

**Albertson's/Max Food Warehouse and Claudette Tuxhorn, Petitioner and United Food and Commercial Workers Union, Local Union No. 7.** Case 27-UD-99

September 30, 1999

DECISION ON REVIEW AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX,  
LIEBMAN, HURTGEN, AND BRAME

The issue presented in this case is whether the union-security deauthorization procedures contained in Colorado's labor law, which place greater limits than Federal law on the ability of employees to seek deauthorization, are preempted by the National Labor Relations Act (NLRA). For the reasons that follow, we hold that those limitations are inconsistent with the precepts of the NLRA and, therefore, must yield to Federal law.

Local 7 of the United Food and Commercial Workers Union (the Union) is the exclusive representative of a unit of employees at Albertson's/Max Food Warehouse (the Employer). The Union and the Employer are parties to a collective-bargaining agreement which contains a union-security clause. On April 28, 1998, the Petitioner, a member of the bargaining unit, filed a deauthorization petition with the Board's Regional Office in Denver. On May 12, 1998, the Regional Director dismissed the petition, finding that under *City Markets, Inc.*, 266 NLRB 1020 (1983), the petition was inappropriately filed with the Board, and instead should have been filed with the Colorado Department of Labor and Employment. Thereafter, on May 19, 1998, the Petitioner filed a timely request for review of the Regional Director's dismissal of the petition. The Petitioner's request for review is granted.

Having carefully reviewed the case, including the undisputed facts, the Petitioner's brief, and Board precedent, we conclude that the proper course is to overrule *City Markets* and reverse the Regional Director's dismissal of the petition.

I. FACTS

For a number of years, the Union has represented a unit of employees at the Employer's Clifton, Colorado store. On November 10, 1989, pursuant to an authorization election held by the Colorado Department of Labor and Employment, the unit employees voted 42 to 6 in favor of a union-security agreement requiring all employees to join or pay dues to the Union as a condition of employment.<sup>1</sup> From that time through the present,<sup>2</sup> the collective-

<sup>1</sup> The Colorado Labor Peace Act authorizes the parties to a collective-bargaining agreement to enter into a union-security agreement when either a majority of all the employees eligible to vote or three-quarters or more of the employees actually voting vote in favor of such an agreement. Colo. Rev. Stat. § 8-3-108(1)(c)(I).

<sup>2</sup> The current collective-bargaining agreement between the parties remains in effect through December 4, 1999.

bargaining agreements between the parties have contained a union-security provision.

On April 28, 1998, the Petitioner, a member of the bargaining unit at issue, filed a deauthorization petition with the Board pursuant to Section 9(e)(1) of the NLRA, which provides for a secret ballot election upon the filing of a petition by 30 percent or more of the unit employees seeking a rescission of authorization for the union-security provision.<sup>3</sup> Relying on the Board's decision in *City Markets*, supra, the Regional Director dismissed the petition based on the finding that the petition must be timely filed in the state forum which authorized the union-security agreement in the first instance.

II. ANALYSIS

The NLRA permits an election on a deauthorization petition at any time, provided there has not been a valid election within the preceding 12-month period. See Section 9(e)(2).<sup>4</sup> In comparison, the Colorado Labor Peace Act permits the filing of a deauthorization petition only within a 15-day window period—the period of time between 120 and 105 days prior to the end of the collective-bargaining agreement or the triennial anniversary of the date of such agreement. See Colo. Rev. Stat. § 8-3-108(III)(B). Thus, as Colorado's deauthorization provisions place greater restraints than Federal law on unit members' right to file a deauthorization petition, the provisions generally are "less restrictive" of (i.e., foster the maintenance of) union-security agreements than those contained in the NLRA. See *Asamera Oil (U.S.) Inc.*, 251 NLRB 684, 685 (1980).

The Board in the past has squarely addressed the issue of the interplay between the provisions of the NLRA and Colorado's Labor Peace Act concerning union-security agreements and the fora available to unit employees with respect to such provisions. In *Asamera Oil*, the State of Colorado, in accordance with the Labor Peace Act, conducted an election among the unit employees to ascertain their desire for a union-security agreement. As a majority of the employees eligible to vote favored such an agreement, the State appropriately issued a certificate indicating that a union-security agreement would be permitted. Thereafter, the union and employer executed a collective-bargaining agreement containing a union-security clause.

<sup>3</sup> Sec. 9(e)(1) of the NLRA provides:

Upon the filing with the Board, by 30 per centum or more of the employees in a bargaining unit covered by an agreement between their employer and labor organization made pursuant to section 8(a)(3), of a petition alleging they desire that such authorization be rescinded, the Board shall take a secret ballot of the employees in such unit and certify the results thereof to such labor organization and to the employer.

<sup>4</sup> Sec. 9(e)(2) of the NLRA states that "[n]o election shall be conducted pursuant to this subsection in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held."

Approximately 7 months after the election, a unit employee filed a deauthorization petition with the Board.

Under those facts, the Board majority in *Asamera Oil* dismissed the deauthorization petition, finding that the petition did not satisfy the requirements of Section 9(e)(2) of the NLRA, in that the petition was filed less than 1 year following the occurrence of the Colorado union authorization election. *Id.* In a concurrence, however, then-Chairman Fanning concluded that the petition should have been dismissed based on the alternative theory that the petitioner should be left “to the forum that gave it the right to vote on union security in the first instance.” *Id.* at 686. In reaching that conclusion, Chairman Fanning opined that the fact that Colorado’s deauthorization provisions were less restrictive of union-security agreements than Federal law did not bar their enforcement, as Section 14(b) of the NLRA did not intend to authorize only those state laws which are in every respect more restrictive of union security than Federal law. *Id.* at 685. Characterizing his analysis as a “concern for the legislative process,” Chairman Fanning determined that although the Colorado statute’s time restrictions for utilization of the deauthorization procedures were less restrictive of union-security agreements than Federal law, they served as a “quid pro quo” for the Colorado statute’s more restrictive initial authorization procedures.<sup>5</sup> *Id.*

Three years later, in a one-paragraph decision, a Board majority adopted Chairman Fanning’s concurrence in *Asamera Oil*. *City Markets*, 266 NLRB 1020. In *City Markets*, the Board dismissed a deauthorization petition filed with the Board pursuant to Section 9(e)(1) of the NLRA, deeming it to be filed in the inappropriate forum. Citing Chairman Fanning’s concurrence in *Asamera Oil*, the Board majority reasoned that, as the union-security agreement at issue was created as a result of the procedures set forth in Colorado’s labor law—which was properly enacted pursuant to Section 14(b) of the NLRA—any deauthorization of the agreement should occur pursuant to those same legislative procedures. *Id.*

For the reasons that follow, we believe that the approach taken by the concurrence in *Asamera Oil*<sup>6</sup> and adopted by the Board in *City Markets* does not properly effectuate the purpose and intent of the NLRA. In the 1947 amendments to the NLRA, Congress chose to prohibit the previously accepted closed-shop arrangement—under which an individual could be required to be a union member as a prerequisite to employment—and undertook extensive regulation of union-security agreements. At the same time, in recognition of the fact that numerous state “right-to-work”

laws had been enacted, Congress determined that it was appropriate to permit the states concurrently to restrict union-security agreements. Thus, Section 14(b) of the NLRA provides:

Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.

In *Retail Clerks Local 1625 v. Schermerhorn*, 375 U.S. 96, 100–101 (1963), the Supreme Court stated that Congress specifically included this provision in the NLRA to express its clear intent not to preempt state regulation of union-security agreements; the Court then concluded that as Congress “did not deprive the States of any and all power to enforce their laws *restricting* the execution and enforcement of union-security agreements,” a state had the right to enforce a right-to-work provision in its state constitution. *Schermerhorn*, 375 U.S. at 102 (emphasis added). Although the Supreme Court in *Schermerhorn* was not faced with deciding whether state laws that *expand* the execution and enforcement of union-security agreements beyond the provisions of Federal law (i.e., provisions that are less restrictive than Federal law) would be enforced, we believe its language supports our view that Congress intended to authorize only more restrictive state legislation.

This view is consistent with the legislative history of the NLRA. Referencing the section that would become 14(b), the House Report on the 1947 NLRA amendments discussed the States’ concurrent right to regulate union-security agreements, even if the state “laws limit compulsory unionism more drastically than does Federal law.” 1 Leg. Hist. 325 (LMRA 1947). Even more elucidating, the report remarked that “it goes without saying that no State may invalidate . . . restrictions or conditions that the amended Labor Act will put upon compulsory unionism.” *Id.*

We think it is evident that through Section 14(b), Congress intended to authorize only those state laws that are more restrictive of union-security agreements than Federal law, and thus, Federal law will take precedence over any less restrictive state law.<sup>7</sup> Indeed, a recent Board decision involving the same state statute at issue in the instant case strongly supports this conclusion. In *Teamsters Local 435 (Mercury Warehouse)*, 327 NLRB 458 (1999), the union argued that, as a result of Colorado’s enactment of union-security legislation, the Board was deprived of jurisdiction to decide whether the union had failed to inform unit employees of their *Beck*<sup>8</sup> rights as required under the NLRA

<sup>5</sup> While the NLRA simply authorizes an employer and a union to collectively bargain for a union-security agreement, see Sec. 8(a)(3), the Colorado statute requires an affirmative vote of at least a majority of all the employees eligible to vote or three-quarters or more of the employees who actually voted. See C.R.S. § 8–3–108(1)(c)(I).

<sup>6</sup> Chairman Truesdale notes that the Board’s decision today is consistent with the majority decision in *Asamera Oil*, in which he participated.

<sup>7</sup> It is axiomatic, for example, that if a state law were to authorize a closed-shop agreement, the state law clearly would be preempted by the NLRA.

<sup>8</sup> Pursuant to the Supreme Court’s decision in *Communications Workers v. Beck*, 487 U.S. 735 (1988), a union seeking to obligate an employee to

(as interpreted by the courts).<sup>9</sup> The Board squarely rejected this argument, stating that the union's "contention that Colorado state law permits it . . . to apply a broader union-security arrangement than that permitted by Federal labor law, as interpreted by the Supreme Court in *Beck* and subsequently applied by the Board, is . . . meritless." *Mercury Warehouse*, 327 NLRB 458 at 460 (footnote omitted). Further, the Board reiterated (*id.*) that

While the states are thus free under Section 14(b) to prohibit union-security arrangements, and may place restrictive conditions precedent on enforcement of union-security arrangements as does the State of Colorado, *Section 14(b) does not permit* the States to sanction *a more expansive union-security arrangement* than permitted by Federal law. [Emphasis added.]<sup>10</sup>

Based on all of the foregoing, we believe that *City Markets* must be overruled, as it fails to effectuate the purposes of the NLRA and frustrates congressional intent. As the clear purpose of Section 14(b) of the NLRA was to reserve for the states the power to further restrict union-security arrangements, Congress could not have intended the anomalous result reached in *City Markets*. Requiring unit employees to wait months or years beyond the period set forth in the NLRA to rescind a union-security agreement they no longer desire would significantly impinge upon the statutory rights Congress granted to employees. In this instance, for example, employees who wished to exercise their right to deauthorize the union-security agreement would be required to wait approximately 15 months pursuant to Colorado's deauthorization procedures, whereas

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pay dues/fees pursuant to a union-security agreement must notify the employee that, *inter alia*, the employee has the right to be/remain a nonmember and that nonmembers have the right to object to paying (and to receive a reduction in) fees for union activities that are not related to the union's duties as bargaining agent.

<sup>9</sup> The union in *Mercury Warehouse* argued that Colorado state law permitted it to charge nonmember objectors for nonrepresentational activities, and thus to apply a broader union-security agreement than allowed under the NLRA.

<sup>10</sup> Our colleagues assert that *Mercury Warehouse* is distinguishable because it dealt with substantive Federal rights (the right of objecting nonmembers not to pay dues to support the union's nonrepresentational activities), whereas the instant case only deals with *when* employees can exercise their right to have a deauthorization election and does not restrict their *right* to such an election. We disagree. Congress was clearly concerned not only about the *right* to a deauthorization election, but also about *when* that right could be exercised. The Board has held that "it is clear" under the provisions of Sec. 9(e) that the normal contract bar principles established by the Board cannot be applied to deauthorization petitions. *Great Atlantic & Pacific Tea Co.*, 100 NLRB 1494, 1495 (1952). The sole congressional restriction on such elections is that they cannot be held within 12 months of another such election. As discussed above, however, Colorado law would impose a further restriction on the Federal right of employees to a deauthorization election, and effectively impose a contract bar by limiting the filing of such petitions to a 15-day window period approximately 4 months prior to the end of the contract or the 3-year anniversary of the contract. Thus, like *Mercury Warehouse*, this case also deals with substantive Federal rights.

the employees presumably could have proceeded with the deauthorization immediately under Federal standards, as there is no claim that any election occurred within the preceding 12 months. That the Colorado statute may make the creation of a union-security agreement more difficult in the first instance does not compensate for the fact that the employees are later denied the right accorded to them by Federal law to rescind such an agreement.

For all the foregoing reasons, we overrule *City Markets*. Instead we find that the timeliness of the petition must be determined under the provisions of the NLRA. Accordingly, we shall reverse the Regional Director's dismissal of the petition and remand to the Regional Director for further processing of the petition.

#### ORDER

The Regional Director's dismissal of the instant petition is reversed, and this case is remanded to the Regional Director for further action in accordance with this decision.

MEMBERS FOX AND LIEBMAN, dissenting.

The issue in this case is whether an employee seeking a deauthorization election should be required to file her petition under the procedures authorized by the State of Colorado. Contrary to our colleagues, and substantially for the reasons stated in then-Chairman Fanning's concurring opinion in *Asamera Oil (U.S.) Inc.*, 251 NLRB 684 (1980), adopted by the Board in *City Markets*, 266 NLRB 1020 (1983), we would affirm the Regional Director's decision to dismiss the petition in this case.

We do not quarrel with our colleagues' conclusion that, in enacting Section 14(b) of the Act, Congress intended only to authorize "more restrictive" state legislation concerning union security. See *Algoma Plywood Co. v. Wisconsin Employment Relations Board*, 336 U.S. 301, 313-314 (1949); and *Teamsters Local 435 (Mercury Warehouse)*, 327 NLRB 458, 460 (1999). But, as Chairman Fanning persuasively reasoned in *Asamera Oil*, we "do not read *Algoma* to suggest that Section 14(b) only authorizes the States to enact legislation which is in *every* single respect 'more restrictive' of union security than Federal law is." 251 NLRB at 685 (emphasis added).

Considering the Colorado Labor Peace Act's requirements for the ratification and rescission of union-security agreements as a whole,<sup>1</sup> its time limitations on the filing of

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<sup>1</sup> The relevant provisions of the Colorado Labor Peace Act state as follows:

(II)(A) Any [union-security] agreement as defined in section 8-3-104(1) between an employer and a labor organization in existence on June 29, 1977, which has not been voted upon by the employees covered by it may, by written mutual agreement of such employer and labor organization, be ratified and upon such ratification shall be filed with the director. Any agreement as defined in section 8-3-104(1) between an employer and a labor organization in existence on June 29, 1977, which has not been ratified and filed, as provided in this subparagraph (II), shall not be legal, valid, or enforceable during the remaining term of that labor contract unless and until either the employer, the labor organization, or at least twenty percent of the employees covered by such agreement file a petition upon

a deauthorization petition<sup>2</sup> are an integral part of an overall mechanism which is in fact significantly “more restrictive” than Federal law, because it requires employees to authorize union-security agreements by a majority of all eligible voters, or by 75 percent of those voting. By contrast, the National Labor Relations Act, which permits deauthorization petitions to be filed at any time, requires no ratification vote by employees to effectuate a union-security agreement. As Chairman Fanning reasoned, “that Colorado may require *opponents* of union security to wait, depending upon the length of the contract, 8, 20, or 32 months to file a deauthorization petition logically can be expected to be a function of the fact that, in the first instance, it has required *proponents* of union security to demonstrate a level of support far beyond that required by Federal law.” *Asamera Oil*, supra at 685. Thus, we agree with former Chairman Fanning that, viewed as part of an overall regulatory scheme, the deauthorization procedures of the Colorado Labor Peace Act do not exceed the “degree of jurisdictional freedom Section 14(b) leaves with the States.” *Id.*

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forms provided by the division, demanding an election submitting the question of the all-union agreement to the employees covered by such agreement and said agreement is approved by the affirmative vote of at least a majority of all the employees eligible to vote or three-quarters or more of the employees who actually voted, whichever is greater, by secret ballot in favor of such all-union agreement in an election provided for in this paragraph (c) conducted under the supervision of the director.

Colo. Rev. Stat. § 8–3–108(1)(c)(II)(A).

(III) The director shall declare any such all-union agreement terminated whenever:

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(B) The employer or twenty percent of the employees covered by such agreement file a petition with the director on forms provided by the division seeking to revoke such all-union agreement and, in an election conducted under the supervision of the director, there is not an affirmative vote of at least a majority of all the employees eligible to vote or three-quarters or more of the employees who actually voted, whichever is greater, in such election by secret ballot in favor of such all-union agreement. Such petition may only be filed within a time period between one hundred twenty and one hundred five days prior to the end of the collective bargaining agreement or prior to a triennial anniversary of the date of such agreement, and the division must complete said election within sixty days prior to the termination or triennial anniversary of said collective bargaining agreement. The director may conduct an election within a collective bargaining unit no more often than once during the term of any collective bargaining agreement or once every three years in the case of agreements for a period longer than three years.

*Id.* § 8–3–108(1)(c)(III)(B).

<sup>2</sup> Petitions may be filed between 120 and 105 days prior to the end of a collective-bargaining agreement or prior to the triennial anniversary of the date of such an agreement.

Contrary to the assertion of our colleagues, our recent decision in *Mercury Warehouse*, supra, is not inconsistent with our position. In *Mercury Warehouse*, the Board rejected the union’s argument that, because Colorado lawfully exercised its jurisdiction to regulate union-security agreements in the Labor Peace Act, the Board was deprived of jurisdiction to decide issues arising under *Communications Workers v. Beck*, 487 U.S. 735 (1988), involving the union’s expenditures of dues or fees on non-representational activities over the objections of a non-member employee. Holding that Section 14(b) of the Act does not license the States to sanction more expansive union-security arrangements than that allowed by Federal law, the Board held that Colorado state law could not be read to permit a union to charge objecting nonmembers for nonrepresentational expenses. *Mercury Warehouse*, supra, at 460.

Clearly, the issue in *Mercury Warehouse* raised substantive Federal concerns. By contrast, in this case, the issue is essentially as Chairman Fanning put it: “Employees have the right, as Section 9(e)(1) evidences, to challenge union-security clauses. But when the right attaches does not seem to me to have been as discernible a Federal concern.” *Asamera Oil*, 251 NLRB at 685–686. In short, the time limits, or “window period,” under Colorado law for the filing of a petition to rescind a union-security agreement in no way restricts employees’ *right* to deauthorize such an agreement in derogation of Federal law; it simply limits *when* that right can be exercised.<sup>3</sup>

Accordingly, we would adhere to *City Markets* and require the deauthorization petitioner to file for an election under the provisions of the Colorado Labor Peace Act. Respectfully, we dissent, and would affirm the Regional Director’s decision to dismiss the petition.

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<sup>3</sup> Cf. *Nielsen v. Machinists*, 94 F.3d 1107, 1116 (7th Cir. 1996). (“Life is full of deadlines, and we see nothing particularly onerous about this one. When people miss the deadline for filing an appeal to this Court, their rights can be lost forever, not just for eleven months, but that does not make time limits for filing an appeal in violation of the law.”)