

Douglas-Randall, Inc., Employer and Catherine J. Morgan, Petitioner and Local 1766T, Amalgamated Clothing and Textile Workers Union, AFL-CIO, CLC, Union. Case 34-RD-197

December 22, 1995

DECISION ON REVIEW AND ORDER

BY CHAIRMAN GOULD AND MEMBERS
BROWNING, COHEN, AND TRUESDALE

Local 1766T of the Amalgamated Clothing and Textile Workers Union, AFL-CIO, CLC (the Union) is the exclusive representative of a unit of the production and maintenance bargaining unit workers at the Employer's facility in Pawcatuck, Connecticut. On May 12, 1994, the Petitioner filed a petition with the Board seeking to decertify the Union as the exclusive representative. Processing of the petition was held in abeyance (blocked) by a pending unfair labor practice proceeding, Case 34-CA-6571.

On September 15, 1994, the Acting Regional Director approved a settlement agreement entered into between the Employer and the Union, which remedied the allegations in the unfair labor practice charge and complaint that the Employer unlawfully refused to recognize and bargain with the Union. On the same day, the Acting Regional Director dismissed the petition on the grounds that the showing of interest was secured, and the petition was filed, at a time when the Employer had illegally withdrawn recognition from the Union, and therefore was tainted by the unfair labor practices of the Employer. On September 26, 1994, the Petitioner filed a request for review of the Acting Regional Director's dismissal of the petition. The Board¹ granted review on February 15, 1995, to consider the appropriateness of processing the petition under *Passavant Health Center*, 278 NLRB 483 (1986). Having carefully reviewed the entire record in this proceeding, including the Union's brief in support of the Acting Regional Director's Order,² we affirm the Acting Regional Director's dismissal of the petition and, in doing so, overrule *Passavant*.

I. FACTS

Although ownership of the Employer's facility has changed on several occasions over the years, since 1968 the Union has continuously been the certified exclusive collective-bargaining representative of the production and maintenance employees at the facility. In March 1994,³ the predecessor employer's general manager informed all employees that the company was being sold. On March 17, the general manager informed the Union that the employer was terminating

the collective-bargaining agreement and that the successor employer (the Employer here) was not going to recognize the Union. At this time, there were ongoing negotiations for a renewal of the then-existing collective-bargaining agreement, which was due to expire on April 30, 1994.

The Employer began operation of the facility on March 28. On March 30, the Union demanded that the Employer recognize it as the exclusive representative of the bargaining unit employees and negotiate a new labor agreement. On April 21, the Union filed charges in Case 34-CA-6571 alleging that the Employer had violated Section 8(a)(1), (3), and (5) of the Act by failing to recognize and bargain with the Union, discriminatorily laying off the Union's president, and directly dealing with bargaining unit employees.

On May 12, as noted above, the Petitioner filed the instant petition. On June 10, the parties executed a partial settlement agreement returning the local union president to work in exchange for the Union's agreement to request withdrawal of its 8(a)(3) and direct-dealing charges. On July 1, the Acting Regional Director approved the partial withdrawal request. Negotiations, which had resumed in June, continued; in July, the Employer agreed to recognize the Union as the unit employees' exclusive collective-bargaining representative. On July 29, a complaint issued in Case 34-CA-6571 alleging that the Employer unlawfully refused to recognize and bargain collectively in good faith with the Union. On August 3, the Union and the Employer reached agreement on a new 2-year collective-bargaining agreement.⁴

On September 15, the Acting Regional Director approved a settlement agreement entered into between the Union and the Employer resolving all remaining allegations of Case 34-CA-6571. The Employer agreed that it would not fail to recognize and bargain collectively in good faith with the Union as the exclusive collective-bargaining representative of the Employer's bargaining unit employees, and would not unilaterally change terms and conditions of employment. The settlement agreement did not contain a "non-admissions" clause. Also on September 15, as noted above, the Acting Regional Director dismissed the instant decertification petition as tainted by the Employer's serious unfair labor practices.

II. ANALYSIS

The issue in this case is the effect of a settlement agreement resolving 8(a)(5) and (1) charges upon the right of employees to proceed with a decertification petition that was filed prior to the settlement agreement but subsequent to the onset of the alleged unlawful

¹Chairman Gould and Members Stephens and Browning.

²Neither the Petitioner nor the Employer filed a brief on review.

³Unless otherwise noted, all dates are in 1994.

⁴The Union asserts that the contract was ratified on August 8. The Petitioner's request for review, dated September 26, asserts that ratification had not yet occurred.

conduct.⁵ Historically, the Board sustained dismissal of such a decertification petition when a settlement agreement contained a bargaining provision. Under the Board's then-settled policy, the employer and the union were entitled to a reasonable time within which to effectuate the provisions of the settlement agreement free from rival claims and petitions. The Board reasoned that unless the employer was obligated to honor the agreement, the agreement would not have achieved its purpose. *Poole Foundry & Machine Co.*, 95 NLRB 34, 36 (1951), *enfd.* 192 F.2d 740, 742-743 (4th Cir. 1951), *cert. denied* 342 U.S. 954 (1952).⁶

In enforcing the Board's Order in *Poole*, the Fourth Circuit explained that while different from a finding by the Board that an unfair labor practice has been committed, "a settlement agreement must . . . have definite legal effect and is quite different from a dismissal of the charges." 192 F.2d at 742. The court further stated that a "settlement agreement clearly manifests an administrative determination by the Board that some remedial action is necessary to safeguard the public interests intended to be protected by the National Labor Relations Act . . ." *Id.* at 743. The court reasoned that a settlement agreement represents an agreement by the employer to undertake promptly the remedial action set out in the agreement rather than to be put to the trouble and expense of litigation before a trial examiner (now administrative law judge), the Board, and possibly the courts. The court observed that settlement agreements are important in the effective administration of the Act, and are used as a satisfactory means of closing cases involving unfair labor practice charges. The court remarked that there would be few of these agreements if the employer, after a solemn promise to bargain with the union, could immediately escape this obligation by questioning whether the union actually represents a majority of the bargaining unit; in that event, an employer could commit an unfair labor practice by refusing to bargain collectively, sign a settlement undertaking to bargain, and then attempt to have a new union certified when dissatisfaction with the old union arose among the em-

ployees because of the unfair labor practice. The court asserted that this should neither be permitted nor encouraged. If a settlement agreement is to have real force, the court stated, a reasonable time must be afforded in which a status fixed by the agreement is to operate. Otherwise, the settlement agreement might have little practical effect as an amicable and judicious means to expeditious disposal of disputes arising under the terms of the Act.⁷

In *Dick Bros., Inc.*, 110 NLRB 451, 453 (1954), the Board applied this reasoning to a situation when, after the settlement agreement was signed, the parties executed a contract within a reasonable time. The Board found that the contract was in fulfillment of the very purposes of the settlement agreement. In these circumstances, the Board held that the settlement agreement, as well as the contract, precluded an election at that time and dismissed the decertification petition.

For many years after *Poole* and *Dick Bros.*, the Board applied these settled principles to give full effect to settlement agreements and any resultant collective-bargaining agreements. In the mid-1980's, however, the Board retreated from those principles and began giving less preclusive effect to settlement agreements. Thus, in *Passavant Health Center*, 278 NLRB 483 (1986), a Board majority extended the reasoning set forth in *City Markets*.⁸ In *Passavant*, the Board rein-

⁷As pointed out by our dissenting colleague, *Poole* involved a decertification petition filed after the execution of a settlement agreement but before the parties had completed a reasonable period of bargaining, unlike here, when the petition was filed prior to the settlement agreement. Nevertheless, the court in *Poole*, in deciding to dismiss the petition, had to wrestle with the same problem we face in the instant case, i.e., how to justify dismissing a decertification petition in the absence of any admission or finding that the employer had committed an unfair labor practice. Thus, contrary to our dissenting colleague, we find the Fourth Circuit's analysis of this problem equally applicable to the instant case.

⁸In *City Markets*, 273 NLRB 469 (1984), a decertification petition had been dismissed subject to reinstatement after blocking charges were resolved. Thereafter, the union and employer reached agreement on new collective-bargaining agreements, and the union unconditionally withdrew its unfair labor practice charges; no formal or informal settlement agreement was entered into. The Board held that a contract entered into during the hiatus in processing a blocked decertification petition will not bar an otherwise timely filed petition when the charges are withdrawn and the complaint dismissed. The original filing date, not the date of request for reinstatement, was found to be the operative date for purposes of applying the Board's contract bar rule. The Board reasoned that dismissal of the decertification petition when there are unremedied refusal to bargain charges is not a determination that the petition is defective, but rather that there is no point in processing the petition because disposition of the alleged violation of Sec. 8(a)(5) may lead to issuance of a bargaining order precluding an election. The Board concluded that because the unfair labor practice charges had been withdrawn and the complaint dismissed, and therefore the unfair labor practice proceedings for which the petition was dismissed would not take place, the considerations that compelled the Board to dismiss the petition in the first instance were no longer present. We do not pass on the Board's decision in *City Markets* or on the issue of the reinstatement of a decertification petition when bargaining and the withdrawal of

⁵We do not address cases when, conversely, a decertification petition is filed prior to the onset of the alleged employer misconduct. In such cases, there is no issue as to whether the employees' disaffection toward the union arose from the employer's conduct, although that conduct may have a tendency to interfere with employee free choice in an election. In such cases, the Board's normal policy is to hold the petition in abeyance pending the resolution of the unfair labor practice proceeding. See *United States Coal & Coke Co.*, 3 NLRB 398, 399 (1937); *Columbia Pictures Corp.*, 81 NLRB 1313, 1314 (1949); see also *Alexander Linn Hospital Assn.*, 288 NLRB 103 (1988).

⁶We recognize that, as the dissent discusses, *Poole Foundry* is distinguishable on the basis that the petition there was not filed until after the parties had entered into the settlement agreement. We nonetheless find, as discussed *infra*, that the broader principles of *Poole* regarding settlement agreements are applicable here.

stated a decertification petition in the context of a bilateral settlement agreement resolving allegations that the employer violated Section 8(a)(5) and (1). The Board majority held that a subsequent collective-bargaining agreement did not bar reinstatement of a decertification petition when the complaint was withdrawn and the terms of the settlement satisfied. The majority concluded that although *City Markets* did not involve a settlement agreement, that fact did not require a different result because the settlement agreement, which included a nonadmission clause, did not constitute an admission that the employer had committed an unfair labor practice.

In *Island Spring*, 278 NLRB 913 (1986), a Board majority held that it was appropriate to reinstate a decertification petition when the unfair labor practice allegations upon which the Regional Director based dismissal of the petition had been resolved pursuant to an informal settlement agreement, the employer had fully complied with the settlement agreement, and the unfair labor practice case was closed. The Board majority held that absence of a nonadmission clause did not warrant a contrary result from that reached in *Passavant*. The majority noted that, as in *Passavant*, the employer had neither admitted the charges nor been found in violation of the Act.

In *Nu-Aimco, Inc.*, 306 NLRB 978 (1992), the Board further extended *Passavant* and *Island Spring* to a situation involving a unilateral settlement agreement, when the union objected to the settlement and refused to join it because it did not require dismissal of the decertification petition. The Board noted the union's concerns, but pointed out that, inter alia, nothing in the Act or the Board's Regulations prohibited the Regional Director from including the decertification petitioner in the settlement discussions, and from taking the position in those discussions that he or she would only approve a settlement that precluded reinstatement of the decertification petition. Shortly thereafter, in *Jefferson Hotel*, 309 NLRB 705 (1992), the Board clarified *Nu-Aimco* to explain that it did not intend that the decertification petition could be dismissed absent consent of the decertification petitioner (or finding of a violation in a litigated case, or an admission by the employer). The Board explained that its aim was to include the petitioner in settlement discussions to allow for the possibility that he or she could agree to a settlement that provides for the dismissal of the petition as a condition of the settlement, but without that consent, the petitioner was not bound to a settlement by others that has the effect of waiving the petitioner's rights under the Act.

The Board's reasoning in *City Markets*, *Passavant*, *Nu-Aimco*, and similar cases is technically accurate in

the unfair labor practice charges occur in the absence of a settlement agreement.

sofar as it observes that settlement of an outstanding unfair labor practice allegation is not the same as an admission by a charged party, or adjudication by the Board, that an unfair labor practice has been committed.⁹ As *Poole* pointed out, however, a settlement also is not the same as a dismissal of that unfair labor practice allegation. In our view, *Passavant* and its progeny extended a logical premise too far. As the Fourth Circuit observed in *Poole*: "While not an admission of past liability, a settlement agreement does constitute a basis for future liability and the parties recognize a status thereby fixed." 192 F.2d at 743. To this extent, *Passavant* and its progeny lost sight of an important aspect of the *Poole* doctrine. Indeed, *Passavant* could lead to the very evil the Fourth Circuit predicted: it permits an employer to commit an unfair labor practice by refusing to bargain collectively with an incumbent union, sign a settlement agreement undertaking to bargain with that union, and then benefit from its unlawful conduct by having the union decertified or replaced because of dissatisfaction with the incumbent union arising from the unfair labor practice. See also *Dick Bros.*, 110 NLRB at 454 and fn. 4.

We recognize that there may be some tension between the employer's concern that it not be treated as if it had been found (or had admitted) to be a violator and the need to give effect to the settlement agreement's remedial provisions. Without giving normal remedial effect to the settlement agreement, however, the Board renders such agreements largely illusory.

Further, the *Passavant* policy unduly complicates the administration of the Act. The decertification petitioner, who is not a party to the unfair labor practice case, is brought into that conflict in an effort to resolve the status of the decertification petition as part of the settlement agreement. As the settlement agreement, however, usually contains an order that the employer recognize and bargain with the incumbent union, decertification petitioners are normally not willing to do this. In addition, reinstatement of the petition undermines the very agreement the parties have executed. A union or employer enters a settlement agreement with the implicit understanding that each party's promise will be fulfilled. Employers agree to settle in order to avoid costly litigation when the General Counsel has found probable merit to the charge or is considered likely to make that finding. When, pursuant to a settlement agreement, the charges are withdrawn and complaint dismissed, the employer has obtained fulfillment

⁹It is on this basis that our dissenting colleague would adhere to *Passavant* and its progeny and reinstate the petition because absent an admission or finding that the employer has committed an unfair labor practice, there is no basis for finding that the decertification petition is tainted. Although we agree that a settlement agreement is not an admission or finding of unlawful conduct, we find, for the reasons set forth here, that in order to give proper effect to such an agreement, the petition should be dismissed.

of the union's promise and has achieved its goal of avoiding litigation. Unions generally agree to settle unfair labor practice charges/complaints involving employers' refusal to recognize and bargain in order to obtain promptly the recognition and bargaining to which they claim they are entitled. But since the advent of the *Passavant* line of cases, the positions of the parties have been reversed. Unions are understandably reluctant to settle, while some employers are eager to settle because settlement clears the way for resumption of decertification efforts, despite any potential effects of the previously alleged employer unfair labor practices.

The Board and courts have concluded that, in order to have meaning, a settlement agreement in which the employer agrees to recognize and bargain with the union must permit bargaining to take place for a reasonable period of time without a challenge to the union's representative status. The logical extension of this protection for bargaining is that if a collective-bargaining agreement is reached, it should be given effect. This was the precise result in *Dick Bros.* As noted by Member Johansen in his dissent in *Passavant*, to reinstate the decertification petition would, for all practical purposes, deprive the union of that for which it settled, and relieve the employer of much of the substantive obligation to which it, in turn, agreed. As a result, the union would be less willing in the future to settle cases and more inclined to attempt to force every case to litigation in order to forestall reinstatement of a decertification petition that the union believes emanated from the employer's unfair labor practices. On the other hand, the employer has little to lose—it is relieved of the charges and complaints, and although it must bargain and may even reach agreement, it can hope that the attack on the union's representative status through a decertification petition (or a rival union's representation petition) will be successful.

Moreover, under the *Passavant* line of cases, the Board frequently has to engage in what would otherwise be unnecessary litigation before such cases can be resolved. There is little incentive for a union to agree to withdraw a charge absent an employer's agreement that the decertification petition will not be reinstated. Even if the union and employer agree, however, to preclude further processing of a decertification petition, the petitioner is not bound by the settlement agreement, absent the petitioner's consent to the dismissal or an admission of wrongdoing by the employer. *Jefferson Hotel*, supra. Recognizing the impact of the requirement of the petitioner's involvement, the General Counsel has given specific directions to the Regional Directors for handling unfair labor practice charges in such cases. (General Counsel Memorandum OM 92-78, dated December 30, 1992). Under the General Counsel's instructions to the Regions, absent either the

petitioner's consent to the dismissal of the petition or an admission by the employer that unfair labor practices were committed, the Regions must decide whether to litigate the unfair labor practice allegations (which, if the General Counsel prevails, will result in the decertification petition being dismissed), or to accept a settlement agreement (thus resulting, upon the employer's compliance with the agreement, in the processing of the petition). Practically, since *Passavant* and even more since *Jefferson Hotel*, if the petitioner does not agree to withdraw his or her petition, Regional Directors have been reluctant to approve proposed settlement agreements. As a result, parties and the Board have spent time and money on fruitless settlement negotiations, and then have been forced to expend additional scarce resources on litigation. The Board's policies are served far better by a practice that encourages the actual parties to an unfair labor practice proceeding to join in an amicable, judicious, and definitive resolution of the case.¹⁰

Further, reinstatement of decertification petitions under *Passavant* leads to anomalous results. Had the unfair labor practices not been settled but rather concluded by a finding by the Board that the unfair practices had been committed, the decertification petition would have been dismissed without the possibility of subsequent reinstatement. See *Alexander Linn Hospital Assn.*, 288 NLRB 103 (1988). As to both the employer and the union, the remedial obligations under a settlement agreement (to bargain in good faith and execute any resultant collective-bargaining agreement) are awkwardly juxtaposed with the circumstance that the decertification petition remains outstanding and another election will take place without regard to what may be accomplished through good-faith bargaining.

It is true, of course, that dismissal of the petition limits to some extent the petitioner's right to seek decertification of the union. That limitation, however, is justified by the unfair labor practice that the employer has allegedly committed, and by the remedial steps it has voluntarily undertaken. If the parties execute a collective-bargaining agreement, the petitioner will be barred from obtaining a decertification election for up to 3 years under the Board's contract bar rules. The petitioner's rights, however, may similarly be limited even if the parties go to trial. The petitioner is not a party to the unfair labor practice proceedings, but is nonetheless affected by what happens there. If a viola-

¹⁰ We note that, regardless of the nature of a settlement, direct involvement by the employer in a decertification effort may still result in dismissal of a petition on traditional tainted showing of interest grounds. *Canter's Fairfax Restaurant*, 309 NLRB 883 (1992). Also, decertification or other petitions filed during the compliance period of a settlement agreement, wherein the employer has agreed to bargain with the union, must be dismissed inasmuch as no question concerning representation can be raised during this period. *Freedom WLNE-TV, Inc.*, 295 NLRB 634 (1989).

tion is found, the decertification petition will be barred regardless of any position taken by the petitioner.

Based on all the above, in order to best effectuate the Act's goals of fostering stable labor relationships, promoting peaceful settlements, and encouraging collective bargaining, we have decided to overrule *Passavant* and its progeny, and to return to the Board's historical procedures for handling decertification petitions (or other petitions challenging unions' majority status) when the parties have resolved concurrent unfair labor practice allegations by entering into a settlement agreement. Thus, an employer's agreement to settle outstanding unfair labor practice charges and complaints by recognizing and bargaining with the union will require final dismissal, without provision for reinstatement, of a decertification petition or other petition challenging the union's majority status filed subsequent to the onset of the alleged unlawful conduct. When the parties reach a collective-bargaining agreement during bargaining pursuant to a settlement agreement, that contract will, of course, serve as a further bar to the petition under the Board's normal contract bar rules. Only when blocking charges have been unconditionally withdrawn without Board settlement, dismissed as lacking in merit, or litigated and found to be without merit, will a petition filed subsequent to the alleged conduct be subject to reinstatement.

We recognize the possibility that a union may raise dubious claims of employer violations in order to reach a settlement that includes a new collective-bargaining agreement, thereby avoiding a decertification proceeding and assuring the union continued representational rights without its having to prove its majority support. Simply filing an unfair labor practice charge, however, does not result in dismissal of a pending representation petition. When charges are unsupported, they will, as now, be dismissed and the petition will be processed promptly. In addition, of course, the charged employer must agree to any proposed settlement.

It may also be possible in some cases for an employer and charging party, in order to rid themselves of a petitioner (either decertification or a rival union) and maintain their current relationship, to act in concert against the decertification or other petitioner. If a Regional Director believes this to be the case, however, he or she may seek permission to conduct the election notwithstanding the existence of ostensibly meritorious charges; if the Regional Director will not pursue this course, the petitioner may appeal the Regional Director's dismissal of the petition to the Board. See, generally, Section 11730 et seq. of the Board's Casehandling Manual. Even a case that proceeds to litigation runs the risk of collusive conduct; a stranger union or decertification petitioner is not normally a party to a blocking unfair labor practice proceeding, and so, as previously noted, even when the matter is

litigated, a petitioner may be affected by a proceeding in which it has played no part.

For the foregoing reasons, we overrule *Passavant* and its progeny, including *Island Spring*, *Nu-Aimco*, and *Jefferson Hotel* and, accordingly, find that the petition here properly was dismissed.

ORDER

The Acting Regional Director's administrative dismissal of the instant petition is affirmed.

MEMBER COHEN, dissenting.

My colleagues have overruled extant precedent,¹ and they have dismissed an untainted decertification petition. I would adhere to that precedent, and I would process the petition. I therefore dissent.

The facts are straightforward. The Union charged, inter alia, that the Employer refused to recognize and bargain with it. A decertification petition was then filed. Subsequently, the parties reached agreement on a new contract, and the charge was resolved when the Acting Regional Director approved an informal bilateral settlement agreement between the Union and the Employer. The settlement agreement does not contain an admission by the Employer that it violated the Act. The Petitioner is not a party to the settlement agreement, and she has not agreed to withdraw her petition.

On these facts, there is no finding by the Board, and no admission by the Employer, that the Employer has engaged in any unlawful conduct. Therefore, there is no basis for finding that the decertification petition has been tainted by any unlawful conduct. Absent a finding of taint, there is no basis for dismissing the decertification petition. Furthermore, the Petitioner did not consent to waive her statutory right to have her petition processed under Section 9(c)(1) of the Act. I would accord her that statutory right.

My colleagues dismiss the petition and rely on *Poole*.² That case does not control here. In *Poole*, the Employer executed a settlement agreement to bargain. The Employer then withdrew recognition based on a decertification petition that was filed *after* the execution of the settlement. I agree that an employer, who signs a settlement and agrees to bargain, cannot then turn around and raise a question concerning representation and refuse to bargain, before the bargaining has had a reasonable chance to succeed. This principle, however, has nothing to do with the instant case, when the question concerning representation was raised *before* the settlement. The previously existing question concerning representation can be nullified only upon a

¹ See *Jefferson Hotel*, 309 NLRB 705 (1992), and *Nu-Aimco, Inc.*, 306 NLRB 978 (1992), reaffirming *Passavant Health Center*, 278 NLRB 483 (1986), and *Island Spring*, 278 NLRB 913 (1986).

² *Poole Foundry & Machine Co.*, 95 NLRB 34, 36 (1951), enf. 192 F.2d 741, 742-743 (4th Cir. 1951), cert. denied 342 U.S. 954 (1952).

showing that it has been tainted by unlawful conduct. A settlement agreement does not establish any such unlawful conduct. Accordingly, the question concerning representation remains extant, and the petition should be processed.

My colleagues assert that I am discouraging settlement and/or encouraging employers to commit unfair labor practices. I am doing neither. The Employer is still encouraged to settle, and thereby to avoid costly litigation. The Union is not deprived of its remedy.

The Employer will have to remedy its alleged violation, and the election will not be held until the remedy has been effectuated and the atmosphere cleansed. Finally, the decertification petitioner will retain her statutory right to have the petition processed.

In sum, absent the finding of a violation, an admission by the Employer, or the Petitioner's consent to withdrawal, there is no basis for dismissing the petition. Accordingly, I would reinstate the petition under prevailing Board law.