Alley Drywall, Inc. *and* Operative Plasterers and Cement Masons International Association, Local 5, AFL–CIO, Petitioner. Case 13–RC–20531

April 18, 2001

ORDER DENYING REVIEW

BY CHAIRMAN TRUESDALE AND MEMBERS HURTGEN AND WALSH

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel, which has considered the request for review of the Regional Director's Decision and Direction of Election (pertinent portions are attached as an appendix) filed by the Intervenors, the International Union of Bricklayers & Allied Craftworkers, Locals 56 and 74, AFL–CIO[1] The request for review is denied as it raises no substantial issues warranting review.[2]

[1] The only issues raised in the request for review were (1) whether the Regional Director properly concluded that the petitioned-for unit of all plasterers of the Employer was an appropriate unit in light of the parties' bargaining history and (2) whether the Regional Director properly denied the Intervenors' request to defer the processing of this petition so as to afford the Petitioner and the Intervenors the opportunity to resolve this matter through the AFL–CIO's Building and Construction Trades Department's Plan for the Settlement of Disputes in the Construction Industry (the Plan).

[2] There are numerous related cases involving the same parties and the same issues pending in the Regional Office. In two of those cases—*Smith Plastering, Inc.*, Case 13–RC–20512, and *Pilon Lath & Plasterers, Inc.*, Case 13–RC–20513—the Regional Director, at the Intervenors' request, deferred processing the petitions for more than 30 days for resolution under art. XX of the AFL–CIO's constitution. When resolution through art. XX was not available due to the nature of the dispute and the industry involved, the Regional Director resumed processing the petitions in all pending cases, including the instant petition. The Intervenors now seek another deferral, contending that the parties should be afforded time to resolve their dispute under the procedures outlined in art. X of the Plan. The Regional Director denied this request by order dated March 21, 2001, finding that processing under art. X would likely not resolve the parties' dispute and that further delay in processing these petitions was unwarranted. Although we agree that the petitions should not be deferred, we do not pass on the Regional Director's finding that art. X does not apply to this dispute. We nevertheless agree with the Regional Director that further delay in processing these petitions is unwarranted. Even assuming that this dispute could be resolved under art. X of the Plan, the Board's Casehandling Manual does not provide for suspension of the processing of a petition for such proceedings. Further, more than 30 days has elapsed from the Intervenor's submission on March 5, 2001, of this dispute under art. X of the Plan, and neither the Regional Director nor the Board has been notified that the dispute has been accepted for resolution under the Plan. In these circumstances, even if we were to treat art. X proceedings like art. XX proceedings, the Casehandling Manual provides for the processing of the petitions, absent extraordinary circumstances. See Sec. 11018.1(e). Accordingly, we perceive no basis for deferring the processing of these petitions.

APPENDIX

DECISION AND DIRECTION OF ELECTION

The Petitioner (Local 5) has a collective-bargaining agreement with the Employer pursuant to Section 8(f) of the Act covering the employees it seeks to represent under Section 9(a) through the instant petition. The 8(f) agreement between the Petitioner and the Employer is a multiemployer association agreement through the Chicagoland Association of Wall and Ceiling Contractors (the Association). Due to agreements between the International Unions of the Petitioner (International Association of Operative Plasterers and Cement Masons, (Operative Plasterers) and the Intervenors (International Union of Bricklayers & Allied Craftworkers (the Bricklayers), establishing certain geographical limitations on each other where there was overlapping coverage of job classifications, the 8(f) collective-bargaining agreements between the Petitioner and the Employer have not been applicable to plastering work performed by the Employer in DuPage County, Illinois. In DuPage County, the work performed by the employees covered by the instant petition has been under the jurisdiction of Bricklayers Locals 56 and 74 which also have 8(f) Association collective-bargaining agreements with the Employer with regard to work in DuPage County. The record does not reflect how long the Employer has had 8(f) relationships with the Petitioner and the Intervenors based upon their separate geographical jurisdictions.

In 1998, the Operative Plasterers unilaterally revoked its agreement with the Bricklayers regarding geographical restrictions. This action by the Operative Plasterers was upheld at the convention of the Building and Construction Trades Department of the AFL–CIO in July 2000. Thereafter, the Operative Plasters authorized the Petitioner to expand its geographic jurisdiction to include DuPage County among other areas. As a result, the Petitioner filed the instant petition seeking to become the certified representative under Section 9(a) of the Act of the employees of the Employer covered by its 8(f) collective-bargaining agreement with the Employer, without regard to the previous geographical restrictions. The Petitioner contends the unit it seeks to represent here is an appropriate single employer unit in which the employees share a sufficient community of interests. The Intervenors, on the other hand, contend that the unit sought by the Petitioner is inappropriate as it is broader than that which the Petitioner has historically represented through its 8(f) agreements with Employer, asserting that the history of collective bargaining under Section 8(f) of the Act is controlling as to the scope of the unit under Board precedent. Accordingly, the Intervenors assert that petition must be dismissed, or alternatively, that the unit description be amended to exclude DuPage County from its scope to conform the unit to its historical scope. The Employer agrees with the Petitioner that the unit sought is appropriate, however, it asserts that the unit description should include the counties covered by the Petitioner's current geographic jurisdiction. The Petitioner objects to the insertion of any geographical limitation in the unit description.

Facts

Alley Drywall Business Operations

The Employer is located in Oswego, Illinois, and is engaged in performing plastering work in the Chicago metropolitan area and surrounding counties. Gary Alley is the president of the Employer and also serves to hire, fire, discipline, and supervise his work force of approximately 35 to 40 employees. In addition to a work force of 35 carpenters and painters, the Employer also has a regular staff of approximately 5 plasterers. The plasterers are hired on a regular basis, not on a job-to-job contingency. Of these five plasterers, one has worked for the Employer for 8 years, another for 7 years, and a third for 2 years. The remaining two have worked for the Employer for approximately 6 months prior to the filing of the instant petition. In January 2001, however, the Employer was forced to lay off the last of the plasterers, but it anticipates that all plasterers will be brought back to work in 4 to 8 weeks.

In addition to Alley, a superintendent supervises the progress of work at all sites. Alley, however, decides where plasterers are dispatched. At the time prior to the final layoff in January 2001, all plasterers were members of Local 5 and all were performing the same work. All the plasterers may work together on one jobsite or they may work on different jobsites, depending on the number and nature of the jobs that the Employer has at any given time. Employees are assigned to jobs based on the complexity and scope of the job, not upon the job situs, the employees' local union membership, or the geographical coverage of any particular local union. The record indicates that the county in which a jobsite is located has absolute nothing to do with the employees assigned to work at that site. Generally, the employees report to work at the jobsite to which they are assigned and not to the Employer's Oswego, Illinois facility. They are commonly supervised. The Employer has utilized the Local 5 hiring hall in the past as well as the Local 5 apprenticeship school, but has never consulted the Bricklayers Local 54 or 76 for the same services.

Within the last 2 years, the Employer has completed projects in at least the counties of Cook, DuPage, Lake, Kendall, Kane, and Will. The record also shows that the Employer has bid for jobs in McHenry County but has not worked jobs in that county recently. The projects range in size and duration from as long as several months to as short as a few hours. Notwithstanding the historical separate geographical jurisdictions between the Petitioner and the Intervenors and the coverage of the Employer's plasterers in DuPage County by an 8(f) agreement with the Intervenors, the record shows that the Employer has applied the terms of its agreement with the Petitioner to its plasterers regardless of where they work. Thus, the Employer pays its plasterers the hourly rate set forth in its agreement with the Petitioner, regardless of whether they were working in the Petitioner's geographical jurisdiction or outside of it. Similarly, the Employer's testimony indicates that it paid the fringe benefits set forth in its agreement with the Petitioner to the Petitioner, regardless of whether the employees were working within the historical geographic jurisdiction of the Petitioner or not.

Analysis

Appropriateness of the Bargaining Unit

Section 9(b) of the National Labor Relations Act directs the Board to "decide in each case whether, in order to assure employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof. . . . '[T]he selection of an appropriate bargaining unit lies largely within the discretion of the Board whose decision, 'if not final, is rarely to be disturbed.'" *South Prairie Construction v. Operating Engineers Local* 627, 425 U.S. 800, 805 (1976) (citation omitted). There is nothing in the Act that requires the unit for bargaining be the only appropriate unit or the most appropriate unit—the Act only requires that the unit for bargaining be appropriate so as to assure employees the fullest freedom in exercising the rights guaranteed by the Act. *Overnite Transportation Co.,* 322 NLRB 723 (1996); *Brand Precision Services*, 313 NLRB 657 (1994); *Phoenix Resort Corp*., 308 NLRB 826 (1992). In defining the appropriate bargaining unit to ensure employees the fullest freedom in exercising the rights guaranteed by the Act, the key question is whether the employees share a sufficient community of interest. *Alois Box Co.*, 326 NLRB 1177 (1998); *Washington Palm, Inc*., 314 NLRB 1122, 1127 (1994).

In determining whether employees share a sufficient community of interests to constitute an appropriate unit, the Board weighs various factors, including the similarity of skills, functions, and working conditions throughout the proposed unit; the central control of labor relations; transfer of employees among the Employer's other construction sites; and the extent of the parties' bargaining history. *P. J. Dick Contracting, Inc.,* 290 NLRB 150, 151 (1988), citing *Metropolitan Life Insurance Co.*, 380 U.S. 438 (1965). Also, the Board will consider a difference in method of wages or compensation; different hours of work; different employment benefits; separate supervision; the degree of similar or dissimilar qualifications, training and skills; differences in job functions; amount of working time spent away from the facility; and integration of work functions. *Kalamazoo Paper Box Corp*., 136 NLRB 134, 137 (1962); *Banknote Corp. of America v. NLRB*, 84 F.3d 637, 647–648 (2d Cir. 1996).

It is clear that the unit petitioned for here would, upon application of the foregoing community-of-interest factors, be found to be an appropriate unit for collective bargaining, in the absence of any consideration of the history of collective bargaining. Thus, the record shows that the petitioned-for unit constitutes a single-employer unit consisting of all of the Employer's employees who are engaged in shared and clearly identifiable job functions[1] and who share the same terms and conditions of employment irregardless of the job situs that they may be working on. In addition, the employees contained in the petitioned-for unit also have a continuity of employment from job to job with the Employer given their combined tenure of 18 years, a

[1] There is no contention here that the plasterers do not constitute an appropriate unit apart from other construction trades as a clearly identifiable group of employees engaged in distinct job functions. *Laborers Local 18 (R. B. Butler, Inc.*), 160 NLRB 1595 (1966).

significant amount given the small work force and transitory nature of the construction industry. The Intervenor's, however, contend that the petitioned-for unit is inappropriate because it is broader in scope than the historical bargaining unit in the 8(f) collective-bargaining agreements between the Petitioner and the Employer. The Intervenors, based on the following language in the Board's decision in *John Deklewa & Sons*, 282 NLRB 1375, 1377 (1987), assert that the scope of the petitioned-for unit must be the same as that in the 8(f) agreement between the Petitioner and the Employer:

> [S]uch agreements [8f] will not bar the processing of valid petitions filed pursuant to Section 9(c) and Section 9(e) . . . in processing such petitions, the appropriate unit normally will be the single employer's employees covered by the agreement. . . .

The Intervenors assert that Board's decision in *P. J. Dick Contracting, Inc*., 290 NLRB 150 (1988), supports its view that where there is a historical relationship under Section 8(f) of the Act, the Board's decision in *Deklewa* requires that the scope of the petitioned-for unit be the same as that found in the 8(f) agreement. In *P. J. Dick Contracting,* the Board rejected the petitioning union's request for a unit covering 33 counties, finding that the petitioning union's alternative request for a unit confined to the 11 counties it had covered in its 8(f) agreements with the employer to be appropriate. In reaching that conclusion, the Board stated:

> [T]he Board's traditional deference to bargaining history is generally applicable in the construction industry. Indeed based on the limited evidence presented, it is the determinative factor in finding in this case that the 11 county jurisdiction of the MBA agreement is the appropriate unit.

Id. at 151.

While it is clear, based upon the foregoing, that bargaining history is a factor to be weighed and considering in determining whether a petitioned-for unit is appropriate, I find that the Intervenor's reading of *Deklewa* language to be too restrictive. Bargaining history pursuant to 8(f) agreements is not the conclusive consideration in determining whether a petitioned-for unit is appropriate. The very language that the Board used in *Deklewa*, 282 NLRB at 1377–1378, "the appropriate unit *normally will be* the single employer's employees covered by the agreement" (emphasis added), clearly sets forth that 8(f) agreement unit is not necessarily conclusive as to the determination of the appropriate unit. Furthermore, the language in *Deklewa* cited by the Intervenors was used by the Board to express its rejection of the merger doctrine in 8(f) situations, rather than to define the scope of single employer units. Under the merger doctrine, the employees of a single employer that belonged to a multiemployer bargaining association were merged into a multiemployer bargaining unit. As such, the employees of the single employer could only exercise their right to select their bargaining representative in conjunction with all the other employees of the other employers who were included in the multiemployer bargaining unit. In *Deklewa*, the Board rejected the merger doctrine's application to representation petitions where the employees had been covered by multiemployer agreements under Section 8(f) of the Act in order to allow the employees of a single employer an opportunity to exercise their Section 7 rights to vote on whether to accept or reject the 8(f) bargaining representative. See *City Electric, Inc*., 288 NLRB 443 fn. 9 (1988). Thus, it is clear that Board's language in *Deklewa,* cited by the Intervenors, was not meant to limit the scope of a single-employer unit in the construction industry under Section 9(b) of the Act to the unit defined by the previous 8(f) bargaining agreement.

The Board's decision in *P. J. Dick Contracting*, supra*,* also makes it clear that, while 8(f) bargaining history is a factor to be weighed in determining the appropriate unit, it is not conclusive. In finding the historical unit to be appropriate, the Board did not find that its decision in *Deklewa* compelled a finding that only the historical unit was appropriate. Rather, the Board made it clear that the broader unit sought by the petitioner might be appropriate; however, the Board found that the petitioner had failed to present any evidence to demonstrate its appropriateness. *P. J. Dick Contracting,* supra at fn. 8.

While the Board gives substantial weight to bargaining history in furtherance of the statutory objective of stability in industrial relations, I find no basis on the record for giving the bargaining history involved herein weight over the other community of interests factors that make the unit sought by the Petitioner otherwise appropriate. For all intents and purposes, the Petitioner has been the collective-bargaining representative of the Employer's employees for all purposes permissible under the Act. The historical geographical exclusions of the employees of the Employer when they work in certain counties from coverage of the 8(f) agreements between the Petitioner and the Employer has no discernable impact upon the employees and their community of interest. For the most part, it appears that the geographical exclusions, as a practical matter, have been completely ignored by the Employer and have made no difference to the employees of the Employer with regard to their terms and conditions of employment.

On the other hand, to find as the Intervenors' contend, that the unit sought by the Petitioner must under Section 9(b) of the Act be confined geographically to the unit the Petitioner represented under the 8(f) agreements only serves, on the facts here, to perpetuate an arbitrary geographical division of the same employees into separate units based upon where they are working. The only basis on the record in the instant case for the historical geographical division of the units between the Petitioner and the Intervenors were political considerations of maintaining geographical integrity for the local unions without competition among the local unions regarding the representation of employees. The record evidence shows that the geographical divisions have little, if anything, to do with the terms and conditions of employees whom these locals represent. Here, it is the same group of employees working under the same general terms and conditions of employment whom the Intervenors' would divide into different units depending solely on what county that they happen to be working in.

It is my opinion, based upon the foregoing, that the 8(f) bargaining history between the parties is not entitled to controlling weight over the community of interests that exists in the unit sought by the Petitioner. In *A. C. Pavement Striping Co.*, 296

NLRB 206, 210 (1989), the Board adopted the decision of the Acting Regional Director which set forth in relevant part:

> The Board has long given substantial, but not conclusive, weight to a prior history of collective bargaining. *General Electric Company,* 107 NLRB 70, 72 (1953). In *John Deklewa and Sons*, *supra*, the Board set forth that in making unit determinations where the employees in question were covered by 8(f) agreements, the appropriate unit will normally be the unit as defined in the agreements. Nevertheless, the Board has also long held that it will not give controlling weight to a history of collective bargaining "to the extent that it departs from statutory provisions or clearly established Board policy concerning the composition and scope of bargaining units." *Williams J. Keller, Inc.,* 198 NLRB 1144, 1145 (1972). Herein, the record shows no rational basis exists for the two historical units other than being purely historical accidents.

In sum, the record herein demonstrates no rational basis for continuing the geographical division of the same groupings of employees into different units based upon local union jurisdictions. Accordingly, based upon the foregoing and the entire record here, I find that the unit sought by the Petitioner is not limited to that previously covered under its 8(f) agreement with the Employer and that the unit may appropriately include plasterers working in DuPage County. Similarly, with regard to the Employer's request at the hearing that the unit description should include the counties in Illinois within the Petitioner's jurisdiction, the Board has long held that a union's territorial jurisdiction and limitations do not generally affect the determination of the appropriate unit. *Groendyke Transport*, 171 NLRB 997, 998 (1968); *CCI Construction Co*., 326 NLRB 1319 (1998). Accordingly, I find the unit sought by the Petitioner to be appropriate and I will not include either the geographical limitation regarding DuPage County sought by the Intervenors nor the Petitioner's territorial jurisdiction as sought by the Employer in the unit's description. Inasmuch as I have rejected both the Intervenors' and the Employer's geographical limitations in defining the unit; no party raises any other issues regarding the description of the unit's scope; and the unit found appropriate encompasses all of the Employer's plasterers who share a substantial community of interests regardless of job location and have a continuity of employment with the Employer from job to job, I find no basis to define the unit or limit the unit in any other geographical terms that might be appropriate in different circumstances. See *Oklahoma Installation Co*., 305 NLRB 812 (1991).