

Section 101.17 of the Board's Statements of Procedure provides:

If a petition is filed by a labor organization seeking certification, . . . the petitioner must supply, within 48 hours after filing *but in no event later than the last day on which the petition might timely be filed*, evidence of representation. [Emphasis supplied.]

The Board has repeatedly held that representation evidence is an administrative matter, not subject to direct or collateral attack.³ Notwithstanding the literal wording of the aforesaid procedural statement, the Board has, in appropriate circumstances, accepted as adequate a showing of interest submitted as late as during the course of a hearing.⁴ Nothing in the Act or in the Board Rules and Regulations, Series 8, as amended, requires that the interest showing be submitted with the petition. We have observed that Section 101.17 is procedural only, intended for the Board's convenience "to screen out those cases in which there is so little prospect of the Petitioner winning an election, if directed, as not to warrant the Board incurring the expense of further proceedings on the petition. Such investigation has no bearing on the issue of whether a representation question exists."⁵

In any event, we do not construe the italicized language of Section 101.17, above, as applicable to a situation where, as here, there is no definite date, which is ascertainable in advance, for the timely filing of a petition. In other words, we distinguish the situation here from one, for example, where a petition to be timely must be filed prior to the last day before the insulated period of an existing contract with another labor organization. Where, as in the instant case, there is no existing collective-bargaining contract and two or more unions are simultaneously engaged in organizing the same employees, it would obviously be at variance with the intent and purpose of the provision to apply it in the manner the Employer urges. Under such an interpretation the employer and one union, by hastily executing a collective-bargaining contract on the day a petition by a rival union was filed, could require the showing of interest of the rival to be submitted simultaneously with the filing of the petition, rather than within 48 hours, and thus reduce the time the Board ordinarily allows a petitioner to submit its showing of interest. And if the petitioner were unaware of the execution of the contract and delayed filing the supporting showing of interest in the good-faith belief that it had 48 hours in which to do so, the petition would become a nullity and the employees would be deprived of an opportunity to choose between the competing unions in a secret election. Section 101.17 was not intended to have this inequitable effect.

We find, therefore, that under the circumstances the Petitioner's submission of its showing of interest within 48 hours of the filing of the petition was timely. Accordingly, as the petition was timely filed

under the *DeLuxe Metal* rule, and as the Employer received timely notification of the filing of the petition before it signed the collective-bargaining contract with the Intervenor, we find that the said contract is not a bar to this proceeding.

4. The parties stipulated, and we find, that the following employees constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All production and maintenance employees at the Employer's Fredericksburg, Virginia, plant, excluding office clerical employees, professional employees, watchmen, guards, and supervisors as defined in the Act.

[Text of Direction of Election⁶ omitted from publication.]

³ *Continental Carbon, Inc.*, 94 NLRB 1026; *Standard Oil Company (Indiana)*, 80 NLRB 1275.

⁴ *O. E. McIntyre, Inc.*, 118 NLRB 1290; *Channel Master Corporation*, 114 NLRB 1486, 1487. Indeed the Board will permit a petitioner to submit a showing of interest even after a hearing where the Board directs an election in a unit broader than that initially sought. *National Welders Supply Company, Inc.*, 129 NLRB 514, 517.

⁵ *The Sheffield Corporation*, 108 NLRB 349, 350.

⁶ An election eligibility list, containing the names and addresses of all the eligible voters, must be filed by the Employer with the Regional Director for Region 5 within 7 days after the date of this Decision and Direction of Election. The Regional Director shall make the list available to all parties to the election. No extension of time to file this list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed. *Excelsior Underwear Inc.*, 156 NLRB 1236.

K-Mart, A Division of S. S. Kresge Company; Gallenkamp Stores Co.; Mercury Distributing Company; Holly Stores, Inc. and Retail Clerks Union Local 770, Retail Clerks International Association, AFL-CIO, Petitioner. Case 31-RC-141.

MARCH 30, 1967

SUPPLEMENTAL DECISION AND DIRECTION
BY CHAIRMAN McCULLOCH AND MEMBERS JENKINS
AND ZAGORIA

On June 13, 1966, the National Labor Relations Board issued a Decision and Direction of Election in the above-entitled proceeding.¹ The Board was thereafter administratively advised that after the original hearing in this case Holly Stores, Inc., had commenced operations as another licensee of K-Mart at the San Fernando store here involved. Accordingly, the Board, on June 22, 1966, issued an Order amending direction of election, wherein the Board amended its Decision and Direction of

¹ 159 NLRB 256.

Election of June 13, 1966, by striking in their entirety the first and second paragraphs on page 262, beginning with the words "We find" and "All regular," and substituting therefor the following paragraphs:

We find, in accordance with the stipulation of the parties, and our findings above, that the following employees of K-Mart and its licensees constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act:

All regular full-time and part-time employees, including employees of K-Mart and those of its licensees, employed at K-Mart's San Fernando, California, store, including selling, nonselling, and office clerical employees, but excluding professional employees and supervisors as defined in the Act.

Thereafter, on July 1, 1966, Holly Stores, Inc., filed with the Board an "objection" to the issuance of the Board's Order of June 22, "without notice, without a hearing, and without affording Holly Stores, Inc., an opportunity to be heard . . ."²

On July 12, 1966, the Board issued a notice ordering Holly Stores, Inc., to show cause why its objection should not be overruled, for the reasons that Holly's objection did not indicate either (1) that Holly Stores, Inc., was prejudiced in any way by the fact that the unit finding made in this case was based upon evidence adduced at a hearing which was held apparently prior to the time when Holly entered into a license agreement with K-Mart, or (2) that the facts adduced at the hearing with respect to the joint employer relationship between K-Mart and the then existing licensees differed in any material respect from the facts relating to the relationship between K-Mart and Holly at the San Fernando store. The notice directed Holly to state in detail those facts which distinguished its relationship with K-Mart from that of the other licensees, and gave the other parties opportunity to respond to Holly's statement.

On July 22, 1966, Holly filed with the Board a written statement contending that Holly "has, as a matter of law, a right to a hearing . . . and . . . there is no obligation or requirement that it 'show cause' therefor." Holly did not, as directed in the notice, specify those facts relating to the joint employer issue. No response was filed by any other party.

After giving further consideration to the matter, the Board, on November 10, 1966, issued an Order reopening record and remanding proceeding to the Regional Director for further hearing. In its Order

the Board directed that a further hearing be held to receive evidence on all issues pertaining to this proceeding as it may affect Holly Stores, Inc., and particularly on the question of whether a licensing or joint employer relationship exists between Holly and K-Mart.³

Pursuant thereto, a further hearing was held on December 7, 1966, before Hearing Officer Norman H. Greer.⁴ The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed. A brief was filed by Holly Stores, Inc.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

At the further hearing the parties stipulated that: (1) the facts adduced at the hearing in *K-Mart, A Division of S. S. Kresge Company*, Cases 12-RC-9128, 9130, and 9309,⁵ with respect to the relationship between K-Mart and each of its licensees, are "equally applicable to the relationship between K-Mart and Holly Stores"; (2) the "licensing arrangement existing between K-Mart and Holly Stores, Inc., is of the same type as was present in those cases"; and, (3) the day-to-day "practice" of K-Mart and Holly with respect to Holly's employees is "in all material respects . . . comparable to the arrangements and the practices described in the record of those cases . . ." The parties also agreed that Holly Stores, Inc., is a subsidiary of S. S. Kresge Company, but that Holly is a separate corporate entity, and that K-Mart is a division of S. S. Kresge Company and not a separate corporation.

Based upon the foregoing and the entire record in this case, we find that K-Mart is a joint employer of Holly's employees at the San Fernando store, and that Holly's employees are included in the unit heretofore found appropriate in our Decision and Direction of Election of June 13, 1966, as amended by our Order of June 22, 1966.

DIRECTION

It is hereby directed that the Regional Director for Region 31 open and count the ballots impounded pursuant to our Order of July 7, 1966, and in accordance with our Decision and Direction of Election of June 13, 1966, as amended, by our Order

² On July 7, 1966, the Board issued a telegraphic order directing the Regional Director (1) to proceed with the election pursuant to the Board's Decision and Direction of Election of June 13, as amended on June 22, 1966, (2) to permit the employees in the department operated by Holly Stores, Inc., to vote subject to challenge, and (3) to impound all ballots cast in the election.

³ In this Order the Board also stated that in deciding that a further hearing was warranted "in the special circumstances of this case" it was not holding that an employer who becomes a

licensee subsequent to a Board hearing has, as was contended by Holly, a "right" to a hearing as a "matter of law."

⁴ After the hearing and pursuant to the Board's Order of November 10, 1966, the case was transferred to the Board for decision.

⁵ The Board's Decision and Direction of Election of June 13, 1966, in the instant proceeding was based, in part, upon evidence adduced at the hearing in Cases 21-RC-9128, 9130, and 9309. See *K-Mart, A Division of S. S. Kresge Company*, 159 NLRB 256, fn 3

of June 22, 1966, and by this Supplemental Decision and Direction, and that he proceed further in accordance with the National Labor Relations Board Rules and Regulations and Statements of Procedure, Series 8, as amended.

Beacon Photo Service, Inc., Employer-Petitioner and Blueprint, Photostat & Photo Employees Union, Local 249, International Jewelry Workers Union, AFL-CIO. Case 29-RM-107.

March 30, 1967

DECISION AND DIRECTION OF ELECTION

BY CHAIRMAN McCULLOCH AND MEMBERS BROWN AND JENKINS

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before Hearing Officer Richard J. Weisberg. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Pursuant to the provisions of Section 3(b) of the Act, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

Upon the entire record in this case, including the briefs filed by the Employer-Petitioner and the Union, the Board finds:

1. The Employer is engaged in commerce within the meaning of the Act.

2. The labor organization involved claims to represent certain employees of the Employer.

3. The Union contends that the Board should defer to the arbitration procedure of the collective-bargaining contract to which the Employer and the Union are parties and dismiss the petition.

The Employer is engaged in the business of developing and processing photographic film for the general public. For many years, it has been a member of an employer association which has bargained with the Union on a multiemployer basis. The collective-bargaining contract presently in effect provides:

Article I, Section 1:

The Association recognizes that the Union represents a majority of all the employees employed by the Employer members of the Association, individually and collectively. The Association on behalf of itself and all of its members hereby recognizes the Union as the

sole collective-bargaining agent for all employees of the Employers who are members of the Association.

Article II, Section 1 G:

The term "plant" or "shop" as used herein means each separate photo finishing plant or plant doing work connected with photo finishing, maintained by an Employer in New York Metropolitan Area, and this collective agreement shall apply to such "plants" or "shops".

Article VII, Section 3:

Any disputes, differences or grievances which may arise concerning the terms of this agreement or the performance of the terms of this agreement or any other disputes, differences or grievances connected with this agreement, shall be settled by arbitration which said arbitration must commence within five days after written demand therefor.

Until the summer of 1965, the Employer had only one plant which was located in Brooklyn, New York. In July 1965, it opened a second plant in Rockville Centre, Long Island, New York, about 25 miles from the Brooklyn plant. In May 1966 the Union requested the Employer to recognize it as the bargaining representative of the Rockville Centre plant employees, asserting that recognition was required by the terms of the existing collective-bargaining contract. The Employer refused the request upon the ground that the Union did not represent a majority of employees at the Rockville Centre plant. Thereafter, the Union initiated proceedings to compel arbitration of a grievance based on the Employer's refusal to grant the recognition requested, and the Employer filed the present petition.

There are two issues presented by this case: (1) whether the multiemployer collective-bargaining contract relied upon by the Union was intended to cover the subsequently established Rockville Centre plant; and (2) whether, assuming the first question is answered in the affirmative, the contracting parties could so extend the contract to the Rockville Centre plant without the consent of the latter's employees. The first question can be answered by an arbitrator, but the second question is only for the Board. Even if an arbitrator should decide that the existing contract was intended to cover employees to be hired after the execution of the contract at new facilities of the Employer, the Board will nevertheless refuse to find the contract a bar to a petition seeking to resolve a question of representation at the new facilities unless these are an accretion to the contract unit.¹

¹ *Pullman Industries, Inc.*, 159 NLRB 580