

Bloom & Meyer Construction Company and George Lewis, Petitioner and Local 876, International Brotherhood of Electrical Workers, AFL-CIO. Case 7-RD-1367

June 22, 1977

DECISION ON REVIEW AND ORDER

BY MEMBERS JENKINS, MURPHY, AND WALTHER

On November 18, 1976, the Regional Director for Region 7 issued his Decision and Direction of Election in the above-entitled proceeding, in which he found that the petitioned-for unit was appropriate, notwithstanding the current multiemployer collective-bargaining agreement between the Union and the American Line Builders Chapter, National Electrical Contractors Association (hereinafter referred to as the Association), of which the Employer was a member, because the Union acquiesced in the Employer's untimely withdrawal from that collective-bargaining agreement. Thereafter, in accordance with Section 102.67 of the National Labor Relations Board Rules and Regulations, Series 8, as amended, the Union filed a timely request for review of the Regional Director's decision on the grounds, *inter alia*, that, in finding that the Union had acquiesced in the Employer's untimely withdrawal from the Association contract, he departed from officially reported precedent.

By telegraphic order dated December 20, 1976, the Board granted the Union's request for review and the election was stayed pending decision on 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 with respect to the issues under review and makes the following findings:

The Employer is engaged in underground construction work and maintenance of public utilities. The Petitioner seeks an election among the Employer's construction employees. The Union argues that this unit is inappropriate because the Employer's employees are part of a larger unit covered by the Union's

contract with the Association. The Employer contended at the hearing that it timely withdrew from the Association contract or, in the alternative, that even if its withdrawal were untimely, the Union acquiesced in its withdrawal.¹

The Employer has been represented by the Association in collective bargaining with the Union since 1971. In 1971 and 1972, the Employer signed "Letters of Assent" which authorized the Association to bargain for it and bound it to the Association contract then in effect, with a requirement that notice of intent to withdraw be given 30 days prior to the notification date in the contract. In 1973, the Employer signed a letter of assent which authorized the Association to bargain for it, bound it to the Association contract, and required notice of intent to withdraw 150 days before the "anniversary date" of the then current Association agreement. In 1974, 1975, and 1976, the Employer did not sign letters of assent, but its president participated in bargaining and the Employer adhered to the terms of the Association contracts negotiated during those years, including the last contract which ran from May 31, 1976, to November 28, 1976.

On August 9, 1976,² the Union notified the Association of its desire to reopen the current collective-bargaining agreement and included a list of 10 desired changes.

On August 24, the Employer notified the Association and the Union of its desire to withdraw from the Association and to engage in individual bargaining with the Union. On August 27, the Association replied in two separate letters: one acknowledging the Employer's resignation from the Association; the other informing the Employer that its notice to cancel its letter of assent was untimely because the letter of assent required 150 days' notice. In response, the Employer's attorney notified the Association and Union by letter that the Employer did not consider itself bound to the "next" agreement and contended that the letter of assent applied only to the 1973 Association contract.

At the Union's request, in mid-September³ the Union's business manager and the Employer's principal owners met for several hours at the Employer's offices. The Employer indicated that it wished to engage in individual bargaining, and that

¹ The Employer did not file a request for review herein. Therefore, the issue of the timeliness of the Employer's withdrawal is not before us, and we consider it unwise to raise the issue *sua sponte* as urged by our colleague. The failure of the Employer to request review on this issue deprived the Union of notice that the issue might be considered by the Board and of an opportunity to offer its arguments on this issue; while the issue of timeliness and that of acquiescence in untimely withdrawal are somewhat related, as they both relate to contract bar, they are separate issues as to which quite different principles apply. Further, if the Board were to make a practice of reviewing issues as to which review has not been requested, we might unwittingly find ourselves creating an inference that the Board agrees with

all findings at the regional level unless such findings are reversed, even though the Board may have considered only the issues as to which review was requested in later cases. The rule cited by our colleague has never been interpreted to require that the Board review every issue decided by the Regional Director, whether contested by the parties or not.

² Except as otherwise indicated, all dates are in 1976.

³ Although the Association mailed its counterproposals to the Union on August 31, it appears from the record that face-to-face negotiations had not yet commenced, but were held on October 5, when new contract terms were agreed on.

the source of its dissatisfaction with multiemployer bargaining was the job referral system. The Union's business manager responded that a separate contract was possible but would not be of any advantage to the Employer because the Union could not give the Employer terms which did not also apply to the Association; he also indicated that the Union would work with the Employer as it had in the past.⁴ The Employer's president asked that the Union negotiate with the Employer first, then give the Employer any additional terms which were negotiated with the Association. There were no counterproposals by the Union; the parties did not settle on contract terms, agree to negotiate, or agree to meet again. On September 23, the instant petition was filed.

While, as noted previously, we accept the Regional Director's finding that the Employer's attempted withdrawal from the Association contract was untimely, we do not find that the Union's actions here demonstrate acquiescence in the Employer's attempted withdrawal from multiemployer bargaining. Rather, we conclude that the Union's actions are not inconsistent with an attempt to retain the Employer in the multiemployer group rather than engage in individual bargaining. Supporting that conclusion we note that, although the Union's business manager admitted that a separate contract with the Employer was "possible," at no time did he in fact offer proposals which would differ in any way from the terms of a multiemployer contract which he anticipated negotiating with the Association. Moreover, the Union's statement that it would work with the Employer regarding the desired change in the job referral system does not indicate individual bargaining.

Since the Employer's individual concerns had previously been dealt with in the multiemployer bargaining context, the Union's actions in trying to achieve a peaceful reconciliation by reminding the Employer that its concerns had been represented by

the Association do not evidence that "course of affirmative action 'clearly antithetical' to the union's claim that the employer has not withdrawn from multiemployer bargaining"⁵ which the Board has required in order to imply that a union has consented to an untimely withdrawal. We therefore conclude that, in the circumstances here, the Union did not acquiesce in the Employer's untimely withdrawal from multiemployer bargaining.

Accordingly, we find that the petitioned-for unit is inappropriate as it does not conform to the existing multiemployer bargaining unit.

ORDER

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

MEMBER WALTHER, dissenting:

I would reach the issue of the timeliness of the Employer's attempted withdrawal from the Association and find that the Employer's letters of August 24, 1976, timely notified the Union and the Association of the Employer's desire to withdraw from multiemployer bargaining.⁶ I view *Carvel*,⁷ relied on by the Regional Director and cited with approval by my colleagues, as readily distinguishable from the instant case. In *Carvel*, the authorized representatives of all parties agreed in an exchange of letters, which occurred prior to the attempted withdrawal of the employer therein, that the letters themselves constituted the beginning of actual negotiations. The Board was therefore warranted in applying the consequences of that agreement to the parties to the contract and finding the attempted withdrawal untimely.

In the instant case, however, the only communication between the Union and the Association prior to the Employer's attempted withdrawal was a letter sent by the Union on August 9, 1976. The letter served as notice of the Union's desire to reopen the

submission of briefs, or further hearing, as it may determine, to decide the issues referred to it or to review the decision of the regional director, and shall direct a secret ballot of the employees, dismiss the petition, affirm or reverse the regional director's order in whole or in part, or make such other disposition of the matter as it deems appropriate. [Emphasis supplied.]

The majority has effectively deleted the underlined portions of this rule. With respect to the instant case, I do not consider myself bound to review only one aspect of the contract-bar issue—that of union acquiescence in an untimely withdrawal—when in order to reach that issue a clearly erroneous finding that the Employer's attempted withdrawal was untimely must be affirmed. Our Rules and Regulations specifically permit the *sua sponte* reconsideration of errors which come to our attention in the process of considering other alleged errors. While I am not—as my colleagues imply—contending that the Board *must* review every issue decided by a Regional Director, whether contested by the parties or not, I will not join in their effective abrogation of a discretionary practice long exercised by this Board.

⁷ *The Carvel Company and C and D Plumbing and Heating Company*, 226 NLRB 111 (1976).

⁴ The record shows that the most recent contract was amended by a letter of understanding which altered the job referral system. The Union's business manager testified that this change was the result of the Employer's difficulties with the system and that he was referring to this accommodation when he stated that the Union "had worked with" and "would continue" to work with the Employer.

⁵ *I. C. Refrigeration Service, Inc., etc.*, 200 NLRB 687, 689 (1972).

⁶ My colleagues contend that it is unwise for this Board to examine any findings not specifically challenged in the request for review. The significance of this position with respect to future processing of representation cases can hardly be overestimated. Not only have my colleagues denied what has long been Board practice, but in addition they have effectively deleted significant portions of Sec. 102.67 of the Board's Rules and Regulations.

The case was transferred to the Board pursuant to Sec. 102.67(c) of our Rules. Subsec. (j) of 102.67 indicates on what basis the Board may proceed once review has been granted. Sec. 102.67(j) provides:

Upon transfer of the case to [the] Board, the Board shall proceed, either forthwith upon the record, or after oral argument or the

contract and included a list of 10 desired changes. The letter was sent approximately 3 weeks prior to the deadline established in the contract for requesting a reopening.⁸ Unlike *Carvel*, there is no evidence that the Association agreed that notice to reopen would be tantamount to the commencement of actual negotiations nor had the Association responded to the Union's demands prior to the date the Employer gave written notice of its intent to withdraw from the Association.

⁸ In my opinion, the terms of the 1973 letter of assent signed by the Employer do not govern the timeliness of the Employer's attempted

Absent unusual circumstances such as those in *Carvel*, I would not permit a union to cut off the legitimate rights of an employer to timely withdraw from multiemployer bargaining by merely including a list of bargaining demands in a premature notice of intent to reopen.

In view of the above, I would dismiss the petition herein.

withdrawal from multiemployer bargaining, as that letter clearly refers to the contract then in effect.