Windee's Metal Industries, Inc., Employer-Petitioner *and* Sheet Metal Workers, Local 25, Sheet Metal Workers International Association, AFL–CIO *and* Sheet Metal Workers Local Union No. 22 of New Jersey. Case 22–RM–687

December 16, 1992

DECISION ON REVIEW AND ORDER

BY MEMBERS DEVANEY, OVIATT, AND RAUDABAUGH

On July 29, 1992, the Regional Director for Region 22 issued a Decision and Direction of Election in which he directed an election between Sheet Metal Workers Local 25 (Local 25), Sheet Metal Workers Local No. 22 (Local 22), and no union, in a unit composed of all journeyman sheet metal workers, apprentice sheet metal workers, and apprentice applicant sheet metal workers employed by the Employer at its Brunswick, New Jersey location. Thereafter, in accordance with Section 102.67 of the Board's Rules and Regulations, Local 25 filed a timely request for review in which it argued that there was no evidence of a question concerning representation sufficient to warrant its inclusion, pursuant to the Employer's petition, on the ballot. On September 1, 1992, the Board granted the Union's request for review.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the entire record in this case.

The issue presented is whether the Regional Director erred in directing an election including on the ballot, inter alia, Local 25. For the reasons set forth below, we find that the Regional Director erred in directing an election with respect to Local 25, and remand the case for further proceedings consistent with this decision.

Background

The Employer is engaged in the installation of sheet metal at construction projects located at various sites in New Jersey, and employs approximately four journeymen, apprentice, and apprentice applicant sheet metal workers at its Brunswick, New Jersey jobsite. The Employer and Local 22 are currently parties to an 8(f) prehire agreement, applicable to this project, which expires on August 31, 1994.

On June 5, 1992, representatives of Local 25 commenced picketing at the Brunswick jobsite with signs stating that the Employer was not paying the ''prevailing rate.'' The Employer responded by advising Local 25 that it was, in fact, paying prevailing wage rates. On June 15, 1992, picketing resumed with new signs that read:

INFORMATIONAL

WINDEE'S METAL INDUSTRIES, INC. SHEET METAL WORK ON THIS JOB IS NOT BEING DONE BY SHEET METAL WORKERS LOCAL 25, AFL–CIO.

THIS SIGN IS NOT INTENDED TO INTERFERE WITH, NOR RESTRAIN, NOR COERCE THE RIGHTS OF ANYBODY LEAVING OR ENTERING THIS JOB.

SHEET METAL WORKERS LOCAL 25.

On June 17, 1992, the Employer filed the instant petition together with an unfair labor practice charge alleging that Local 25 had violated Section 8(b)(7)(C) by engaging in unlawful recognitional picketing. The charge was dismissed by the Regional Director on July 9, 1992, on the grounds that the picketing was protected informational picketing; we are administratively advised that the dismissal has not been appealed. By letter dated July 14, 1992, the Union disclaimed any interest in representing the Employer's employees. The Union continued to picket the Employer with the same signs as noted above.

Discussion

Section 9(c)(1)(B) of the National Labor Relations Act provides that an election petition may be filed by an employer when ''one or more individuals or labor organizations have presented to him a claim to be recognized'' as the representative of a majority of employees for the purpose of collective bargaining. The Regional Director apparently found that the picketing engaged in by Local 25 constituted a ''claim to be recognized.'' We disagree.

The Board has consistently construed Section 9(c)(1)(B) as requiring evidence of a ''*present* demand for recognition'' before an employer's petition will be processed. *Martino's Complete Home Furnishings*, 145 NLRB 604, 607 (1963) (emphasis in original). This interpretation is based not only on the plain language of Section 9(c)(1)(B), but also on the legislative history preceding its enactment. Prior to 1947, the Board would entertain election petitions filed by employers only under limited circumstances.[1] While the proponents of what eventually became the Taft-Hartley Act of 1947[2] sought to broaden the circumstances in which employers could petition for an election, Congress recognized that ''such a right may be subject to abuse, in that employers may seek an election at the earliest possible moment in an organizational campaign and thereby obtain a vote rejecting the union before it

[1] See NLRB Rules and Regulations, Series 2, Art. III, §§ 1–3 (1939) (employer petitions accepted when two or more unions assert conflicting claims of representative status).

[2] Pub.L. 80–101, 61 Stat. 136 (80th Cong. 1st Sess.).

has had a reasonable opportunity to organize.''[3] Accordingly, the original House and Senate bills reported out of committee both contained the language found in Section 9(c)(1)(B) today, limiting employer petitions to cases in which the union has presented a ''claim to be recognized.'' The legislative history further shows that Congress understood this provision to mean that ''[e]mployers may ask for elections, *but only after a representative has claimed collective-bargaining rights*.''[4] Thus, it would be contrary to the Congressional intent underlying Section 9(c)(1)(B) to find that any conduct with a representational objective, which falls short of an actual, present demand for recognition, will support an election petition filed by an employer.

The Board has also consistently rejected the view that informational picketing, without more, is sufficient to establish a present demand for recognition. See, e.g., *Martino's Complete Home Furnishings*, above. As the Board stated in *John's Valley Foods*, 237 NLRB 425, 426 (1978) (footnote omitted):

> Classic informational picketing may, of course, be also ultimately recognitional. But such activity, without more, does not evince a present demand for recognition and if that is all there is, an employer's election petition must be dismissed.

Protected informational picketing, by definition, is picketing (1) for the purpose of truthfully advising the public, including consumers, that an employer does not employ members of, or have a contract with, a union, and (2) which is not coercive, in that it does not have the effect of inducing any individual not to pick up, deliver, or transport any goods or not to perform any services in the course of his employment. Section 8(b)(7)(C). Such picketing falls short of the type of conduct that Congress envisioned as satisfying the requirements of Section 9(c)(1)(B).[5]

Moreover, as the Board recognized in *Martino's*, it would be inconsistent with the statutory scheme established by Section 8(b)(7) of the Act to find that informational picketing alone is sufficient to warrant processing an election petition under Section 9(c)(1)(B). Thus, while Section 8(b)(7)(C) prohibits a union from engaging in recognitional picketing unless an election petition has been filed within a reasonable period of time not to exceed 30 days, and provides for an expedited election without regard to the provisions of Section 9(c)(1) under those circumstances, the second proviso to Section 8(b)(7)(C) specifically exempts informational picketing from the above prohibition and expedited election process.[6] If informational picketing were found to be equivalent to a claim for recognition under Section 9(c)(1)(B), then an employer could file an election petition under that provision of the Act as soon as the informational picketing commenced and, if the union lost the election, further recognitional picketing—including informational picketing—would be

[3] 93 Cong.Rec. 1911, 2 Leg. Hist. LMRA 983 (1947) (Leg. Hist.) (remarks of Senator Morse).

[4] Labor Management Relations Act, 1947 (H.R. 3020), H. R. Rep. No. 245 (80th Cong., 1st Sess.) at 35, 1 Leg. Hist. 326 (emphasis in original). See also S. Rep. No. 105 (80th Cong., 1st Sess.) at 25, 1 Leg. Hist. 431 (''Employers are also given the right of petition after a union has actually claimed a majority or demanded exclusive recognition.''); 93 Cong.Rec. 3954 (1947), 2 Leg. Hist. 1013 (remarks of Senator Taft) (employer may obtain election when union says ''I represent your employees. Sign this agreement, or we strike tomorrow.''); 93 Cong.Rec. 5146 (1947), 2 Leg. Hist. 1496 (remarks of Senator Ball) (bill would authorize employer petitions ''whenever one or more unions present to the employer a demand for recognition as representing the employees'').

[5] We recognize that unions which engage in informational picketing may have as their ultimate goal recognition by the picketed employer as the representative of its employees. However, such common organizational tools as soliciting authorization cards, meeting with employees and appointing in-plant committees also have as their ultimate goal the union's recognition as majority representative. It would be inconsistent with the language and legislative intent of Sec. 9(c)(1)(B) to find that such activities, or informational picketing, are sufficient to allow an employer to petition for an election merely because an objective of the activity may be to obtain eventual recognition. See *Hod Carriers Local 840 (C. A. Blinne Constr.)*, 135 NLRB 1153, 1168 fn. 29 (1962).

[6] Sec. 8(b)(7) provides that it shall be an unfair labor practice for a labor organization or its agents

> to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective-bargaining representative, unless such labor organization is currently certified as the representative of such employees:
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> (A) where the employer has lawfully recognized in accordance with this Act any other labor organization and a question concerning representation may not appropriately be raised under section 9(c) of the Act,
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> (B) where within the preceding twelve months a valid election under section 9(c) of the Act has been conducted, or
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> (C) where such picketing has been conducted without a petition under section 9(c) being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: *Provided*, That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 9(c)(1) or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: *Provided further*, That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services.
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> Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this section 8(b) [this subsection].

The expedited election procedures established in the first proviso to Sec. 8(b)(7)(C) are not applicable in the case of informational picketing. See *C. A. Blinne Constr*., above.

barred for 12 months pursuant to Section 8(b)(7)(B). This result would be inconsistent with the immunity granted such picketing under the second proviso to Section 8(b)(7)(C). See *Martino's*, above.

Applying these principles to the facts of this case, we find that Local 25 has not engaged in any conduct which demonstrates a present demand for recognition. The Board has found that a present demand for recognition may be established where the union requests that the employer sign a contract, or where the union states that the picketing would cease if the employer signed a contract with the union.[7] However, there is no evidence of this character present here. Rather, an affidavit submitted by the Employer's president states only that he ''construe[d]'' Local 25's picketing ''as a demand for recognition. *Presumably*, if I sign a contract with Local 25, the job will be done by members of Local 25 and the picketing will cease [emphasis added].'' Nothing in this affidavit, or in the testimony of the only witness to appear at the hearing, Local 22 Business Agent Gallagher, who testified on behalf of the Employer, even remotely suggests that Local 25 has presented a claim for recognition within the meaning of Section 9(c)(1)(B). In this regard, we decline to find such a claim based on the Employer's supposition concerning the likely outcome of events if it were to sign a collective-bargaining agreement with Local 25, in the absence of any evidence that Local 25 has ever requested that it do so.

[7] See, e.g., *Roberts Tires*, 212 NLRB 405 (1974); *Holiday Inn*, 179 NLRB 337 (1969); and *Grand Central Liquors*, 155 NLRB 295 (1965).

We recognize that, in cases where a union has in fact initially demanded recognition but subsequently disclaimed interest in representing the employees, the Board has found that a present demand for recognition may still exist where the union engages in postdisclaimer picketing, in effect relying on the picketing—together with the demand for recognition—to establish a present demand for recognition. See, e.g., *McClintock Market*, 244 NLRB 555 (1979); *Holiday Inn*, above; and *Capitol Market No. 1 (Retail Clerks Local 770)*, 145 NLRB 1430 (1964). However, these cases are distinguishable. While continued picketing viewed in the light of a contemporaneous demand for recognition may establish a present demand for recognition, notwithstanding the disclaimer, nothing in these cases suggests that the picketing alone would be sufficient in that regard. Since all that exists in the present case is such picketing, we find it unnecessary to pass on the Regional Director's finding that the disclaimer was invalid to establish that there was no current claim to be recognized. A disclaimer is unnecessary when no claim has been made.

Although the instant petition must be dismissed, in light of the above, insofar as it seeks to force Local 25 to participate in an election, we note that the petition also includes Local 22 and that the Employer indicated at the hearing that it wished to proceed to an election even if Local 22 alone, a party to an 8(f) agreement, were on the ballot. Accordingly, we will remand this case to the Regional Director for Region 22 for further proceedings consistent with this decision.