

**Air Lacarte, Florida, Inc., and District Lodge No. 145,
International Association of Machinists and Aero-
space Workers, AFL-CIO, Petitioner. Case 12-
RC-4159**

August 6, 1974

DECISION AND DIRECTION OF ELECTION

BY MEMBERS JENKINS, KENNEDY, AND PENELLO

Upon a petition duly filed on June 28, 1972, a hearing was held on July 25, 1972, before Hearing Officer Jack D. Livingston. On August 14, 1972, the Regional Director for Region 12 issued a Decision and Order in this case dismissing the petition.

Thereafter, on December 5, 1973, Petitioner filed with the Regional Director a "Petition for Revocation of Prior Decision and Order, Reinstatement of Petition and Other Relief." United Textile Workers of America, AFL-CIO (hereinafter called Intervenor), and the Employer filed no written opposition with the Regional Director. On January 25, 1974, The Regional Director issued an "Order Rescinding Previously Issued Decision and Order, Reinstating Petition, Reopening the Record and Scheduling Further Hearing"¹ for the reasons noted below.

Pursuant to the Regional Director's order, a supplemental hearing was held on February 5, February 20, March 13, and April 9, 1974, before Hearing Officer Leonard Bass. 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 12. Petitioner and Intervenor have filed briefs 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 Officers' 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 Although Intervenor did not file a written opposition to Petitioner's December 5, 1973, petition, it did file charges with the AFL-CIO alleging Petitioner had violated art. XX of the AFL-CIO constitution by seeking to organize employees who are covered by a contract. The Regional Director, in his January 25, 1974, order, noted the use of this internal dispute procedure, but ruled that the facts pertaining to the charges did not meet the factual prerequisites necessary for a deferral of action by the Board pending disposition of the art. XX charges. We agree that deferral is inappropriate here. In this connection we note that this action originated before the Board long before Intervenor invoked the AFL-CIO internal dispute procedure. Furthermore, issues have been raised regarding abuse of the Board's processes in which the Board has a direct interest.

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 and Intervenor² are both labor organizations³ claiming to represent certain employees of the Employer.

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 Employer is a Florida corporation primarily engaged in in-flight catering for scheduled airlines with its principal base of operations at Miami, Florida.

At the July 25, 1972, representation hearing, the Employer and Intervenor urged that Petitioner's June 28, 1972, petition be dismissed on the ground of contract bar, and in support of their position introduced into evidence a collective-bargaining agreement dated June 28, 1972, and purportedly signed on that date by Joseph Krause, International vice president of Intervenor; Richard Gasbarro, general manager of the Employer; and four employee-members of the negotiating committee. At the hearing, the Hearing Officer asked Krause, who was sitting at the counsel table and was not under oath at the time, if the contract had been signed on the day of June 28, to which Krause replied, "Yes, sir." Petitioner took a position at the hearing that no contract bar existed because the Employer knew prior to June 28 that a question of representation concerning Petitioner existed; it did not, at that time, argue that the contract was not signed on June 28, because it did not then have any basis for such a suspicion. In his Decision and Order following the hearing, the Regional Director found that the contract between the Employer and Intervenor was executed the same day that the petition was filed, and that, although Petitioner did attempt to contact officials of the Employer on or before June 28, it did not inform the Employer that it had filed a petition prior to the time the contract with Intervenor was signed. Consequently, the Regional Director dismissed the petition pursuant to the rule of *Deluxe Metal Furniture Company*⁴ that a petition is barred if filed on the same day that an immediately or retroactively effective contract is signed, and if the employer does not know that a petition has been filed.

On July 24, 1973, a Federal grand jury in and for the Southern District of Florida returned an indict-

² United Textile Workers of America, AFL-CIO, intervened based on a contract and a recognition agreement allegedly in effect between Intervenor and the Employer.

³ We find no merit in Intervenor's contention that Petitioner exists for the purpose of illegally obtaining money from an employer under the pretense of representing employees and therefore is not a labor organization within the meaning of the Act.

⁴ 121 NLRB 955 (1958).

ment which charged, *inter alia*, that Joseph Krause knowingly made a false, fictitious, and fraudulent statement and representation as to a material fact within the jurisdiction of the National Labor Relations Board by telling a Hearing Officer he had signed the contract on the 28th day of June when in fact he was not in the State of Florida on that day and did not arrive in Florida until June 29, 1972; and that this misstatement influenced the outcome of the hearing. A jury found Krause guilty of the above charge on October 20, 1973.

On December 5, 1973, Petitioner filed its "Petition for Revocation of Prior Decision and Order, Reinstatement of Petition and Other Relief," asserting that, based upon the above verdict, it had newly discovered evidence not previously available indicating that the contract was in fact signed subsequent to June 28, 1972, and therefore could not have constituted a contract bar to the 1972 petition. Upon consideration of this motion and upon taking administrative notice of the United States District Court proceeding, the Regional Director concluded that the motion had merit and therefore rescinded the August 14, 1972, Decision and Order, reinstated the dismissed petition, reopened the record, and scheduled further hearing.⁵

At the subsequent hearing, Petitioner introduced into evidence the transcript of the criminal proceeding as well as related exhibits.⁶ The testimony of

Krause therein, along with his weekly work report for the week ending July 1, 1972, submitted to his Union and his airline ticket to Florida, all indicate that he was in New York on June 28, and did not arrive in Miami for the purpose of negotiating with the Employer and signing a collective-bargaining agreement until June 29. Intervenor argues that the evidence offered to show that Krause signed the contract on June 29 does not justify the failure to apply the contract-bar rule, since Krause's testimony before the Board was not sworn and the contract, whose date was not disputed at the original hearing, speaks for itself by bearing the date June 28, 1972. Intervenor stresses the testimony at the criminal trial that Angel Colon, another signatory to the contract, had claimed the contract was signed on June 28. Petitioner, in turn, offers the court testimony of Sara Ledo, a former employee of the Employer who, with her husband, was a signatory to the contract as a member of the union negotiating committee.⁷ She had testified that, although she could not recall the date she signed the contract, she did remember that it was the first time she ever received overtime pay while working for the Employer. Her timecard and that of her husband indicate that they were credited with overtime hours on June 29 but not on June 28.

Intervenor alternatively contends that the instant petition is barred by the Employer's recognition of Intervenor as bargaining representative on June 26, 1972, 2 days before the petition was filed. Intervenor raised this point for the first time at the 1974 hearing, having offered no evidence of a recognition bar at the July 25, 1972, hearing. Several documents were introduced into evidence, one of which purportedly was a stipulation between the Employer and Intervenor appointing one Grace A. Mason as a neutral party to conduct a card check in order to determine if Intervenor had been designated as bargaining representative by the majority of the Employer's employees. This document, bearing the date June 26, 1972, and identifying the location of the signing as Dade County, Florida, contains, with others, the signature of Joseph Krause, yet the same work report for the week ending July 1, 1972, in evidence at the criminal trial and discussed above, indicates that on June 26, 1972, Krause was again not in Florida but instead had "met with the management of Fenkel and Local 402 committee on several grievances." Another document offered by Intervenor is signed by Grace A. Mason and states that, on June 26, 1972, a card check, indicating majority support for Intervenor, was held at the Employer's offices at which both sides were represented. The document lists as representatives of In-

⁵ We find no merit in Intervenor's contention that the Regional Director's order reinstating the petition and reopening the record was improperly issued. Also, we find no merit in Intervenor's contention that the petition for revocation should have been dismissed as to its argument that the motion, based upon newly discovered evidence, was not filed promptly on discovery of such evidence as required by Sec. 102.65(e)(2) of the Board's Rules and Regulations. Although Krause was found guilty by a jury on October 20, 1973, and Petitioner did not file its petition for revocation until December 5, 1973, the actual written verdict and sentence was not issued until December 27, 1973. As to its argument that the Regional Director's order has no support in the rules, the Regional Director has full authority to reconsider his decisions in representation cases based on an evaluation of new evidence. e.g., *Delto Company, Ltd. d/b/a Cabrillo Lanes*, 202 NLRB 921, fn. 2 (1973); *Pentagon Plaza, Inc. and its wholly owned subsidiaries Riverhouse West, Inc. and Riverhouse South, Inc.*, 143 NLRB 1280, 1281, fn. 3 (1963), and, under the circumstances of this case, he has not abused his authority.

⁶ Although the Board is not bound by either of the holding or findings of fact of the trial in the United States District Court for the District of South Florida, the Hearing Officer is authorized to admit into evidence the record of such proceedings if it contains relevant and competent evidence which is considered to be of probative value. Cf. *Nashville Corporation and Avco Manufacturing Corporation*, 94 NLRB 1567, 1568 (1951). Such a procedure has the support of Sec. 101.20(c) of the Board's Statements of Procedure which sets forth in pertinent part, "The hearing [in a representation case], which is nonadversary in character, is part of the investigation in which the primary interest of the Board's agents is to insure that the record contains as full a statement of the pertinent facts as may be necessary for determination of the case." Also see Sec. 102.64(a) of the Board's Rules and Regulations which provides, "It shall be the duty of the hearing officer to inquire fully into all matters in issue and necessary to obtain a full and complete record upon which the Board or regional director may discharge their duties under section 9(c) of the act." Furthermore, the rules of evidence prevailing in courts of law and equity are not controlling in such hearings. See Sec. 102.66 of the Rules and Regulations. We find that the court record is of probative value to the proceeding herein.

⁷ Although Petitioner attempted to locate Mrs. Ledo for the recent Board hearing, she was unavailable.

tervenor several employees and Joseph Krause. Mrs. Mason testified at the criminal trial that when she signed the above document she did not know what it meant but had signed it quickly without reading it or having it explained to her. Petitioner, to further support its position that the documents regarding recognition lack credibility, notes that the letter signed by the Employer's general manager, Richard Gasbarro, which formally recognized Intervenor as the collective-bargaining agent, is dated June 26, 1972, but was sent to Krause in New York. Petitioner argues that if Krause were in Miami on June 26 as the other documents indicate, then this letter need not have been sent to New York.

Assuming, *arguendo*, that the Employer did in fact recognize Intervenor on June 26, an important question arises as to whether the Employer knew of Petitioner's organizational efforts on that date, because if the Employer had such knowledge no recognition bar would exist.⁸ In support of its position that the Employer knew of its organizational campaign, Petitioner alleges that its grand lodge representative, George Brown, twice attempted to reach a representative of the Employer by telephone to demand recognition and left his name and number so that the Employer might return the calls, and that Petitioner's authorization cards indicate the existence of an active campaign during this time period. Also, the Employer was aware that shortly before the filing of the instant petition Petitioner had filed another petition with the Board for the same unit; it was dismissed because of infirmities in the authorization cards presented.⁹

We are asked in this case to determine whether there is a contract or recognition bar to the instant petition. In the circumstances of this case and upon consideration of all the evidence presented, we cannot

⁸ *Pineville Kraft Corporation*, 173 NLRB 863 (1968); cf. *Keller Plastics Eastern, Inc.*, 157 NLRB 583 (1966).

⁹ We find no merit in Intervenor's assertion that Petitioner's showing of interest is inadequate because the instant petition was filed only a few weeks after the Regional Director had dismissed an earlier petition due to evidence of supervisory taint in the authorization card solicitation process. The Regional Director, in entertaining the instant petition, apparently was satisfied that the taint had been dissipated, and we have no reason to believe otherwise.

determine whether a contract was in fact signed on June 28, 1972; nor can we determine whether on June 26, 1972, the Employer made a good-faith recognition of Intervenor at a time when it had no knowledge of Petitioner's organizational efforts. We recognize that a bargaining relationship between the Employer and Intervenor has existed since the summer of 1972, which an election at this time might upset. However, the Board must decide what interest is paramount in each case. It must weigh and resolve the conflicting interests of maintaining stability in an existing bargaining relationship, and of protecting the freedom of employees to choose their representatives.¹⁰ We do not believe that the serious doubts arising out of the events of June 1972, which hindered our efforts to determine the issues, create a situation which stabilizes labor relations, and thus we conclude that no bar to the instant petition can be found.¹¹ We shall therefore direct an election among the employees in the appropriate unit.

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

All production and maintenance employees of Employer employed at its plant located at 2411 Northwest 39th Avenue, Miami, Florida; including drivers, driver helpers, food handlers, food handler helpers, cooks, salad makers, porters, checkers, bakers, dishwashers, potwashers, setup, dishout, butcher helpers, warehousemen and warehouse helpers, sanitation and maintenance employees, including all regular part-time employees employed in the aforementioned categories; excluding all office clerical employees, guards, and supervisors as defined in the Act.

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

¹⁰ *Delto Company, Ltd d/b/a Cabrillo Lanes*, *supra*

¹¹ *Id.*