

Pierson Electric, Incorporated d/b/a Golden West Electric, Employer-Petitioner and Local Union No. 180, International Brotherhood of Electrical Workers, AFL-CIO. Case 20-RM-2715

July 24, 1992

DECISION ON REVIEW AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY, OVIATT, AND RAUDABAUGH

On July 20, 1989, the Acting Regional Director for Region 20, administratively dismissed the instant petition. The Acting Regional Director concluded that the Union was the 9(a) representative and that the collective-bargaining agreement between the Union and the construction industry Employer effective from June 1, 1987, through May 31, 1990, barred the petition.

Thereafter, in accordance with Section 102.67 of the Board's Rules Regulations, the Employer-Petitioner filed a timely request for review of the Acting Regional Director's dismissal of the petition, contending that the parties' collective-bargaining agreement was an 8(f) agreement which could not bar the instant petition. On January 9, 1990, a panel of the Board granted the Employer's request. On May 23, 1990, the Board issued a Supplemental Order Remanding, finding that the issue of 9(a) status could best be resolved after development of a full record including, inter alia, what evidence, if any supported the Union's claim, and the Employer's acknowledgement, of the Union's status of majority representative of the Employer's employees.¹

On August 10, 1990, an evidentiary hearing was conducted and thereafter, on August 17, the Regional Director issued an order transferring representation case to the Board. Both the Employer-Petitioner and the Union filed briefs with the Board in support of their positions after the evidentiary hearing.

The Board has considered the entire record in this case with respect to the issue on review and it has decided, for the reasons set forth below, to find that, because the Union and the Employer have a 9(a) relationship, the instant petition is barred by the parties' collective-bargaining agreement.

The Employer is a California corporation engaged in the business of electrical contracting, electrical retail sales, and operation of a lighting fixture showroom. The Employer's principal place of business is located in Suisun City, California. During the most recent fiscal year, a representative 12-month period, the Employer had gross revenues in excess of \$500,000 and purchased goods and services valued in excess of \$50,000 from directly outside the State of California. The parties stipulated, and we find, that the Employer is engaged in commerce within the meaning of the Act

¹ Member Devaney did not pass on the relevance of evidence supporting the Union's majority status.

and the Union is a labor organization within the meaning of the Act.

The issue in dispute involves whether the Union is the 9(a) representative of the employees of the Employer. The resolution turns on whether, as alleged by the Union, the Employer's actions in September 1988 constituted voluntary recognition of the Union as the 9(a) representative of its employees.

The Employer has been a member of the multiemployer National Electrical Contractors Association (NECA) since 1976. From that time until 1990, the Employer assigned its bargaining rights to NECA. In 1990, the Employer, while retaining its NECA membership, withdrew bargaining authority from the multiemployer group. The most recent NECA contract to which the Employer as signatory by virtue of its membership in the multiemployer group states that it was effective from June 1, 1987, to May 31, 1990.

It is undisputed that Keith Feigel, the Union's assistant business manager and president of the Local, went to the Employer in September 1988 with a voluntary recognition agreement and letter of assent, and that James Pierson, the Employer's owner and president, signed these documents.² Feigel additionally testified at hearing that he also presented authorization cards for two employees to Pierson, and that Pierson responded with "Yeah, these are the signatures of the guys." Feigel further testified that he explained the documents to Pierson, who then signed the letter of assent and voluntary recognition agreement and returned them to Feigel. Feigel explained at hearing that the Union's actions were prompted by circuit court affirmation of the Board's *Deklewa* decision, 282 NLRB 1375 (1987), enfd. sub nom. *Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1988), discussed infra, in which the Board relevantly held that the relationship between a union and a construction industry employer will be presumed to be governed by Section 8(f) unless the Union shows it is the 9(a) majority representative of the employees in question.

Pierson testified at hearing that he had never seen the two authorization cards before the hearing. However, he agreed that he signed the voluntary recognition agreement and letter of assent in September 1988, which he claims were the only documents given to him

² The voluntary recognition agreement provides, inter alia, as follows:

The Union claims, and the Employer acknowledges and agrees, that a majority of its employees has authorized the Union to represent them in collective bargaining.

The Employer agrees to recognize, and does hereby recognize, the Union as the exclusive collective bargaining agent for all employees performing electrical work on all present and future jobsites within the jurisdiction of the Union.

The letter of assent signed contemporaneously by the Employer purportedly authorized NECA to bargain for it and bound the Employer to the current NECA collective-bargaining agreement.

at the time.³ He otherwise testified to several different versions of the events surrounding the signing of the documents. He initially testified that he signed the documents when presented with them, but could not recall any discussions in conjunction with the signing with anyone from the Union. Later he testified that the reason Feigel gave for his visit in September 1988 was that there were new forms that the Union required him to sign, but that Feigel did not explain further. When asked by the hearing officer to explain the discrepancy between those versions, Pierson responded that he first could not recall but, after thinking, he recalled talking to Feigel who said it was the International that said the Union should get the documents signed. Ultimately, Pierson recalled a ‘‘real general, light conversation, not something that this is very serious . . . like these are new forms that the International [wanted employers] to sign.’’⁴

The Employer thus acknowledges that it signed the voluntary recognition agreement, but denies that Pierson was ever presented with the authorization cards or that Pierson and Feigel discussed the significance of the documents Pierson signed. Its argument is that its September 1988 actions in signing the boilerplate voluntary recognition agreement were not sufficient to meet the burden of establishing the requisite unequivocal demand for and acceptance of 9(a) status in light of the parties’ existing 8(f) agreement. The Union argues to the contrary that the Employer’s actions were sufficient to establish the parties’ 9(a) relationship.

In *John Deklewa & Sons*, supra, 282 NLRB at 1375, 1385 fn. 41, the Board held, inter alia, that the party asserting a 9(a) relationship in the construction industry has the burden of proving such relationship exists. *Deklewa* made clear that this could be done by showing that a construction industry employer voluntarily recognized a union ‘‘based on a clear showing of majority support among the unit employees, e.g., a valid card majority.’’ Id. at 1387 fn. 53. Subsequent cases have further explained that a union can establish voluntary recognition by showing its express demand for, and an employer’s voluntary grant of, recognition to the union as bargaining representative based on a contemporaneous showing of union support among majority of employees in an appropriate unit. *Brannan Sand & Gravel Co.*, 289 NLRB 977, 979–980 (1988); *American Thoro-Clean*, 283 NLRB 1107, 1108–1109 (1987). Further in *J & R Tile*, 291 NLRB 1034, 1036

³Feigel had testified that, in addition to the two authorization cards discussed above, he had also submitted a copy of the most recent NECA contract and an acknowledgement of recognition form to Pierson. There is no union contention that Pierson signed these additional documents.

⁴On cross- and recross-examination, Pierson stated that he read the voluntary recognition agreement before signing it and that he did not doubt that the Union represented a majority of his unit employees when he signed the agreement.

(1988), the Board held that, to establish voluntary recognition, there must be positive evidence that a union unequivocally demanded recognition as the employees’ 9(a) representative and that the employer unequivocally accepted it as such.

Contrary to the Employer and in agreement with the Union, we find that, under all the circumstances presented, the Union has established by the weight of the evidence a clear intent of the parties in September 1988 to establish a 9(a) relationship founded on the Union’s majority status. The voluntary recognition agreement signed by the Employer by its terms unequivocally states that the Union claimed it represented a majority of the employees and Employer acknowledged that this was so. In this regard, Pierson testified that he had read the voluntary recognition agreement before signing it and, at the time he signed it, was in agreement that the Union represented a majority of his unit employees. Thus, although there is conflicting evidence as to whether the Employer in fact saw the authorization cards,⁵ there is no dispute that the Employer knew at the time it signed the agreement that both parties were in accord that the Union was seeking recognition as the unit employees’ majority representative and that the Employer was granting the Union recognition as such.⁶

Further, despite Pierson’s initial testimony to the contrary, the balance of his testimony establishes that Feigel and Pierson did in fact engage in some discussion relating to the reason for the signing of the new documents. Moreover, in this regard, Pierson’s conflicting testimony indicates that his recollections of the events in issue were none too vivid. Under these circumstances, we are of the view that the weight of the evidence reflects that the Union was cognizant of the requirements for acquiring 9(a) status and, in approaching the Employer, conducted itself accordingly.

For all the above reasons, we find that the parties’ relationship is governed by Section 9(a) of the Act. We therefore conclude that the collective-bargaining agreement in existence between the parties at the time the instant petition was filed bars its processing. Accordingly, we shall dismiss the petition consistent with the action of the Acting Regional Director.

ORDER

The petition is dismissed.

⁵Chairman Stephens concludes that, given the Union’s intent and need to meet Board standards for achieving 9(a) recognition, the express reference to a claim of majority status in the agreement signed by Pierson, and the fact that Feigel’s testimony was more definite and not marked by memory lapses of the kind apparent in Pierson’s testimony, the evidence weighs in favor of a finding that Feigel showed Pierson the cards of two out of the three unit employees.

⁶In addition, the evidence shows that, at the time of recognition, the Union had majority support within the unit.

MEMBER OVIATT, concurring.

Under *John Deklewa & Sons*, 282 NLRB 1375 (1987), enfd. sub nom. *Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1988); and *Brannan Sand & Gravel Co.*, 289 NLRB 977 (1988), a collective-bargaining relationship in the construction industry is presumed to be Section 8(f) rather than Section 9(a), and the party asserting a 9(a) relationship bears the burden of proving such relationship exists. In this regard, a union can establish that it is the 9(a) representative by showing its express demand for, and an employer's voluntary grant of recognition to the Union as the bargaining representative, based on a contemporaneous

showing of support by a majority of employees in the appropriate unit, e.g., a valid card majority.

In this case, the Board remanded for development of a full record on the issue of 9(a) status. Based on that record, I agree with Chairman Stephens' conclusion in footnote 5, *supra*, that the weight of the evidence support a finding that Feigel, the Union's president and assistant business manager, showed the Employer's owner and president, Pierson, the authorization card of two out of the three unit employees contemporaneously with Feigel's presenting, and Pierson's signing, the voluntary recognition agreement and letter of assent.

Accordingly, I join in dismissing the petition.