Arden Electric, et al. *and* Local 340, International Brotherhood of Electrical Workers affiliated with International Brotherhood of Electrical Workers, Petitioner. Cases 20-RC-15401 through 20-RC-15417

August 12, 1982

ORDER

On May 14, 1982, Sacramento Valley Chapter, National Electrical Contractors Association, and certain other Employers[1] filed with the Board a motion for reconsideration of its decision directing that the petitions filed in the instant case be reinstated and that the cases be remanded to the Regional Director for a hearing.

After careful consideration, the Board has determined that the motion should be granted in part.[2] Thus, the previous ruling is hereby amended to direct a hearing limited to the issue of the continuing existence or viability of the multiemployer unit which the Regional Director has administratively found to constitute a bar to the petitions. The Board desires that at this time the parties be afforded an opportunity to adduce evidence bearing solely on the aforementioned issue.[3] This evidence shall include, but not necessarily be limited to:

1. The extent of the authority of Sacramento Valley Chapter, National Electrical Contractors Association, as demonstrated by letters of assent, by-laws, or any other evidence, to bargain with unions other than Local 340, International Brotherhood of Electrical Workers, for electrical contracting work;

2. The degree to which specific named Employer-members of the Association did or did not attempt to withdraw from the Sacramento Valley Chapter, National Electrical Contractors Association and the number of Employers and employees involved; and

3. The manner (e.g., how, when, etc.) in which these Employers sought to or did withdraw.

Contrary to our dissenting colleagues, we feel that the action taken in this case is entirely appropriate and clearly warranted by the present state of the record. Facts crucial to a determination on the appropriateness of the individual petitions before us are not clear, and must be resolved before any authoritative assessment can be made. Unlike the dissent, we find it unwise to assume that Employer-members have consented to a multiemployer bargaining relationship with any union other than IBEW, and that the present petitions are thus barred. We find it even less wise to treat this question as immaterial. As the Board and one of our dissenting colleagues have recognized "[t]he Board does not find a multiemployer unit appropriate except where all parties clearly agree to such a unit or where there has been a history of bargaining on a multiemployer basis *and the employers* and either the incumbent or a rival union desire to continue bargaining on such a basis. In the absence of either of these two factors, the Board will not find appropriate a unit covering employees of more than one employer, regardless of the desirability of such a unit." *The Evening News Association*, 154 NLRB 1494, 1496 (1965) (emphasis supplied).

Thus, we take the most appropriate measure now available to answer the question before us and direct this preliminary hearing.

IT IS HEREBY ORDERED that this proceeding be remanded for the purpose of taking evidence on the sole issue set forth above, and that after the taking of such evidence, the above-entitled matter be transferred to and continued before the Board in Washington, D.C.

IT IS HEREBY ORDERED that, upon service of the order transferring this matter, the parties may file briefs with the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, in accordance with Section 102.67(i) of the National Labor Relations Board Rules and Regulations, Series 8, as amended.

MEMBERS JENKINS and HUNTER, dissenting:

Thirty years ago, the Board recognized the impropriety of allowing an incumbent union, after having bargained for many years on a multiemployer basis, to disrupt the multiemployer unit by petitioning for a unit of the employees of one of the employers in the existing unit. *The Stouffer Corp.*, 101 NLRB 1331 (1952). Since then, the rule barring such a petition has evolved into one regulating the time and manner of attempts by unions and employers alike to withdraw from multiemployer units. *The Evening News Association*, 154 NLRB 1494, 1496 (1964), enfd. 372 F.2d 569 (6th Cir. 1967). But it has remained the Board's position that a union may not, by the device of disclaiming an interest in representing certain employees, accomplish an untimely withdrawal from the multiemployer unit. *William Moses, Rose Moses and Eugene Moses, Individually and as Trustees for the Estate of Bella Moses*, 247 NLRB 144 (1980). In *Moses*, the incumbent union attempted to withdraw partially from the multiemployer unit by disclaiming an interest in representing the employees of one

[1] AD-1345 (May 5, 1982).

[2] The Employer's request for *en banc* consideration is also granted. In all other respects the motion is hereby denied.

[3] See, e.g., *The President and Fellows of Harvard College*, 229 NLRB 586 (1977).

employer. In the instant case, the Petitioner has attempted to disrupt the existing multiemployer unit by purporting to disclaim an interest in representing any employees in the unit, and then, almost immediately, filing petitions for single-employer units of employees of 17 of the employers in the unit. The Board cannot, consistent with the line of cases outlined above, permit the Petitioner to succeed in this blatant attempt to whipsaw the unit. As the Petitioner's attempted withdrawal was untimely for the purposes of fragmenting the unit, we would affirm the Regional Director's administrative dismissal of the petitions.

The majority would remand the case for a hearing on the issue of the authority of the employer association representing the unit employers to bargain with unions other than the Petitioner and on the attempts of employers to withdraw from the unit. We find such a remand to be unnecessary. The association's authority to bargain with another union is irrelevant to the issue before us—the appropriateness of the petitioned-for units. Although, in response to the Petitioner's "disclaimer," the association has purported to recognize another union, it has taken no action inconsistent with the continued existence of the multiemployer unit. Whether the Petitioner or the new union is the lawfully recognized representative of the employees in the multiemployer unit is a question for another day.[4] Sufficient to say, there is a union willing to represent them on a multiemployer basis. See *The Evening News Association, Incorporated, supra.*

Nor has a material issue of fact been raised as to the effective withdrawal of a sufficient number of employers from the unit to fragment and thereby destroy the integrity of the unit. The association, which has the right to prevent untimely withdrawals by its employer-members even if the union consents, has not consented to any such withdrawals. *Teamsters Union Local No. 378, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Capitol Chevrolet Co.)*, 243 NLRB 1086, 1089, fn. 1 (1979). Moreover, no evidence has been proffered to us that a substantial number of employers in the multiemployer unit, including any who are named in the instant petitions, took timely steps to withdraw. As to any employers who may have attempted to withdraw after the Petitioner's "disclaimer," the question of whether the "disclaimer" was such an unusual circumstance as would permit them to do so when, as here, withdrawal would otherwise have been untimely, is not before us. We do not burden representation cases with unnecessary unfair labor practice issues. Whether or not any employers would have been justified in withdrawing in response to the Petitioner's actions, simple justice forbids that if the Petitioner succeeded through impermissible means in fragmenting the unit it should profit by its wrongdoing. Therefore, we conclude that for purposes of acting on the instant petitions the multiemployer unit should be deemed to exist as it did before the Petitioner's misleading "disclaimer," and that it is thus a viable unit that precludes a finding that the separate units sought are appropriate. If, given a ruling by the Board that the multiemployer unit still exists as before, any employers still wish to withdraw, the propriety of their doing so may be determined in an appropriate proceeding.

[4] If, ultimately, the Petitioner should be found to have lost its representative status, that will be a situation largely of its own making.