

City Markets, Inc. and Juanita Larson, Terry Paulson, Larry D. Beckwith, John O. Price, William Portouw, Petitioner and United Food and Commercial Workers, Local No. 7. Cases 27-RD-614, 27-RD-617, 27-RD-619, and 27-RD-622

14 December 1984

DECISION AND DIRECTION OF ELECTIONS

BY CHAIRMAN DOTSON AND MEMBERS
ZIMMERMAN AND HUNTER

On petitions duly filed under Section 9(c) of the National Labor Relations Act, a hearing was held before Hearing Officer Michael J. Belo. Following the hearing and pursuant to Section 102.67 of the Board's Rules and Regulations, the Regional Director for Region 27 transferred this case to the Board for decision. The Employer and the Union filed briefs.

On the entire record in this case, the Board finds

1. The Employer is engaged in commerce within the meaning of the Act.

2. The Union is a labor organization which was certified as the majority representative of certain of the Employer's employees.

3. A question of representation affecting commerce exists within the meaning of Section 9(c) and Section 2(6) and (7) of the Act.

The Employer is a Colorado corporation engaged in the retail sale of groceries in Colorado, Utah, and Wyoming. The Union is the certified bargaining representative of four separate geographical units of the Employer's employees in Colorado. One unit encompasses the Employer's stores in Grand Junction and Clifton, one the store in Steamboat Springs, one the store in Aspen, and one the store in Glenwood Springs. The Union and the Employer were parties to a separate collective-bargaining contract for each location, all of which expired on 4 September 1982. When the old contracts expired, the parties were bargaining over the terms of new contracts but had not yet reached agreement.

Between 7 September and 8 November 1982 decertification petitions were filed by employees from each of the four Colorado units. Meanwhile, as a result of charges filed by the Union, the General Counsel issued a complaint on 15 October 1982 alleging, inter alia, that since 5 September 1982 the Employer had been violating Section 8(a)(5) of the Act by conditioning its contract offer on employees' refraining from engaging in protected activity such as handbilling and picketing. By letters dated 19 October 1982 the Regional Director informed the Petitioners from the Aspen, Steamboat Springs,

and Grand Junction units that their petitions were being dismissed because the alleged violation of Section 8(a)(5), unremedied at the time the petitions were filed, precluded the finding of a question concerning representation. The letters further informed the Petitioners that the petitions were subject to reinstatement if appropriate upon their application after the disposition of the unfair labor practice allegations. An identical letter was sent to the Petitioner from the Glenwood Springs unit on 16 November 1982.

The Union and the Employer continued to negotiate over new contracts while the unfair labor practice allegations were pending. On 16 February 1983 they entered into collective-bargaining agreements covering each of the four units. The agreements were to be effective retroactively from 5 September 1982 and to expire on 1 March 1986.

After the agreements were executed, the Union requested withdrawal of the charges that prompted the 15 October 1982 complaint. The Regional Director approved the withdrawal of the charges and dismissed the complaint on 21 March 1983. Thereafter, on various dates in March, April, and May 1983 the Petitioners from all four of the above-described units asked the Regional Director to reinstate their petitions.

The Union contends that the current and valid collective-bargaining agreements executed on 16 February 1983 prevent the subsequently requested reinstatement of the decertification petitions under the Board's discretionary contract-bar doctrine.¹ The Board has established the general rule that where, as here, a contract of definite duration is reduced to writing and executed by both parties, it will act as a bar for up to 3 years of its term to an election petition filed by an employee or rival union after the contract is executed. *General Cable Corp.*, 139 NLRB 1123 (1962); *Appalachian Shale Products Co.*, 121 NLRB 1160 (1958); *Pacific Coast Assn. of Pulp Manufacturers*, 121 NLRB 990 (1958). If, on the other hand, a petition is filed before the execution date of a contract effective either immediately or retroactively and is otherwise timely, the contract subsequently entered into will not bar the processing of the petition and the holding of an election. *Deluxe Metal Furniture Co.*, 121 NLRB 995 (1958). If the incumbent union prevails in the election held, any contract executed with the employer will be valid and binding; but if the union

¹ The Board has held that in circumstances in which a contract will normally act as a bar it will be disabled from doing so if, for example, it does not contain substantial terms and conditions of employment or embrace an appropriate unit. The parties do not contend that the contracts in themselves lack the requisites established by the Board for valid contract-bars.

loses, the contract will be null and void. See *RCA Del Caribe, Inc.*, 262 NLRB 963 (1982) (certification petition filed by rival union) (same rule applied to decertification petitions in *Dresser Industries*, 264 NLRB 1088 (1982)).

Here, the decertification petitions were timely when originally filed according to the Board's contract-bar rules. Each was filed after the prior contracts had expired and before the new contracts were executed. The new contracts therefore would not normally act as a bar to the petitioned-for elections. The Union urges, however, that the new contracts do operate as a bar to the elections because they were executed after the Regional Director had dismissed the petitions and before the requests for reinstatement were made; in other words, during the hiatus in the processing of the petitions caused by the Regional Director's determination that, in view of the pending unfair labor practice litigation, no question concerning representation could exist. We reject the Union's contention because it attributes undue significance to the Regional Director's dismissal of the petitions here.

As the Union points out, the Regional Director dismissed the petitions pursuant to the Board's "blocking charge" policy as exemplified by *Big Three Industries*, 201 NLRB 197 (1973). In that case the Board weighed the right of employees under Section 9(c) of the Act to decertify their bargaining representative against the employer's obligation to bargain in good faith. The Board concluded that where a complaint has issued alleging that the employer has refused to bargain in violation of Section 8(a)(5) of the Act and the appropriate remedy if the allegation be proved is an affirmative bargaining order, the employees' opportunity to decertify the union must be postponed pending litigation of the bona fides of the employer's bargaining efforts in order to preserve the orderly procedure of collective bargaining contemplated by the Act. Accordingly, the Board will sustain the Regional Director's dismissal of a decertification petition in the face of unremedied refusal-to-bargain charges under its authority granted by Section 9(c) of the Act to determine if a question of representation warranting an election exists. The Regional Director's dismissal of an election petition in these circumstances does not operate as a determination that the petition itself is defective, i.e., that it does not raise a real question concerning representation because, for example, it lacks a sufficient showing of interest or is tainted by employer support. It merely indicates that the petitioner must await the outcome of the unfair labor practice litigation, at which time he is entitled to request reinstatement of the petition, and that there is no point

in processing the petition further because the disposition of the alleged violation of Section 8(a)(5) of the Act may lead to the issuance of an affirmative bargaining order which would preclude an election for a certain period of time in any event. A dismissal of this kind does not in itself extinguish the employee right to an election invoked by the timely filing of a valid decertification petition.²

The unfair labor practice proceedings in anticipation of which the Regional Director dismissed the petitions will not take place since the charges have been withdrawn and the complaint dismissed. Moreover, the Employer and the Union have returned to the bargaining table and agreed upon new contracts. The countervailing considerations that compelled the Board to sustain the dismissal of the decertification petition in *Big Three Industries* are thus no longer present.³ Therefore, in accord with the Board's avowed intent to process valid petitions and conduct elections as expeditiously as possible, *RCA Del Caribe* and *Dresser Industries*, we will direct reinstatement of the petitions and the holding of elections in each of the designated units.⁴

² The Union contends that the Regional Director's determination that no question concerning representation existed became final upon the failure of the Petitioners to request review of the dismissal of their petitions. The Union thus seeks to equate the requests for reinstatement with the untimely filing of new petitions after the current contracts were executed. While the Union's contention that the dismissals were final would be correct had the petitions been dismissed on their merits, there is no requirement that the Petitioners here request such review in order to preserve their ultimate right to request reinstatement of their petitions following the unfair labor practice proceedings. Moreover, for the purpose of applying the Board's contract-bar rules the original filing date of a petition will control where the petition is dismissed on its merits and later reinstated pursuant to a favorable ruling on appeal. *Deluxe Metal Furniture*, supra at 1001. A fortiori, the original filing date of a petition which is dismissed subject to reinstatement after blocking charges have been resolved, as were the petitions here, controls in determining timeliness.

³ Member Zimmerman finds no merit in the Union's contention that the withdrawn complaint precludes reinstatement of the petitions. The Union argues that the complaint alleging a violation of Sec 8(a)(5) involved a substantive refusal to bargain. Therefore, it urges that it is impossible to say whether absent the Employer's refusal to bargain a collective-bargaining agreement would have been signed prior to the filing of the petitions. The chief difficulty with the Union's position is that it in effect urges the Board to find that 8(a)(5) allegations are meritorious solely on the basis that the Regional Director issued a complaint. The Union has withdrawn the charge, as a result the complaint has been dismissed, and no evidence has been presented indicating that the Employer engaged in conduct which would require a finding that the petitions should not be processed. In these circumstances I find no basis for concluding that the Employer engaged in unfair labor practices which preclude reinstating the petitions.

⁴ Member Hunter agrees with his colleagues that the circumstances of this case warrant reinstatement of the petitions. In doing so, however, he does not pass on the continued viability of the Board's decision in *Big Three Industries*.

The parties stipulated at the hearing on the requests for reinstatement that, should an election be directed, the four existing single location units as described in the documents comprising the collective-bargaining agreements entered into on 16 February 1983 are appropriate units.

[Direction of Elections omitted from publication.]

CHAIRMAN DOTSON, concurring.

The Employer contends that *RCA Del Caribe, Inc.*, 262 NLRB 963 (1982), is controlling. That case holds that an employer must continue to bargain with an incumbent union after a representation petition is filed, but should the parties execute a contract, its validity will rest on the outcome of the petitioned-for election. The same rule was applied to the filing of a decertification petition in

Dresser Industries, 264 NLRB 1088 (1982). While I do not pass on the wisdom of the rule in *RCA Del Caribe* and *Dresser*, which effectively converts a Board-conducted representation election into a ratification vote on an existing contract, I do agree with my colleagues that the circumstances here do not deprive the petitioning employees of their prerogative under Sections 7 and 9(c) of the Act to indicate in a secret-ballot election whether the Union continues to be the majority representative. I therefore concur in the reinstatement of the decertification petitions and the direction of prompt elections.