Weather Vane Outwear Corporation, Inc. *and* International Ladies' Garment Workers' Union, AFL–CIO, Petitioner

Ralco Sewing Industries, Inc. *and* Deanna Dale Dunaway, Petitioner, and United Brick and Clay Workers of America, AFL–CIO.[1] Cases 9–RC–11734 and 9–RD–745

November 11, 1977

DECISION AND DIRECTION OF ELECTIONS

BY CHAIRMAN FANNING AND MEMBERS PENELLO AND MURPHY

Upon separate petitions duly filed under Section 9(c) of the National Labor Relations Act, as amended, a consolidated hearing was held before Hearing Officer Daniel J. Roketenetz. Following the hearing and pursuant to Section 102.67 of the National Labor Relations Board's Rules and Regulations and Statements of Procedures, Series 8, as amended, and by direction of the Regional Director for Region 9, this case was transferred to the Board for decision. Thereafter, the Employer[2] and both Petitioners filed briefs with the Board which have been duly considered.

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 reviewed the Hearing Officer's rulings made at the hearing and finds that they are free from prejudicial error. They are hereby affirmed.

1. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.[3]

2. International Ladies' Garment Workers' Union, AFL–CIO, herein called ILGWU, and United Brick and Clay Workers of America, AFL–CIO, herein called Brick Workers, are labor organizations within the meaning of the Act.

3. A question affecting commerce exists concerning the representation of employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

Case 9–RD–754: This petition seeks an election in the unit set forth in the collective-bargaining agreement which expired December 1, 1976. The Employer (Ralco) and the Brick Workers assert that on November 30, 1976, they signed a new collective-bargaining agreement and that this agreement is a bar to the decertification petition filed December 1, 1976. The petitioner asserts that the petition was filed while an unresolved question concerning representation, raised by the petition filed in Case 9–RC–11684, was still pending and that therefore the November 30, 1976, contract is not a bar.[4]

Briefly the facts are as follows: Ralco manufactures winter garments for Weather Vane and employed at times material herein over 100 employees. The garments are stored and shipped out of a separate warehouse called Weather Vane. On August 11, 1972, the Brick Workers was certified to represent the nonsupervisory plant employees at Ralco. A 3-year collective-bargaining agreement was entered into on October 11, 1972. Thereafter, by amendment executed by both parties on June 6, 1974, the collective-bargaining agreement was extended to December 1, 1976.

On September 8, 1976, ILGWU timely filed a representation petition in Case 9–RC–11684 with respect to the unit covered by the existing agreement between Ralco and the Brick Workers, as follows:

> All production, maintenance, shipping and receiving employees employed by the Employer [Ralco] at its Olive Hill, Kentucky, location; but excluding all office clerical employees, professional employees, truck drivers, all guards and supervisors as defined in the Act.

On September 15, 1976, the Brick Workers filed a "no-raid" complaint pursuant to article XX of the AFL–CIO constitution charging the ILGWU with raiding its established bargaining unit. On November 24, 1976, an impartial umpire of the AFL–CIO issued his decision in which he found the ILGWU's organizational activity to be a raid in violation of article XX.

On November 30, 1976, Ralco and the Brick Workers executed a new contract to be effective from November 30, 1976, to October 15, 1979. On

[1] United Brick and Clay Workers of America, AFL–CIO, intervened in Case 9–RC–11734.

[2] Counsel for Weather Vane Outwear Corporation, Inc., and Ralco Sewing Industries, Inc. (hereinafter called Weather Vane and Ralco, respectively) acknowledge that these two corporations constitute a single employer concerning the operations involved herein. Accordingly, we refer to these two companies, collectively, as the Employer.

[3] Counsel for the Employer conceded that Ralco and Weather Vane each were engaged in commerce within the meaning of the Act. However, the Employer refused to produce data concerning interstate commerce, except that its counsel represented that in excess of $50,000 was shipped to customers located outside the Commonwealth of Kentucky. The record showed that Weather Vane is a New York corporation doing business in the Commonwealth of Kentucky. Ralco is a wholly owned subsidiary of Weather Vane. The goods made by Ralco are marketed by Weather Vane and are sold nationally. Weather Vane also sometimes employs manufacturers in other States to make garments for it. Based on the above, we assert jurisdiction over the Employer. *Tropicana Products, Inc.*, 122 NLRB 121, 123 (1958).

[4] As to the inclusion or exclusion of the Weather Vane employees, discussed *infra* in connection with the petition in Case 9–RC–11734, Petitioner herein takes no position but is willing to abide by our determination as to the scope of the unit in the instant case.

December 1, 1976, Ralco employee, Deanna Dunaway, filed the instant decertification petition in the contract unit described above. On December 3, 1976, the ILGWU requested permission to withdraw its petition in Case 9–RC–11684, and the Regional Director approved the withdrawal of that petition on December 15, 1976.

When one petition under Section 9(c) is timely filed, and a second petition is filed during the pendency of the unresolved question concerning representation raised by the earlier one, our contract-bar doctrine is rendered inoperative as to the later petition.[5] As the ILGWU's representation petition was filed less than 90 days and more than 60 days before the old contract expired, it clearly was timely. And since Dunaway's decertification petition, although filed after the contract was renewed, was filed before the ILGWU's petition had been withdrawn, it also was timely filed.

The Employer, however, maintains that the impartial umpire's decision on November 24, 1976, finding the ILGWU petition in violation of article XX, resolved the representation question, that the Board should defer to that decision, and that, because the decision issued prior to Dunaway's filing the decertification petition, said petition was untimely filed as there then was no unresolved question concerning representation.

In *Cadmium & Nickle Plating Division of Great Lakes Industries, Inc.*,[6] the Board refused to defer to a no-raid agreement because to do so would permit a private resolution of a representation question "in a manner contrary to the policies of the Act and would impinge upon the Board's exclusive jurisdiction and authority to resolve such questions of representation." We adhere to that view.

Therefore, we find that the representation question raised by the ILGWU petition in Case 9–RC–11684 was not resolved by the impartial umpire's decision and thus remained open at the time the decertification petition was filed.

Accordingly, because the petition herein was filed during the pendency of a question concerning representation,[7] we shall direct an election in the following unit:[8]

> All production, maintenance, shipping and receiving employees employed by Ralco at its Olive Hill, Kentucky, location; but excluding all office clerical employees, professional employees, truckdrivers, and all guards and supervisors as defined in the Act.

Case 9–RC–11734: On October 7, 1976, the ILGWU filed a petition in Case 9–RC–11734 seeking to represent a warehouse unit of:

> All shipping clerks, including local truck drivers employed by Weather Vane, at its Olive Hill, Kentucky, location; but excluding office clerical employees, professional employees, guards and supervisors as defined in the Act.

It asserts that the above warehouse employees constitute a separate and identifiable appropriate unit and that they have not been included in the unit represented by the Brick Workers. The Employer essentially contends that these employees do not have a separate community of interest from the Ralco production and maintenance employees and that they are part of the unit represented by the Brick Workers.

In 1970, Ralco opened a plant in Kentucky with both production and shipping done out of one plant. In 1971, a separate warehouse was opened called Weather Vane. In 1972, the Brick Workers was certified to represent the nonsupervisory plant employees at Ralco. The collective-bargaining agreement then in effect specifically referred to warehouse employees in two clauses: one dealing with wages and the other with job bids regarding warehouse employees. The warehouse employees in the unit sought herein remained on the Ralco payroll until 1974.

In that year, the warehouse employees were put on the Weather Vane payroll (in New York), and remained on it until December 1976, when these employees were again transferred to the Ralco payroll.[9] In late summer 1975, both Weather Vane and Ralco moved to their present location in Olive Hill, Kentucky. The Ralco production plant and the Weather Vane warehouse are separated by a 100-foot common parking lot used by employees of the Employer. At all times material to our discussion herein, Ralco employed over 100 employees and Weather Vane employed about 6 employees (with the exception of the employees below whose eligibility is in dispute).

In agreement with Petitioner, we find that the warehouse employees sought are not included in the unit presently represented by the Brick Workers. Although the warehouse employees apparently were included in the 1972 contract between Ralco and the Brick Workers, that contract has not been applied to them at least since the move to the present location

[5] *General Dyestuff Corporation*, 100 NLRB 72, 74 (1952); *Marinette Paper Company*, 127 NLRB 1319, 1320 (1960).

[6] 124 NLRB 353, 354 (1957).

[7] In view of this finding, we find it unnecessary to pass on Petitioner Dunaway's additional contention that the contract cannot act as a bar because it was not signed by authorized representatives.

[8] We find *infra* that the warehouse employees involved are not included in the contract unit.

[9] For purpose of identification we shall continue to refer to these employees as the Weather Vane employees in discussing the issues herein.

in 1975. In 1976, none of the warehouse employees belonged to the Union. Despite the union-security clause in the contract, new warehouse employees were not asked to join the Brick Workers, to pay dues, or informed who the union steward was. Although 25 to 30 grievances went to the second step at Ralco in 1976, warehouse employees have never filed grievances. Further, while the contract provides for a 15-cent raise after the completion of the 90-day probationary period, two warehouse employees testified that though they had worked over 4 months they did not receive a raise. Warehouse employees are also not on the Ralco seniority list. It is thus apparent that the Brick Workers, at least since 1975, has not represented the warehouse employees. Nor has the collective-bargaining agreement been applied to them.[10] Accordingly, we conclude that these employees are not part of the unit represented by the Brick Workers.

The warehouse employees of Weather Vane are the only employees not represented by the Brick Workers. Under these circumstances we have treated the petition as a request for a residual unit of all unrepresented employees. Accordingly, we shall direct an election in such a unit, which is described below.[11]

Remaining at issue, however, is the status of warehouse employees Harold Waggoner, Keith Hicks, Walter Evans, Jerry Stevens, Tony Jones, Rodney and Ronnie Vanlandingham, Lowell Dexter Fielding, and Ralph Lowe. The ILGWU contends that these employees were temporarily laid off and have a reasonable expectancy to be recalled and thus are eligible to vote in the election. Employer contends that all but Waggoner and Hicks were permanently laid off.

Waggoner and Hicks were hired on June 7, 1976, and were laid off on October 23, 1976. Evans was hired on June 19, 1976, and was laid off at the end of November 1976. They performed the same work, under the same supervision, and with the same benefits as other warehouse employees. Warehouse Supervisor Bowling testified that they were laid off because of lack of work and that he informed them that he did not know whether they would be recalled. The Employer asserted at the hearing that Waggoner, Hicks, and Evans were permanently laid off. However, in its brief, the Employer admits that Waggoner and Hicks were temporarily laid off.

We find that Waggoner, Hicks, and Evans are eligible to vote, since the Employer admits that Waggoner and Hicks were temporarily laid off, and the evidence with respect to Evans' layoff is similar to that of Waggoner and Hicks. Evans was employed at approximately the same time and for the same duration as Waggoner and Hicks, and was apparently laid off on the same basis.

Stevens, Jones, Rodney and Ronnie Vanlandingham, Fielding, and Lowe were hired either in the last week of August or the first week of September and were laid off in late October or early November. They also performed the same work, under the same supervision, and with the same benefits as the other warehouse employees. Bowling testified that they were told that they were temporary employees and when they were laid off he said they were "done as temporary" and he did not know what would be next. However, Ronnie Vanlandingham, Fielding, and Lowe denied being told they were temporary employees or how long they were scheduled to work. Fielding and Lowe also testified that Bowling told them they would not be needed for awhile when he laid them off. Ronnie Vanlandingham stated that Bowling had told him that he would be rehired. The Employer laid off all its warehouse employees, except Bowling, in December and January and gradually rehired employees in the spring.

We conclude, in light of the fact that, according to both the Employer's and ILGWU's witnesses testimonies, Stevens, Jones, Rodney and Ronnie Vanlandingham, Fielding, and Lowe were hired for an indefinite period, performed the same duties as other employees, were laid off in the midst of a seasonally slow period when the Employer was effectuating a general reduction of its work force, and were not told when they were laid off that there was little possibility of their being rehired, that they were temporarily laid off and have a reasonable expectancy of recall.

Accordingly, we find that Waggoner, Jones, Hicks, Evans, Stevens, Rodney and Ronnie Vanlandingham, Fielding, and Lowe are eligible to vote in the election hereinafter directed in Case 9–RC–11734.[12]

On the basis of the foregoing, we find that the following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:[13]

[10] The evidence on whether the contract prior to 1975 had been applied to them and to what extent is contradictory. However, we find it unnecessary to deal further with this evidence since we find that the contract has not been applied since 1975.

[11] *Building Construction Employees Association (A.B.C. Construction Co.)*, 147 NLRB 222 (1964). We therefore need not determine whether in other circumstances a separate warehouse unit would be appropriate.

[12] Since the record is insufficient to enable us to resolve the conflicting testimony as to whether Fielding quit or was laid off, we shall permit him to vote subject to challenge.

[13] The Brick Workers has not indicated whether it wishes to be on the ballot in Case 9–RC–11734. However, in view of the fact that it intervened and claimed to represent those employees, we have included it on the ballot. If Brick Workers wishes it may withdraw by notifying the Regional Director

All shipping clerks, including local truckdrivers, employed by Ralco at Olive Hill, Kentucky, excluding office clerical employees, professional employees, guards and supervisors as defined in the Act.

[Direction of Elections omitted from publication.]

CHAIRMAN FANNING, concurring and dissenting:

I would dismiss the petition in Case 9–RD–754 on the ground that it is barred by the contract executed the day before the petition was filed.

To avoid the obvious bar interposed by that contract, my colleagues rely on the proposition that, when a second petition is filed during the pendency of an unresolved question concerning representation timely raised by an earlier petition, contract bar is inoperative as to the second petition.

I agree with that in principle; I do not agree with its application to the facts of this case.

The timely petition was filed on September 8, 1976, by ILGWU. On September 15, the incumbent Brick Workers filed a no-raid complaint. On November 24, an impartial umpire found the ILGWU in violation. On November 30, Ralco and Brick Workers executed a new contract. On December 1, the instant petition was filed. On December 3, ILGWU requested permission to withdraw its petition and, on December 15, permission was granted.

My colleagues reject the argument that there was, in reality, no unresolved question concerning representation when the petition was filed, relying on general language in *Cadmium & Nickel Plating, supra,* for the proposition that to defer to a no-raid agreement would permit a private resolution of a representation question in a manner contrary to the Act and impinge on the Board's exclusive authority to resolve questions concerning representation.

Cadmium is distinguishable on its facts. There, unlike here, the petitioning union did not voluntarily comply with the no-raid pact, but acted only under compulsion. Moreover, the election had already been held and the union that would have benefited from honoring the withdrawal request got no votes. Finally, the language cited by the majority is surely too broad in view of the fact that the Board's procedures are intended to accommodate to proceedings under the no-raid pact. (See part two of the Casehandling Manual, sec. 11052.1.)

Here, there was resort to the no-raiding procedures and voluntary withdrawal by ILGWU. In view of that, the question raised by the ILGWU petition was in fact disposed of on November 24, when the impartial umpire ruled against ILGWU, and all that remained was the purely ministerial act of withdrawal. In these circumstances, it is excessively formalistic to hold that there was a question pending on December 1, when this petition was filed. I would not do so, and therefore would hold the contract a bar and dismiss the petition.

In all other respects I agree with my colleagues.

within 10 days of this Decision of its desire to do so. In the event it participates in the election in Case 9–RC–11734 and the employees choose it as their bargaining representative, then such employees shall be included as part of the unit involved in the election in Case 9–RD–754 for the purpose of collective bargaining (but not for the purpose of determining the results of the election in that case), assuming that the Brick Workers remains the bargaining representative of the employees in said unit.