Delto Company, Ltd. d/b/a Cabrillo Lanes *and* Earl A. Cummings, Petitioner, and Service Employees' Union, Local 77, Service Employees International Union, AFL–CIO. Case 20–RD–806

April 5, 1973

DECISION AND DIRECTION OF ELECTION

BY MEMBERS FANNING, KENNEDY, AND PENELLO

Upon a petition duly filed on August 21, 1972, and a first amended petition filed on August 30, 1972, a hearing was held on October 27, 1972, before Hearing Officer Jonathan J. Seagle. On November 3, 1972, the Acting Regional Director issued a Decision and Order in this case dismissing the petition.

Thereafter on November 10, 1972, the Employer filed a Motion for Reconsideration of the Acting Regional Director's Decision. The Union filed an opposition to the Employer's motion on November 15, 1972. Thereafter, on November 24, 1972, the Acting Regional Director issued an Order reopening the record for a further hearing for the reasons noted below.

Pursuant to the Acting Regional Director's order, a supplemental hearing was held on December 20, 1972, before Hearing Officer Seagle. Thereafter, following the hearing and pursuant to Section 102.67 of the National Labor Relations Board Rules and Regulations and Statements of Procedure, Series 8, as amended, this case was transferred to the Board for decision by the Regional Director for Region 20. None of the parties filed a brief or any other papers with the Board subsequent to this transfer.

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 hearings and finds they are free from prejudicial error. They are hereby affirmed.

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

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.

2. The Petitioner asserts that the Union, which is the currently recognized bargaining representative of the employees involved herein, is no longer the representative as defined in Section 9(a) of the Act

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

The Union has been the collective-bargaining representative of the employees in the unit here in question since at least 1965. George Tosello, who is general partner in the Employer, testified that when he took over the business in October 1966 there was then in effect a contract with the Union covering a time span of September 1, 1965, to September 1, 1968. Tosello undertook that contract until its expiration on September 1, 1968.

At the first hearing, the Union introduced into evidence a contract signed by Tosello for the Employer and Julian Gutierrez as secretary of the Union for the Union. This contract was for a term from September 1, 1968, to September 1, 1971, and provided for automatic renewal thereafter. It was on the basis of this contract, the only one submitted at the first hearing, that the Acting Regional Director originally dismissed the petition.[1] He noted that it was undisputed that neither party had given timely notice to modify, amend, or terminate the agreement and thus found that the agreement, by its terms, automatically renewed itself for a year so that the petitions of August 21 and 30, 1972, were untimely filed.

Subsequently, however, the Employer filed a motion with the Acting Regional Director based on the Employer's alleged discovery of a different contract between the Employer and the Union with the same September 1, 1968,—September 1, 1971, term but not providing for automatic renewal. If this contract, which also bears the signatures of Tosello and Gutierrez, were controlling, the petitions would be timely filed.

It was to resolve the question of which contract is to control that the Acting Regional Director ordered the record be reopened and that a further hearing be held for the purpose of adducing evidence concerning the execution and application of any collective-bargaining agreements between the Employer and the Union. At the second hearing, the Union maintained that the contract introduced at the first hearing should control while the Employer argued that the one found after the initial hearing should control. The Petitioner took no position on the issue.[2]

[1] The Employer, at the first hearing, contended that the contract had expired on September 1, 1971

[2] At the outset of the second hearing, the Union made a motion to close the record and the hearing since it argued that the evidence the Employer introduced in his Motion for Reconsideration was evidence that was available to him at the time of the original hearing and that such evidence should have been introduced then The Regional Director has full authority to grant motions for reconsideration in representation cases and he has the same authority as the Board to reconsider his decisions in such cases *Pentagon Plaza Inc*, 143 NLRB 1280, 1281, fn 3 In the circumstances of this case, we do not think the Acting Regional Director abused his authority in reopening the record and the Union's motion is therefore denied

At the second hearing, Tosello testified that in 1968 he and Robert Reeves, then business agent of the Union, had discussions concerning the terms of a new contract on two occasions but Tosello could not recall the substance of these conversations. Tosello did enter into evidence, however, a note dated October 23, 1968, addressed to him and allegedly written by Reeves, which stated that Reeves was leaving with Tosello a copy of the Union's agreement with another bowling proprietor as a model for him to consider. Reeves' note stated that the model "provides essentially the same economic package *as the one I gave you last week.* Advise me next week of your choice; either one is OK with us." (Emphasis supplied.) Tosello testified that Reeves returned on October 29, 1968, and at that time, in his presence, Tosello signed the contract he claims is not a bar.[3] He testified that Gutierrez' signature was already on that contract when he signed and he acknowledges that he himself dated the contract "October 29, 1968." He thereafter kept the contract he had signed.[4]

The Union's president also testified at the hearing. He contended that the only applicable contract that the Union had in its file was that introduced by the Union at the first hearing, i.e., the contract with the automatic renewal provision. This contract is dated October 2, 1968.[5] The Union introduced at the second hearing a copy of an unsigned memo addressed to Tosello by Gutierrez and dated November 15, 1968, in which the Union stated it was enclosing two contracts and asking the Employer to sign and forward one back to the Union. The date of the memo is 17 days later than the date on which Tosello testified he signed the contract he claims is not a bar.[6]

Tosello does not dispute the authenticity of his signature on the contract the Union presented, but he does not specifically recall any of the circumstances surrounding its execution or when he signed it.[7] For its part, the Union also does not dispute the authenticity of the signature of the Union's agent, Gutierrez, on both contracts.[8]

The two contracts in issue contain virtually the same provisions on wage rates and the costs of fringe benefits. The contracts do differ with respect to the referral of employees by the Union and various other matters. In an attempt to correlate the parties' actions during the interval 1968–71 to the particular provisions of the contracts in order to determine which contract controlled, the Hearing Officer asked Tosello certain questions as to his operations during that time period. Such inquiry we think proved inconclusive.[9]

At the first hearing, Tosello testified that subsequent to September 1, 1971, he informed the Union that he thought the contract had expired but he also stated that the Union's representatives told him they thought the contract was still in effect since "they said that there was a clause in the contract that they interpreted in some way as continuing it." After September 1, 1971, Tosello raised the wages of his employees but he continued to make contributions to the Union's health and welfare fund.[10]

We are asked in this case to determine which of the two contracts in evidence is controlling and thus whether there is or is not a contract bar to the instant petition. In the circumstances of this case, on the evidence presented, we can not determine which contract is controlling. Rather we find no bar to the petition filed.

Whenever a representation petition is filed for an election among a group of employees who are presently represented by a bargaining representative, the Board must make a decision as to what interest is paramount in that case. Thus, the Board must weigh and resolve the conflicting interests of maintaining stability in an existing bargaining relationship, as represented by the existing contract, and of protecting the freedom of employees to change their representatives.

Here, however, we are faced with a situation where

[3] The contract that Tosello claims is not a bar is *not* the model contract but the other he had been given previously The model contract contains an automatic renewal provision

[4] Reeves was not called as a witness at the hearing At that time, he was no longer employed by the Union

[5] It contains the same provisions as the model contract Reeves sent the Employer

[6] Tosello testified he had never seen such a memo There is no direct evidence that Tosello ever received this memo or the contracts allegedly contained with it

[7] He offered as an explanation his thought that at some date after he signed the contract he claims is controlling, the Union may have sent him another contract to sign and this is how his signature came to be on the contract the Union presented. He was certain that he signed no contract before he signed the one he claims is controlling Such a statement makes the contract dated October 29, 1968, the earlier signed contract *vis-a-vis* the Union-introduced contract dated October 2, 1968

[8] Gutierrez did not testify However, it is not clear from the record whether Gutierrez was still working for the Union at the time of the hearings Only the Petitioner, an employee of the Employer, was asked this question directly and he stated that Gutierrez was still in the Union's employ

[9] Thus the fact that in the 3-year period 1968–71, the Union referred no applicants for employment (as was its prerogative under the contract it states is controlling), is counterbalanced by the fact that there is no evidence that the Employer ever notified the Union of any job vacancy during the period (as was its duty under the contract it claims is controlling). There was also evidence introduced that subsequent to September 1, 1971, the Union asked to negotiate a new contract with the Employer and held a meeting in the summer of 1972 with the employees to explore their interests in such a project But it is also undenied that subsequent to September 1971, the Union maintained to both the Employer and the employees that it thought there was still a contract in effect

[10] Tosello noted on each form that he sent in that he thought the contract had expired but that he was continuing payment until the matter was resolved Two such forms dated March 1 and July 1, 1972, were sent to the Building Service Health & Welfare Trust The Union gets copies of the form at a later date

there are in evidence conflicting contracts, each purported to be the one the Employer and Union agreed upon in the course of their negotiations. Each contract is duly signed by an authorized representative of the Employer and the Union and is fully complete in itself but each contract has a different termination provision.

Such a difference in this term is crucial, however, since by it the Employer and Union have created a situation which precludes a clear determination by a potential petitioner of the proper time for filing a new petition. We do not think that such a situation stabilizes labor relations and we thus conclude that the conflicting contracts offered here create no bar to the instant petition. We shall therefore direct an election in the following unit.

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

> All janitors and watchmen, desk personnel, lanesmen, matrons and child care attendants, apprentices, mechanics and master mechanics, excluding all other employees, office clerical employees, guards and supervisors as defined in the Act.[11]

At the first hearing, the Union sought to have five persons excluded as part-time employees not eligible to vote. The Employer would have included all five in the unit.[12]

Betty McGowan is a nursery attendant who, at the time of the first hearing, had worked over 6 months for the Employer. She was working 3 days a week for 13 hours each week at the time of the first hearing.[13] We find that she should be included in the unit as a regular part-time employee.

Janis Kenner is a helper at the control desk. She had started working for the Employer about 1 1/2 weeks before the first hearing, and at that time the Employer was undecided on her complete schedule. However, she had worked approximately 20 hours a week for a total of 4 or 5 days a week and the Employer considered her a permanent employee. We find that she should be included in the unit as a regular part-time employee.

Revel L. Oaks is a porter-janitor. He is a student and is a replacement for the regular porter. Oaks had been working a little over 4 months for the Employer at the time of the first hearing. He worked the same shift every week, which was 2 days a week for 12 hours a week. He should be included in the unit as a regular part-time employee.

James Lawton works as part of the desk personnel, assigning bowling lanes and renting equipment. He has worked for the Employer for 4 years and usually works two shifts a week for a total of 16 hours though at times this is reduced to 13 hours. He should be included in the unit as a regular part-time employee.

Nancy Register had been working for Respondent for 2 weeks before the first hearing. She had been hired when the manager's wife became ill, but the Employer stated that he had decided to keep her on permanently. She had worked on the desk, renting lanes and shoes, and had worked a regular schedule of two shifts a week for a total of 16 hours a week before the hearing. She is included in the unit as a regular part-time employee.

[Direction of Election and *Excelsior* footnote omitted from publication.]

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[11] The Employer and the Union agreed to exclude from the unit Carey Tosello, the son of the general partner, George Tosello We agree with this stipulation

[12] After the Employer stated his initial position, he and the Union orally agreed to exclude three of the five employees from the unit The Hearing Officer noted their agreement but stated that he was not accepting it at that time but rather was referring it to the Regional Director for final decision Since we have determined that all five employees are regular part-time employees eligible to vote, to accept the agreement of the Employer and Union in these circumstances would contravene established Board policy towards regular part-time employees We therefore do not accept the agreement of the Employer and Union *Cf. Harvey Russell*, 145 NLRB 1486, 1488 (1964)

[13] She had been working 16 hours a week until shortly before that hearing