bar to an election. In so doing, Member Truesdale finds *East Manufacturing Corporation*, 242 NLRB 5 (1979), distinguishable from the instant case. In *East Manufacturing*, the incumbent local labor organization, which consisted only of the employees of the employer, executed a disclaimer during the course of a hearing on another union's petition to represent the employees covered by the incumbent's contract with the employer. Thus, in that case, the petitioning union conducted its organizational activity, solicited its showing of interest, and filed its petition prior to the incumbent union's disclaimer. In the instant case, the employees did not, as implied by the dissent, "persuade" Teamsters Local 665 to disclaim interest in them; rather, the employees merely exercised their statutory right to petition for an election to deauthorize their representative's union-shop authority. Having exercised this right, the employees then found themselves abandoned by virtue of their representative's arm's-length disclaimer. The record clearly shows that the Petitioner had no contact with Teamsters Local 665 prior to the date of the disclaimer and filed its petition several weeks after the disclaimer. In these circumstances, the purposes of the Act are not served by a result which would, in fact, leave the employees with no representation at all for the remainder of the term of Teamsters Local 665's contract.

<sup>4</sup> Our dissenting colleague cites the order of the United States District Court for the Northern District of California in support of his conclusion that the contract herein is a bar to an election. However, as the court in that decision acknowledged, its decision on the validity of the contract is not binding on the Board in determining whether the contract constitutes a bar to an election. In addition, in light of our decision herein, we find it unnecessary to pass on Petitioner's contention that the contract is not a bar to an election because it is unlawful on its face.

<sup>2</sup> Chairman Fanning, who dissented in *Mack Trucks* and *Gate City Optical*, would have found the collective-bargaining agreements in those cases not to be bars to the petitions therein.

or when an employer transfers its business to a successor employer, the succeeding union or employer is not bound by a prior contract, even if the terms of the contract have not yet expired.<sup>5</sup> The same principle applies when an existing contract is held not to bar an election, and a new union becomes the representative of the employees previously covered by the contract.<sup>6</sup>

2. In its request for review, the Employer asserts that its drivers should not be included in the bargaining unit on the ground that they lack a community of interest with the production and maintenance employees. We disagree.

At the time the collective-bargaining agreement between the Employer and Teamsters Local 665 was negotiated, the Employer did not employ drivers or a dispatcher.<sup>7</sup> These positions apparently came into existence several months before the instant petition was filed. The record clearly shows that the drivers share a community of interest with the production and maintenance employees sufficient to warrant their inclusion in the bargaining unit. Drivers, like production and maintenance employees, are hourly paid and punch a timeclock. All employees receive the same fringe benefits and holidays. Although the drivers spend most of their worktime picking up and delivering automobiles, they do occasionally perform "detailing" work which has historically been performed by production and maintenance employees. Similarly, production and maintenance employees occasionally pick up and deliver automobiles. Accordingly, as Petitioner seeks to represent the drivers, and as the overall unit is clearly appropriate, we affirm the Acting Regional Director's finding that the drivers should be included.

We shall therefore remand this case to the Regional Director for the purpose of opening and counting the impounded ballots and, thereafter, issuing the appropriate certification.

MEMBER PENELLO, dissenting:

As the record in this case contains no evidence that Teamsters Local 665 is defunct, I would find, contrary to my colleagues, that its disclaimer did not remove its collective-bargaining agreement with the Employer as a bar to the petitioned-for election herein.

The principle that a disclaimer will not operate to remove a contract as a bar to an election, absent a showing that the disclaimer union is defunct, was re-

cently reiterated in *East Manufacturing Corporation*, 242 NLRB 5 (1979). As the Board stated in that case, this principle is based on "compelling policy considerations which are a cornerstone of the statutory scheme." Primary among these policy considerations is industrial stability, a consideration which the contract-bar doctrine, here at issue, was developed to promote.

When a majority of employees in an appropriate bargaining unit select an exclusive bargaining representative, and the representative, on behalf of the employees, negotiates and executes an agreement with the employer covering the wages, hours, and terms and conditions of the employees' employment, that agreement is a stabilizing force in the interrelationships among the representative, the employees, and the employer. In defining the employment conditions for the term of the contract, the agreement reflects not only the successful operation of the collective-bargaining process, but also the substantial investments which the parties have made to their bargaining relationship. In the interest of encouraging and protecting the process and the relationship, the agreement itself must be afforded some degree of integrity and durability, and the parties must have confidence that its provisions will be enforced during its negotiated term.

A second "compelling policy consideration," against which the interest of industrial stability is balanced when a contract is urged as a bar to an election, is employee freedom of choice in selecting a bargaining representative. Ordinarily, when a contract is executed, postponement of the employees' right to select or change their representative is justified for a reasonable period of time by the paramount interest of contractual stability.<sup>8</sup> The delay in the exercise of employee freedom of choice preserves as much time as possible during the term of a contract from the potential disruption and uncertainty in labor relations caused by a rival union's organizational activities. In balancing the sometimes conflicting considerations of stability and employee free choice, the Board has provided employees the opportunity, at reasonable and predictable intervals, to reappraise and, if they so desire, change their representative.<sup>9</sup> The rules governing when election petitions will be accepted by the Board thus put the parties to a bargaining relationship and any rival unions on notice as to the appropriate times to organize for and seek such a change in representation.

The Board has recognized, however, that in some circumstances a specific contract may not serve to

<sup>5</sup> See *N.L.R.B. v. Burns International Security Services, Inc., et al.*, 406 U.S. 272, fn. 8 (1972), and accompanying text, wherein the Supreme Court rejected the Board's contention that a successor employer should be bound to the terms of its predecessor's collective-bargaining agreement.

<sup>6</sup> *American Seating Company*, 106 NLRB 250 (1953).

<sup>7</sup> The Acting Regional Director found, and on review the parties do not dispute, that the dispatcher is a supervisor within the meaning of the Act.

<sup>8</sup> See, e.g., *Paragon Products Corporation*, 134 NLRB 662 (1961).

<sup>9</sup> *Deluxe Metal Furniture Company*, 121 NLRB 995 (1958).

stabilize industrial relations in the manner contemplated in the statutory scheme, and strict application of the contract-bar doctrine, in those circumstances, would unduly limit the right of employees to be represented by an organization of their own choosing. Thus, exceptions to the contract-bar doctrine have developed. A simple disclaimer of interest in the contract by one of the parties thereto is not one of these exceptions; rather, only in such cases as a schism, defunctness, or a substantially expanded bargaining unit is the contract no longer a stabilizing force and the direction of an immediate election in the interest of both restoring stability and assuring employees their right to select their representative. Even in these cases, the burden of establishing the need for an election is heavy. In the case of a schism, there must be a basic intraunion conflict, and the employer must be confronted with two labor organization, each claiming to be the organization previously chosen by the employees as their representative.<sup>10</sup> In the case of defunctness, the union must be both unable and unwilling to represent the employees; inactivity, negligence, a lack of members, or employee dissatisfaction will not render an incumbent union defunct.<sup>11</sup> And where on expanding unit is at issue, a contract will not bar election only where less than 30 percent of the current employees were employed, and less than 50 percent of the current job classifications were in existence, at the time the contract was executed.<sup>12</sup>

The result reached by the majority here, in the language of *East Manufacturing*, "impugns the integrity of the collective-bargaining process and encourages circumvention of our contract-bar doctrine." Under the majority's decision, all collective-bargaining agreements become contracts terminable at will.<sup>13</sup> Disgruntled or dissatisfied employees will at any time be able to escape the terms of their contract and force their employer to renegotiate employment conditions by persuading their current representative to simply disclaim interest in representing them, as the employees herein so persuaded Teamsters Local 665 by filing

a deauthorization petition. The predictability and stability in labor relations, supplied by mutual and binding commitments contained in collective-bargaining agreements and by our contract-bar principles, will be frustrated by a lingering, if not persistent, threat that one party will walk away from those commitments.

In its *amicus* brief, Teamsters Local 665 argues that employee free choice is the single most important factor in this case, and that the mutual decision of the employees and their representative to terminate their relationship should be honored. I do not agree. The employees selected Teamsters Local 665 as their representative for purposes of collective bargaining, and, as their representative, it is Teamsters Local 665 which is the party to the contract. Mutual assent of the parties thereto will operate to remove a contract as a bar to an election, as will circumstances which establish one of the traditional exceptions to the contract-bar doctrine. A unilateral disclaimer, however, even if based on employee dissatisfaction with their representative, will not. In this regard, I note that when an employer becomes bound to a contract and thereafter acquires a good-faith doubt that the contracting union represents a majority of employees in the relevant bargaining unit, the employer may not lawfully refuse to abide by existing contract or unilaterally change the established terms and conditions of employment.<sup>14</sup>

Contrary to Member Truesdale, I do not find *East Manufacturing* distinguishable from this case. In both cases, the viable, nondefunct incumbent union disclaimed interest in representing employees covered by a collective-bargaining agreement in effect at the time of the disclaimer. In both cases, the disclaimer resulted from employee dissatisfaction with their representative. As in *East Manufacturing*, the disclaimer alone should not operate to remove the contract as a bar to an election.<sup>15</sup> Accordingly, I would not affirm the Acting Regional Director's decision and would order that the petition be dismissed.

<sup>10</sup> *Hershey Chocolate Corporation*, 121 NLRB 901 (1958).

<sup>11</sup> E.g., *Road Materials, Inc.*, 193 NLRB 990 (1971); *Crane and Breed Casket Company*, 175 NLRB 206 (1969); *Aircraft Turbine Service, Inc.*, 173 NLRB 709 (1968); *Moore Drop Forging Company*, 168 NLRB 984 (1967).

<sup>12</sup> *General Extrusion Company, Inc., General Bronze Alwintite Products Corp.*, 121 NLRB 1165 (1958).

<sup>13</sup> Contracts which lack termination or duration provisions and contracts which are terminable at will have long been held not to bar elections. *Pacific Coast Association of Pulp and Paper Manufacturers*, 121 NLRB 990 (1958).

<sup>14</sup> See, e.g., *Victor Miceli and Sam Miceli d/b/a Riverside Produce Company*, 242 NLRB 615 (1979).

<sup>15</sup> Shortly after Petitioner UAW filed its petition in this case, the Employer filed an action in the United States District Court for the Northern District of California seeking a declaratory judgment that its collective-bargaining agreement with Teamsters Local 665 was valid and enforceable. Although not binding on the Board, it is interesting to note that the court issued an order on May 25, 1979, holding the collective-bargaining agreement to be valid and enforceable on the authority of *East Manufacturing*.