

Central Parking System, Inc. and Teamsters Automotive & Allied Workers, Local 665, AFL-CIO.
Case 20-RM-2831

August 27, 2001

ORDER AFFIRMING DISMISSAL
BY CHAIRMAN HURTGEN AND MEMBERS
LIEBMAN
AND TRUESDALE

On October 6, 2000, the Regional Director for Region 20 administratively dismissed the instant petition. Thereafter, in accordance with Section 102.67 of the National Labor Relations Board Rules and Regulations, the Employer-Petitioner filed a timely request for review.

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

Having carefully considered the matter, the Board has decided to affirm the Regional Director's dismissal of the petition.

Facts

The Employer operates various parking facilities in California. The Employer and the Union are parties to two separate collective-bargaining agreements, one of which applies to the employees at the Employer's parking facilities in San Francisco and San Mateo counties. The Union contends that this collective-bargaining agreement contains an "after-acquired clause," pursuant to which the Employer allegedly agreed—upon proof of majority status—to recognize the Union as the bargaining representative of employees at parking facilities subsequently acquired by the Employer in the San Francisco area.¹

In 1999, the Employer acquired the Allright Parking Corporation (Allright), a company also engaged in the operation of parking facilities in San Francisco. Following this acquisition, the Union, relying on the alleged after-acquired clause in its existing collective-bargaining agreement with the Employer, sought recognition as the collective-bargaining representative of the employees at the Allright facilities in San Francisco. The Employer refused to recognize the Union, asserting that Allright, a subsidiary of the Employer, was the employer of the employees at the facilities in question, and that Allright was not a party to any collective-bargaining agreement with the Union. The Union subsequently filed a grievance and requested that the matter be referred to arbitration. Consistent with its previously stated position, the Employer

¹ In support of its interpretation of the collective-bargaining agreement provision, the Union also relies on a prior settlement agreement between the parties and a letter from a labor relations consultant interpreting the parties' contract.

rejected the Union's request to proceed to arbitration. Thereafter, the Union filed a complaint in Federal district court to compel arbitration of the dispute.

On May 18, 2000, the Employer filed the instant petition for an election in a separate unit consisting of the employees at Allright's San Francisco facilities. The Regional Director administratively dismissed the petition on the basis that the Union had not made a demand for recognition in the petitioned-for unit but, rather, had sought to add the employees at issue to its existing unit. For the reasons that follow, we conclude that the Regional Director properly dismissed the petition.

Analysis

In seeking recognition on behalf of the Allright employees, the Union here was asserting that the Employer had agreed to an "after-acquired" clause requiring recognition of the Union at future Employer locations upon proof of majority status. In essence, the assertion of an after-acquired clause is a claim that the Employer has waived its right to demand an election. As the Board stated in *Houston Division of the Kroger Co.*, 219 NLRB 388, 389 (1975):

Interpreting these clauses to mean that an employer can . . . demand an election renders them totally meaningless and without effect, for unions need no contract authorizations to establish their representation status in a Board-conducted election. . . .

. . . .

To permit the Employer to claim the very right which it has forgone, perhaps in return for concessions in other areas, would violate the basic national labor policy requiring the Board to respect the integrity of collective-bargaining agreements.

See also *Pall Biomedical Products Corp.*, 331 NLRB 1674, 1675 (2000).

Accordingly, the Union's demand for recognition based on an alleged contractual "after-acquired" clause does not entitle the Employer to demand an election under Section 9(c)(1)(B).

Further, as the Regional Director noted, the Union does not seek to represent the employees in the petitioned-for unit, i.e., a separate unit of the employees at Allright's San Francisco facilities.² It is settled Board law that where a union does not seek to represent the em-

² Even if, as the Employer contends, the Union has not "maintained a consistent position" with regard to the appropriateness of a separate unit of employees at Allright facilities and its willingness to represent those employees in a separate unit, it is clear, and the Employer concedes, that the Union's "current" position is that it does not seek to represent the employees in the petitioned-for separate unit.

ployees in the unit in which the employer seeks an election, no question concerning representation exists within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act. *Woolwich, Inc.*, 185 NLRB 783, 784 (1970); *Bowman Building Products Division*, 170 NLRB 312, 313 (1968). See also *Carr-Gottstein Foods Co.*, 307 NLRB 1318 (1992); *United Hospitals, Inc.*, 249 NLRB 562 (1980).³ Since the Union does not seek to represent the Allright employees in a separate unit, but rather only as part of the existing unit, the Regional Director properly dismissed the petition. See *Luper Transportation Co.*, 92 NLRB 1178 (1951).

Our dissenting colleague, citing no case support, would process the Employer's petition simply because the Union has made a demand to represent its employees, regardless of the unit sought by the Union. Our colleague obviously disagrees with the long-settled precedent in this area.⁴ We perceive no basis to disturb this precedent.

Finally, our colleague faults us for leaving representation issues to the arbitral forum. Although the Board only infrequently defers to arbitration in representation proceedings, the Board will find deferral appropriate

³ Our dissenting colleague's citation of *United Hospitals* as support for his position is misguided. There, a union sought to accrete some unrepresented employees to the unit of employees it currently represented pursuant to a collective-bargaining agreement with a multi-employer association (to which the employer belonged). The employer, however, filed an RM petition, seeking a self-determination election among the unrepresented employees. The Board determined that the employer's petition should be dismissed, because the union was not seeking to represent the employees in a separate unit. In this regard, *United Hospitals* directly supports our decision to dismiss the Employer's petition here.

It is true, as our dissenting colleague indicates, that the Board additionally resolved the accretion issue in that case. It concluded that an accretion was inappropriate given the employees' (and other similarly situated employees') historical exclusion from the unit. The Board therefore vacated the Acting Regional Director's order adding the unrepresented employees to the existing multiemployer unit.

However, it is well-established that accretion is a matter involving the application of statutory policy and standards—a matter within the particular province of the Board. See *Marion Power Shovel Co.*, 230 NLRB 576, 577–578 (1977). By contrast, an issue of contractual interpretation arising from the assertion of an after-acquired clause—the issue presented in this case—is, as noted below, a matter that is properly resolved through the grievance-arbitration procedure.

⁴ Although it is true, as our dissenting colleague observes, that Sec. 9 of the Act permits an employer to file an RM petition upon receipt of an individual's or union's "claim to be recognized" as the bargaining representative of its employees, the language of that section cannot be read in isolation, without regard to the well-established precedent under which the Board consistently has interpreted this section to require that an employer's petition be coextensive with the unit of employees for which the union has demanded recognition. Indeed, it would be illogical for the Board to compel an unwilling union to represent a group of employees that it does not desire to represent.

when the resolution of the issues "turns solely on the proper interpretation of the parties' contract." *St. Mary's Medical Center*, 322 NLRB 954 (1997).

Such is the case here. If the arbitrator finds, as the Union contends, that the parties' collective-bargaining agreement contains an "after-acquired" clause, then the employees at the Allright facilities will be added to the existing unit upon demonstration of the Union's majority status.⁵ If, however, the arbitrator finds, as the Employer contends, that there is no "after-acquired" clause in the agreement, then there will be no existing question concerning representation of those employees by the Union. In either situation, the arbitrator's resolution of the contractual issue resolves all other issues in this case.

For the foregoing reasons, we conclude that the Regional Director properly dismissed the instant petition. Accordingly, the dismissal is affirmed.

CHAIRMAN HURTGEN, dissenting.

I would not dismiss the RM petition. I would remand the case to the Regional Director for him to hear and decide the issues involved herein.

Central Parking and the Union are parties to a contract covering all of Central's parking facilities in San Francisco. The contract and other documents allegedly require recognition at all "after-acquired" locations in San Francisco.

In 1999, Central purchased Allright Parking Corp., a company with parking facilities in San Francisco. The Union, citing the alleged "after acquired" agreements, sought recognition as the representative of the Allright employees. Central refused. The Union seeks arbitration of the dispute. The instant RM petition seeks an election among the Allright employees.

In dismissing the RM petition, my colleagues assert that a demand for recognition, if based on an alleged "after acquired" clause, would not support an RM petition. I disagree. Under Section 9(c)(1)(b), a demand for recognition will support an RM petition. There is absolutely nothing in Section 9(c)(1)(b) to suggest that the validity of the RM petition would depend upon the basis on which the demand for recognition was made. To be sure, if the Board finds that an "after acquired" clause is a clear and unmistakable waiver of the Employer's right to an election, that would lead to a dismissal of the RM

⁵ Our dissenting colleague suggests that the arbitrator's resolution of this issue will not ensure that "the 'majority' requirement of *Kroger* is read into the clause." But the Union makes no claim that it is entitled to represent the employees at issue without regard to majority support. Indeed, it repeatedly asserted that it had garnered majority support. Nevertheless, in the unlikely event that an arbitrator would fail to read a "majority requirement" into the after-acquired clause here, the Employer could seek appropriate recourse through the Board's procedures.

petition.⁶ However, there is no finding of such a waiver here. My colleagues have dismissed the RM petition here based solely on a *claim* concerning an *alleged* “after acquired” clause. The issues of whether there is such an agreement and whether such an agreement is a waiver of the Employer’s right to an election, are the subject of a demand for arbitration. In sum, there has been no finding of waiver, and hence there is no basis for dismissal of the RM petition.

The Regional Director dismissed the petition on a different basis. He relied on the fact that the Union never sought recognition in a unit confined to the Allright employees. Rather, the Regional Director said the Union sought to accrete the Allright employees into the extant unit. My colleagues agree with the Regional Director. I disagree.

Unquestionably, the Union is demanding recognition as the representative of the Allright employees. If the Union had confined its demand to those employees, the RM petition could be processed, and an election would be held (absent a waiver). However, by seeking to accrete these employees into the extant unit, i.e., add them *without* an election, the RM petition is dismissed. Surely, this is an anomalous result, wholly at odds with Sections 7 and 9.

My colleagues suggest that processing of the RM petition would compel an unwilling union to represent a group of employees that it does not desire to represent. Of course, the fact is that, in the instant case, the Union does seek to represent the employees.

My colleagues say that my position (to continue processing of this RM case) is without case support. It is true that I rely primarily on the language of the Act itself. Section 9 states that an employer can file an RM petition if a union makes a “claim to be recognized.” Clearly, that has occurred herein. Section 7 of the Act gives employees the right to choose, or refrain from choosing, representation by the Union. As discussed below, the Board, by resolving this case, can assure that these rights are protected. Finally, I rely on *United Hospitals, Inc.*, 249 NLRB 562 (1980), where the Board, in an RM case, resolved an accretion issue.

With further respect to *United Hospitals*, my colleagues note that the Board dismissed the RM petition there. Although that is technically correct, the more significant point is that the Board resolved the accretion issue. That is precisely what the Employer and I seek here, i.e., resolution of the accretion issue (along with the other representation issues). For, as stated by my col-

leagues: “Accretion is a matter involving the application of statutory policy and standards—a matter within the particular province of the Board.”

In my view, the *Board* should determine whether the agreement meets *Kroger* standards. That is, the Board should determine, inter alia, whether the Employer has agreed to recognize the Union as the representative of the Allright employees, based on a showing of majority support. If the Employer has so agreed, and majority status is shown, the RM petition would be dismissed.

My colleagues suggest that majority status is not at issue, i.e., that the Union claims majority support. However, a claim is not a fact. My colleagues leave to the arbitrator the issues of (1) whether he will require a majority showing, in circumstances where the contract does not require it; and (2) if he does, whether the union has an uncoerced majority. Contrary to my colleagues, these are not contractual issues.

It is appropriate for the Board, rather than an arbitrator, to decide these issues. The Board, for example, can assure that the “majority” requirement of *Kroger* is read into the clause, and that this requirement has been satisfied. In short, the Board can assure that Section 7 rights are protected.

By dismissing the RM petition, the Board leaves representation issues to a non-Board forum. These issues include: (1) whether there has been a waiver of the Employer’s right to an election; (2) whether Central and Allright are a single employer; (3) whether the unit is appropriate; (4) whether the “majority” requirement of *Kroger* has been satisfied; (5) whether there is an accretion. These issues are representation case issues and thus should not be left to arbitration.⁷ Rather, these representation issues should be addressed by the Board in the instant case.

My colleagues suggest that the issue here is solely one of contract interpretation and not one of accretion. I disagree. Surely, by the Union’s seeking to add employees to a unit without an election, accretion issues are present. Further, the many other aspects of this representation case, as set forth above, extend beyond that of contract interpretation and thus are best resolved by the Board.

In sum, in the interest of protecting employee rights to choose representation or non-representation in an election, and in the interest of protecting a vital area of the Board’s jurisdiction, this RM case should not be dismissed.

⁶*Houston Division* 219 NLRB 388 (1975).

⁷*Hershey Foods*, 208 NLRB 452 (1974); *Commonwealth Gas*, 218 NLRB 857 (1975).