Mark Burnett Productions *and* Stephen R. Frederick, Petitioner *and* International Alliance of Theatrical Stage Employees. Case 31–RD–1554

March 30, 2007

ORDER DENYING REVIEW

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND WALSH

On July 27, 2006,[1] the Regional Director for Region 31 administratively determined to hold the decertification petition in abeyance pending resolution of outstanding unfair labor practices against the Employer. Pursuant to Section 102.71 of the National Labor Relations Board's Rules and Regulations, the Petitioner filed a timely request for review. The Union filed a statement in opposition.

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

Having carefully considered the entire record, including the Petitioner's request for review and the Union's statement in opposition, we find that the Petitioner's request for review of the Regional Director's determination to hold the petition in abeyance pending resolution of the outstanding unfair labor practice charges raises no substantial issues warranting reversal of the Regional Director's determination.

On November 25, 2005, the Union and the Employer agreed on the terms of an initial contract.[2] Shortly thereafter, the Union refused the unit employees' request for a ratification vote on the contract. On January 13 and 16, the employees submitted a "disaffection" petition to the Employer, stating that they no longer wished to be represented by the Union and that they wanted the Employer to cease recognizing the Union. On January 20, the Employer did not sign the contract as the Union requested, and, on January 23, the Employer withdrew recognition from the Union.

The Union filed unfair labor practice charges against the Employer alleging that the Employer violated Section 8(a)(5) of the Act by refusing to sign the contract and by withdrawing recognition from the Union. The Petitioner filed the decertification petition on July 14. The Regional Director informed the parties on July 27 that, notwithstanding the timing of the Petitioner's showing of interest supporting the decertification petition, he would "block" the processing of the petition pending resolution of the outstanding unfair labor practice charges against the Employer. Shortly after the unfair labor practice complaint against the Employer issued on October 6, the Regional Director reaffirmed his decision to hold the petition in abeyance.[3]

Unlike our colleague, we agree with the Regional Director's determination not to hold the election in this case. The Board's general policy is to hold the processing of a representation petition in abeyance if there are concurrent unfair labor practice charges that allege conduct which, if proven, would interfere with employee free choice if an election were to be held. NLRB Casehandling Manual, Part Two, Representation Proceedings, Section 11730, et seq.

In *General Shoe Corp*., 77 NLRB 124, 127 (1948), the Board stated that, "[i]n election proceedings, it is the Board's function to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees." The Board's policy of holding the petition in abeyance in the face of pending unfair labor practices is designed to preserve the laboratory conditions that the Board requires for all elections and to ensure that a free and fair election can be held in an atmosphere free of any type of coercive behavior.[4]

We recognize that the showing of interest supporting the employees' disaffection petition was secured prior to the Employer's alleged unfair labor practices and that there is no allegation that the petition is "tainted" by the alleged unfair labor practices. However, a complaint has issued against the Employer based on meritorious charges alleging a withdrawal of recognition and the failure to sign a contract.[5] These are serious and, at this time,[6] unremedied

[1] All subsequent dates are in 2006, unless indicated otherwise.

[2] The Employer voluntarily recognized the Union as the representative of editors, associate editors, and assistant editors in July 2005.

[3] The Regional Director stated that the allegations against the Employer involved type II blocking charges which are charges that allege conduct that not only could interfere with an election, but also are inherently inconsistent with the petition. The Regional Director subsequently issued an "Erratum," in which he informed the parties that the charges against the Employer constituted type I blocking charges which allege conduct that interferes with employee free choice in an election. See NLRB Casehandling Manual, Part Two, Representation Proceedings, Sec. 11730.2 and 3.

[4] "[T]he blocking charge policy is premised solely on the Agency's intention to protect the free choice of employees in the election process." NLRB Casehandling Manual, Part Two, Representation Proceedings, Sec. 11730.

[5] Here, the Employer agreed to the contract prior to receiving the decertification petition. A union is "entitled . . . to a conclusive presumption of majority status during the term of any collective-bargaining agreement." *Auciello Iron Works v. NLRB*, 517 U.S. 781, 785 (1996). Under well-established precedent, this rule applies "[o]nce final agreement on the substantive terms" of an agreement has been reached "regardless of the status of any written instrument incorporating that agreement," and even if the employer "has lawful grounds for believing that [the union] has subsequently lost its majority status," which might otherwise permit a withdrawal of recognition. *North Bros. Ford, Inc.,* 220 NLRB 1021, 1022 (1975). See also 347 NLRB 615, 615 fn. 6 (2006); *Flying Dutchman Park, Inc.,* 329 NLRB 414, 417 fn. 8 (1999).

unfair labor practice allegations that affect all unit employees notwithstanding an untainted showing of interest. If proven, the Employer's conduct would have a tendency to undermine the Union in the eyes of the employees, in effect "polluting" the election atmosphere. This is not the "free and fair" election atmosphere in which the Board prefers to conduct representation elections. Thus, it was not an abuse of discretion for the Regional Director to hold the petition in abeyance pending resolution of the unfair labor practice proceedings.

We agree with our dissenting colleague that the employees have a right to and an interest in an expeditious vote on their preference regarding their representation. But, employees also have the right to an election that reflects their untrammeled views. In order to effectuate this right, the Board's blocking charge procedures fulfill its longstanding policy that elections should be conducted in an atmosphere free of *any* type of coercive behavior that could affect employee free choice sufficiently to sway the outcome of the election. Postponing a decertification election until the election atmosphere is free and fair does not violate the employees' statutory right to an election, but instead provides them an opportunity to participate in an election reflecting their true—and uncoerced—views.

Accordingly, we affirm the Regional Director's determination to hold the petition in abeyance.

CHAIRMAN BATTISTA, dissenting.

I would not block the election. I would permit the employees to vote to express their desires concerning representation by the Union.

On January 13 and 16, 2006,[1] prior to the alleged commission of any unfair labor practices, a substantial majority of the unit employees (18 of 25) clearly expressed their desire to oust the Union as their representative. This expression of Section 7 desires was not tainted by any unlawful conduct. *Thereafter*, on January 20 and 23, the Respondent committed the allegedly unlawful conduct of refusing to sign an alleged contract and withdrawing recognition. It took these actions because the Union had lost majority support.

The petition herein was filed on July 14. It is not asserted that the petition was tainted by the allegedly unlawful conduct. This is not surprising, given the fact that the employees registered their disaffection from the Union before the allegedly unlawful conduct. Neither is it contended that the alleged contract is a bar to the petition or that it precludes a challenge to the Union's majority status.[2] Finally, it is not asserted that the withdrawal of recognition on January 23 precludes the processing of the petition. Rather, the contention is that the allegedly unlawful conduct will interfere with the holding of a fair election.

I disagree. The employees indicated their desires more than 1 year ago, prior to any unlawful conduct, and they now wish to register their choice, in an official way, in the secrecy of a voting booth. The allegedly unlawful conduct will not likely affect their vote. Indeed, it was their disaffection from the Union that caused the Respondent to not sign the alleged contract and to withdraw recognition. In these circumstances, I would hold the election. If the Union loses the election, it can assert that the allegedly unlawful conduct sullied the atmosphere, and the election can be set aside. We can deal with that contention as an objection if the need arises. But, in the meantime, an election can be held, and these employees, long frustrated in their effort to have an election, at least will have had one.

My colleagues argue that employees have a right to an election in a noncoercive atmosphere. I agree. The only issue is whether to hold the election now, with the possibility of setting it aside if the election atmosphere is shown to be coerced by unlawful conduct *or* to not hold the election now because of the *possibility* that (a) the unfair labor practice charges have merit and (b) they produced a coercive atmosphere. For the reasons indicated, I would not allow these *possibilities* to outweigh the benefits of a secret election now.

My colleagues say that the allegations, if proven, would "pollute" the election atmosphere. The naked assertion does not prove this fact. Concededly, there is a possibility that this is so. However, as indicated above, I would not allow that possibility to delay the election.

Finally, without passing on the merits of the complaint, I note that the allegedly unlawful conduct was the consequence of the employees' disaffection from the Union, not the cause of their disaffection. If the Respondent had signed the alleged contract, it would have been signing with a minority union (and arguably would have violated Section 8(a)(2)).[3]

In sum, I believe that the Board is here using the "blocking charge" rule to frustrate Section 7 desires and to delay election procedures. I would not do so.

[6] A hearing on the unfair labor practice complaint is scheduled for the end of April 2007.

[1] All subsequent dates are in 2006, unless indicated otherwise.

[2] Thus, the cases cited in fn. 5 of the majority opinion are inapposite.

[3] Compare *Levitz Furniture Co. of the Pacific*, 333 NLRB 717, 726, fn. 52 (2001), where the Board said that there would be no 8(a)(2) violation if there were a pending election petition at the time of the employee's action. However, there was no such petition here at that time.