Albuquerque Insulation Contractor, Inc., Employer-Petitioner *and* Local 76, International Association of Heat and Frost Insulators and Asbestos Workers, AFL-CIO. Case 28-RM-393

May 18, 1981

DECISION ON REVIEW AND ORDER

On January 7, 1981, the Regional Director for Region 28 issued a Decision and Direction of Election in the above-captioned proceeding in which he granted the Employer's petition for a representation election in a unit consisting of the insulators and insulator helpers employed by it within the State of New Mexico, excluding office clerical employees, watchmen, guards and supervisors as defined in the National Labor Relations Act. In granting the petition, the Regional Director concluded that the Union had requested recognition as representative of the employees in the unit, and that therefore the Employer was entitled to an election under Section 9(c)(1)(B) of the Act. 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 contending that the Union had never requested recognition as the majority representative of the unit employees, and that therefore the granting of the election petition was contrar to the express language of Section 9. The Employer filed a memorandum in opposition.

On January 30, 1981, the National Labor Relations Board, by telegraphic order, granted the Union's request for review.[1]

The Board has considered the entire record in this case with respect to the issues under review, and makes the following findings and conclusions.

I. FINDINGS OF FACT

The Employer is engaged in the business of providing insulation contracting services in the building and construction industry at various jobsites in New Mexico. It employs at its Albuquerque, New Mexico, facility three employees[2] in the unit stipulated to be appropriate.

In March 1980,[3] Union Business Agent Wayne Lowe contacted George Gray, owner of the Employer, and asked him if he was going to sign a contract with the Union. Gray replied that he was "seriously thinking" about signing, and at another meeting a few days later (on or about April 1) Gray told Lowe and Union President Bobby Mitchell that he was interested in getting his three current insulators[4] into the Union, and in rejoining the Union himself. At no time during these discussions did the Union ever claim to represent a majority of the Employer's employees. The Employer then signed a collective-bargaining agreement that expired, by its terms, at 7 a.m., April 1, 1980. There is no evidence that the terms of that expired agreement were ever applied to the Employer or its employees. Gray did not rejoin the Union.

The Union and the Employer had no further communications concerning collective bargaining until July 16, when the Union contacted the Employer and proposed that it sign the recently negotiated agreement between the Union and the local chapter of the Western Insulation Contractors Association, and further requested individual negotiations with the Employer. The Employer turned down the proposal and the request. Sometime in October the Union again requested the Employer to sign the new agreement, and the Employer declined. (At that time Union Business Agent Lowe indicated that the Union might picket).

On or about October 24, the Employer received notification from the owner of a jobsite on which the Employer was working that the Union intended to engage in informational picketing of the Employer. The Employer filed the instant petition for an election on October 27. On or about November 1, the Union informed the Employer that it would not engage in any picketing of the Employer, on the ground, *inter alia*, that the reserve gate provided by the owner of the jobsite "would make it nearly impossible to communicate to the public that [the Employer] does not employ members of, or have a contract with," the Union.

II. DISCUSSION

We find from the foregoing that the Union's request that the Employer sign what was undisputably on its face an agreement permitted by Section 8(f) of the Act did not constitute a request for recognition as the majority representative of the unit employees as provided in Section 9, and that therefore the Employer's petition for an election should be dismissed.

The Regional Director's contrary conclusion was based upon his view that Section 9(c)(1)(B) does not require that the union claim to represent a majority of the employer's employees before the employer can assert that the union's demand for recognition raises a question concerning representation which may lead to a Board-conducted certification

[1] The Union's request for oral argument is denied, as the record, including the request for review and the briefs of the Union and the Employer, adequately presents the issues and the positions of the parties.

[2] Insulators Donald Duran and Henry George Jimenez and insulator helper Joseph Montoya.

[3] All dates herein are in 1980.

[4] Duran, Jimenez, and J. D. Haaland.

election. Rather, he found that any claim to represent employees may trigger such a representation election. For the reasons discussed below, we hold that Section 9(c)(1)(B) of the Act permits representation elections on the petition of an employer *only* when that employer has been presented with a claim of *majority* status by "one or more individuals or labor organizations."

The starting point is the language of the Act. Section 9(c)(1) provides that, in appropriate circumstances, the Board "shall direct an election by secret ballot and shall certify the results thereof" where, *inter alia*, an election petition is filed "(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a)." Section 9(a), in turn, states that "[r]epresentatives designated or selected for the purpose of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining . . . ." Thus, absent a claim by someone for recognition as the majority-supported representative of the employees, an employer is not entitled to an election under Section 9(c)(1)(B) of the Act.

Of course, at the time Section 9(c)(1)(B) was added to the Act in 1947, there was no provision for lawful recognition of a union as representative of employees absent majority status. And there was no perceived need to adapt recognitional procedures to the special problems of the construction industry, because the Board did not assert jurisdiction over that industry until after the passage of the 1947 amendments. See *N.L.R.B.* v. *Local Union No. 103, International Association of Bridge, Structural & Ornamental Iron Workers, AFL–CIO* [*Higdon Contracting Co.*], 434 U.S. 335, 348 (1978). Consequently, Congress did not address the question of whether a request for recognition without a claim of majority status could trigger an employer-initiated election, since all requests for recognition were, *a fortiori*, claims of majority status. But, following assertion of juridiction over the construction industry, the prevalence and usefulness of prehire agreements in the construction industry became apparent and led to the addition of Section 8(f) to the Act in 1959.

Section 8(f) carved out an exception to the general rule requiring majority status as a prerequisite to recognition. Specifically, Section 8(f) provides that:

> It shall not be an unfair labor practice . . . for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members . . . because (1) the majority status of such labor organization has not been established under the provisions of section 9 of this Act prior to the making of such agreement . . . *Provided further*, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 9(c) or 9(e).

Thus, Section 8(f) makes it lawful for construction unions to request and obtain recognition without first establishing majority status. This "extra-Section 9" recognition, while limited to voluntary arrangements and terminable at will by the employer, is by its very nature, then, not based upon a claim of current majority status. Consequently, a union receiving such recognition is not a "representative as defined in Section 9(a)," unless it later achieves majority status. Since a request for recognition under Section 8(f) is not, *per se*, a request to be recognized as a "representative as defined in Section 9(a)," Section 9(c)(1)(B) does not, according to the plain language of the Act, apply to such requests. The legislative history of the 1959 amendments, of which Section 8(f) was a part, gives no indication that Section 8(f) in any way altered the operation of Section 9. Not only was Section 9 not amended to provide for elections where the recognitional request was not based upon a claim of majority status, but nothing in the history of those amendments displayed any congressional intention that the Board should hold elections based on "Section 8(f)" requests. Absent such amendment or indication of legislative intent otherwise, we are compelled to follow the terms of the Act as written. Indeed, as we explain below, this literal reading of Sections 8(f) and 9 comports with the purposes of both sections and of the Act as a whole.

The Employer here contends that it would be entitled to an election *after* signing a prehire agreement, and that therefore it is only reasonable that it should be entitled to such an election prio to signing an agreement. This contention, however, misreads the Act and erroneously assumes that an election must be held on a petition of an employer who is signatory to a Section 8(f) agreement. Rather, the mechanism is as follows: If such an employer wishes to withdraw from the prehire agreement, he may petition for an election. If the union claims majority status (or at least does not disclaim

such status), an election will be directed.[5] If, on the other hand, the union disclaims majority status—and the union had not asserted to the employer that it possessed majority support—then the election petition will be dismissed. However, if the employer then disavows the prehire agreement, the union's disclaimer of majority status will insulate the employer from a charge that it violated Section 8(a)(5). Thus, the employer may use Section 9(c)(1)(B) to compel the union to "fish or cut bait" with respect to whether it has converted its status to that of a Section 9(a) representative.

Similarly, an employer faced with a Section 8(f) recognitional request may also seek an election as a means of determining its employees' and the Union's intentions. But if the union has never requested recognition as majority representative, and maintains that position when presented with the election petition, then the petition must be dismissed. Thus, an employer is not always entitled to an election in Section 8(f) situations; rather it is entitled to force the union to say yea or nay with respect to whether it claims to be the majority representative of the unit employees.

There is good reason for this result. The Section 9(c)(1)(B) requirement that an employer may secure an election *only if* a claim is made by a party that it is the majority representative of the employees was placed in the statute to prevent an employer from precipitating a premature vote before a union has the opportunity to organize. See S. Rept. 80-105 on S. 1126, 80th Cong., 1st Sess. 11 (1947); *Legislative History of the Labor Management Relations Act, 1947*, 417 (G.P.O. 1974). Thus, the Act contemplates that a union which is not presently majority representative may decide when or whether to test its strength in an election by its decision as to when or whether to request recognition or itself petition for an election. This is important because, under Section 9(c)(3) and Section 8(b)(7)(B), a Board-conducted election has the effect of barring any further election or recognitional picketing for a full year. Until the union makes such a move, it is free to organize without the imposition of an election and, in accordance with Section 8(b)(7)(C), it may engage in recognitional picketing for a reasonable period of time not to exceed 30 days prior to filing for an election; an employer confronted with such picketing may petition for an election to force the issue. Thus, once the union seeks recognition as majority representative, the election process—with its potential risks and rewards—may be invoked by either side. But, until that time, an employer may not attempt to short-circuit the process or immunize itself from recognitional picketing by obtaining a premature election. The mere request for Section 8(f) recognition—which the employer is perfectly free to refuse—cannot enable an employer to curtail statutorily guaranteed organizational rights. An employer may not insulate itself from the impact of congressionally permitted organizational tactics simply because a union has requested it to enter into a lawful prehire agreement that does not presuppose union majority status.

Here, the Union did not request recognition as the majority representative of the unit employees. Nor did the Union's statements or conduct following the Employer's last refusal to sign an agreement establish that its Section 8(f) recognitional request was "tantamount" to a claim of majority status. Compare *Robert Tires*, 212 NLRB 405 (1974). Rather, the mere comment by Lowe that the Union might picket, and the subsequent communication to the Employer by the owner of a jobsite that the Union had informed the owner of its intention to engage in informational picketing, did no more than indicate that the Union intended to engage in protected activity. Whether such activity, once embarked upon, would have established a request for recognition as majority representative is pure speculation, particularly in light of the fact that the Union subsequently informed the jobsite owner and the Employer that it was not going to engage in any picketing. Cf. *John's Valley Foods*, 237 NLRB 425 (1978).[6]

Since the Union never requested, directly or indirectly, recognition as the representative of the majority of the Employer's unit employees, we find that no question concerning representation under Section 9 currently exists.

Accordingly, we shall dismiss the petition.

ORDER

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

[5] While implementation of a valid union-security clause *may* legally convert the Union's status to that of a Sec. 9(a) representative and enable the Union to block an election through the Board's "contract bar" rules, this is not germane to the issues before the Board in this case. See *General Cable Corporation*, 139 NLRB 1123 (1962); *General Extrusion Company, Inc., General Bronze Alwintite Products Corp.*, 121 NLRB 1165 (1958).

[6] The Regional Director's reliance on the Employer's charge in Case 28-CP-201 that the Union's intention to picket violated Sec. 8(b)(7)(C) is misplaced, particularly inasmuch as that charge was subsequently withdrawn, following the General Counsel's announced determination to dismiss absent such withdrawal.

The fact that the Employer had a relatively stable work force in the unit through this period does not affect the outcome. Sec. 8(f) makes no distinction between employers with stable and unstable work forces. Moreover, it would make little sense to require a union to run the risk of triggering a premature election because it might turn out that the work force was no expected to grow. As noted above, the employer has the option of refusing to sign a Sec. 8(f) agreement.