Hassett Storage Warehouse, Inc., Petitioner *and* Furniture Chauffeurs, Piano Movers, Packers and Handlers Union, Local No. 705, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO.[1] Case 13-RM-1480

16 December 1987

DECISION AND CERTIFICATION OR RESULTS OF ELECTION

BY CHAIRMAN DOTSON AND MEMBERS JOHANSEN AND BABSON

The National Labor Relations Board, by a three-member panel, has considered objections to an election held 16 February 1987 and the Regional Director's supplemental decision, attached as an appendix, recommending disposition of them. The election was conducted at the direction of the Regional Director pursuant to Section 8(b)(7)(C) and Section 9(c) of the National Labor Relations Act, and Section 102.77 of the Board's Rules and Regulations. The tally of ballots shows 3 ballots were cast for, and 21 against the Union, with no challenged ballots.

The Board has reviewed the record in light of the exceptions and briefs, and for reasons stated below, adopts the Regional Director's findings and recommendations.

As more fully set forth in the attached pertinent parts of the supplemental decision by the Regional Director, the Union, which was the recognized exclusive bargaining representative of the unit employees, called a strike on 15 January 1987[2] after a breakdown in negotiations over the terms of a new agreement to replace the former agreement which had expired on 14 January. On 15 January all unit employees crossed the Union's picket line and reported for work. Later that same day, all unit employees signed a letter addressed to the Union stating that they no longer wished to be represented by the Union, and that they were resigning from the Union. The letter was delivered to the Union on 15 January and a copy was provided to the Employer on the same day. On the basis of the letter, the Employer informed the Union on 15 January that it was withdrawing recognition from the Union. The Union continued to picket from 15 January to about 10 April. On 5 February the Employer filed the petition in this case and on 12 February the Board granted the Regional Director's request to proceed with an expedited election in accordance with the provisions of Section 8(b)(7)(C).

The Union contended that the election on the petition in this case was erroneously expedited under Section 8(b)(7)(C) because that section is applicable only to initial organizational efforts and does not apply to picketing by an incumbent union. The Regional Director, however, found that the proscriptions of Section 8(b)(7)(C) are not limited to initial organizational activities. As more fully explained in his attached supplemental decision, the Regional Director, citing *Higdon Contracting Co.*, 434 U.S. 335 (1978), determined that the Union's continued picketing in the face of the unit employees' clear and unequivocal rejection of the Union's representation constitutes the type of "top down" organizing which Congress sought to limit by enacting Section 8(b)(7)(C) of the Act.

In its appeal to the Regional Director's supplemental decision, the Union reiterates the contentions it made before the Regional Director and further argues, inter alia, that the Regional Director's conclusion is contrary to the Board's holdings in *Warehouse Employees Local 570 (Whitaker Paper)*, 149 NLRB 731 (1964), and *Machinists Local 790 (Frank Wheatley Pump)*, 150 NLRB 565 (1964). We find no merit in the Union's contentions. Specifically, we find the cases cited by the Union to be distinguishable from the present case and, therefore, not controlling here.

In both *Whitaker* and *Wheatley*, the employer in each case, during the course of a lawful economic strike called by the incumbent union and supported by the employees, hired permanent replacements for most or all the strikers and then withdrew recognition of the union on the ground that the hiring of the permanent replacements afforded it a reasonable basis for believing that the union no longer enjoyed the support of a majority of its employees. In both cases, the union in question continued to picket and the employer filed the 8(b)(7)(C) charge in response. Thus, the issue before the Board in *Whitaker* and *Wheatley* was whether the picketing engaged in by the incumbent union to better the wages and working conditions of its members had been converted to recognitional picketing of the type prohibited by Section 8(b)(7)(C) by virtue of the employer's replacement of most or all the strikers during the course of the strike. In both cases,[3] the Board held that the mere hiring of striker replacements did not render the incumbent union's lawful picketing unlawful under Section 8(b)(7)(C).

[1] On 1 November 1987 the Teamsters International Union was readmitted to the AFL-CIO Accordingly, the caption has been amended to reflect that change

[2] All dates are in 1987, unless otherwise indicated

[3] In *Wheatley*, the Board simply relied on its *Whitaker* decision, noting that a different result was not warranted merely because the employer in *Wheatley* had withdrawn recognition more than 1 year after the strike began

In so doing, the Board noted the legislative history of Section 8(b)(7)(C) indicating that the latter provision was not intended to impair or affect the right of organized workers to go on strike for better wages and working conditions and to picket in connection with such a strike. *Whitaker Paper*, supra at 734. Finding that the *Whitaker* picketing was at all times in connection with a strike to better wages and working conditions of *Whitaker* employees, the Board concluded that such lawful picketing was not rendered unlawful by the company's replacement of its striking employees and the Union's failure to file a valid 9(c) petition.

In contrast to *Whitaker* and *Wheatley*, the strike called by the Union here never had the support of any of the Employer's employees. On the day the strike began, all the unit employees drafted a letter, which was delivered to the Union and the Employer, stating that they no longer wished to be a member of the Union and no longer wished to be represented by the Union. They did not, at any time, participate in the strike or picketing. Thus, unlike the situation in *Whitaker* and *Wheatley*, there is no question here of impairing organized employees' right to strike or prohibiting picketing that attempts to secure better wages and working conditions because the employees here did not support the strike, no longer desired representation by the Union, and resigned their membership in the Union. Further, the Employer's withdrawal of recognition in this case was premised on the Union's clear loss of majority status and not, as in *Whitaker* and *Wheatley*, on an alleged but unproven loss of that status purportedly arising from the hiring of striker replacements. Consequently, the issue here, unlike that in *Whitaker* and *Wheatley*, is whether the continuation of the Union's picketing, after the Union no longer enjoyed the support of a majority of the Employer's employees and the Employer had lawfully withdrawn recognition, had a recognitional objective proscribed by Section 8(b)(7)(C). In agreement with the Regional Director, we find that it did. The Union ceased to be an incumbent representative following the Employer's lawful withdrawal of recognition. Thus, we agree with the Regional Director's conclusion that:

> The evil that Congress sought to remedy with the enactment of Section 8(b)(7)(C) present in the situation involved herein, where the employees concerned have clearly and unequivocally rejected the Union's representation, is as great, if not greater, than it is in the normal initial organizing situation where the employees have not had the opportunity to express their desires on the union representation being forced on them.

We therefore conclude that the Regional Director appropriately expedited an election on the instant petition pursuant to Section 8(b)(7)(C) and overrule the Union's objection. Accordingly, we find that a certification of results of election should issue in this case.

CERTIFICATION OF RESULTS OF ELECTION

IT IS CERTIFIED that a majority of the valid ballots have not been cast for Furniture Chauffeurs, Piano Movers, Packers and Handlers Union, Local No. 705, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO, and that it is not the exclusive representative of these employees.

APPENDIX

THE OBJECTION:

The Union by its objection to the election contends that Section 8(b)(7)(C) of the Act was not applicable to its picketing of the Employer-Petitioner, and therefore the Region erroneously expedited the holding of the election in processing the petition involved herein, depriving it of the opportunity to campaign among the eligible voters and to set forth its views at a hearing prior to the election being conducted.

The objection, thus, requires an examination into the circumstances underlying the 8(b)(7)(C) charge filed by the Employer-Petitioner in Case 13–CP–538 and the Region's processing of that charge which resulted in the expedited election being conducted on the petition involved here. This in turn also brings into the focus of inquiry the related 8(a)(5) charge filed by the Union in Case 13–CA–26619. Accordingly, the evidence and conclusions adduced in the aforementioned cases are considered herein.

BACKGROUND-THE EVENTS LEADING UP TO THE FILING OF THE INSTANT PETITION:

Prior to the events of January 15, 1987, set forth *infra*, the Union was for many years the exclusive collective bargaining representative of the employees of the Employer-Petitioner in the unit described above. On January 15, 1987, the Union commenced a strike against the Employer-Petitioner upon failing to come to an agreement with the Employer-Petitioner for the terms of a new collective bargaining agreement to replace the agreement that had expired at midnight January 14, 1987. On the morning of January 15, 1987, the employees of the Employer-Petitioner represented by the Union reported to work at the Employer-Petitioner's facility in mass pursuant to an agreement that they had reached among themselves the night before that they would all report for work despite the expected strike by the Union. In order to report for work without the risk of being fined by the Union for not supporting the strike, the employees had prepared a letter of resignation which was signed by all of the employees of the Employer-Petitioner represented by the Union who were actively working at that time

Prior to crossing the picket line that had been set up by the Union with "on strike" picket signs, the employees attempted to give the resignation letter to a union representative present on the picket line. The union representative refused to accept the resignation letter. However, the employees crossed the picket line anyway

Later that morning another representative from the Union, Don Heim, arrived at the Employer-Petitioner's facility, and the employees gave him the resignation letter. Thereafter Heim entered the Employer-Petitioner's facility and spoke to the President of the Employer-Petitioner, Terrence Sherman, and the Executive Vice-President, Thomas O'Reilly. After speaking with Sherman and O'Reilly, Heim met with the employees and expressed to them his optimism that the Employer-Petitioner would quickly sign the agreement that the Union wanted, ending the strike. On Heim's suggestion the employees took back the resignation letter. The employees then went to speak to Sherman and O'Reilly about the meeting they had with Heim. Sherman and O'Reilly told the employees that nothing had changed in the situation with the Union; that the Union was still insisting that the Employer-Petitioner sign the agreement the Union has reached with other employers; and the Employer-Petitioner still wanted a different agreement which it thought the Union had agreed to and later backed away from.

The employees then met among themselves to discuss the developments of that morning and what course of action they should take. The employees came to a unanimous consensus that the only way to continue working was to "decertify" the Union. To achieve this a letter was drafted and signed by all the employees represented by the Union actively working, approximately 19 employees, setting forth that not only were the employees resigning from the Union but they no longer wished the Union to be their representative. This "decertification" letter was mailed to the Union on the afternoon of January 15, 1987, and was also given to a union representative on the picket line at that time. Copies of both the initial resignation letter and the subsequent "decertification" letter were also given on that date, January 15, 1987, to the Employer-Petitioner by the employees.

Based on the actions of the employees, the Employer-Petitioner, by a letter dated January 15, 1987, notified the Union that it was withdrawing recognition from the Union as the bargaining representative of its employees. The Union continued to picket the Employer-Petitioner with picket signs asserting that the Union was "on-strike" against the Employer-Petitioner. On January 26, 1987, the Employer-Petitioner filed a charge under Section 8(b)(7)(C) of the Act in Case 13-CP-538, alleging, *inter alia*, that the Union was picketing it for a recognitional objective. On January 27, 1987, the Union filed a charge under Section 8(a)(5) of the Act, alleging *inter alia*, that the Employer-Petitioner unlawfully withdrew recognition from the Union. On about January 30, 1987, the Union changed its picket signs to read "on strike, unfair labor practices"

THE FILING OF THE INSTANT PETITION AND PROCEEDING AT THE LABOR BOARD:

On February 5, 1987, the instant petition was filed by the Employer-Petitioner. On February 6, 1987, the undersigned by a letter to the Union, declined to issue a complaint on the Union in Case 13-CA-26619, setting forth that:

> From the evidence, the investigation shows that, after the negotiating session of January 14, 1987, an uncoerced majority of the employees in the bargaining unit gave notice to both the Employer and the Union that they no longer wished to be represented by the Union for the purposes of collective-bargaining. Only thereafter did the Employer withdrew recognition from the Union and then implement its final offer, thereby changing the terms and conditions of employment of the employees in the unit Further proceedings are not warranted at this time and I am, therefore, refusing to issue complaint in this matter.

Pursuant to Section 102.81(c) of the Board's Rules and Regulations, the Union was given until the close of business on February 19, 1987, to file an appeal in Case 13-CA-26619 with the office of Appeals of the General Counsel for the Board On February 12, 1987, the Board granted authorization to the undersigned to conduct an expedited election on the instant petition with the ballots from the election to be impounded pending a final disposition of Union's charge in Case 13-CA-26619 By a letter dated February 12, 1987, to the Union and the Employer-Petitioner, the undersigned directed an election to take place on February 16, 1987, by secret ballot among the Employer-Petitioner's employees in the contractually defined bargaining unit in Case 13-RM-1480. By a letter dated February 13, 1987, to the Union and the Employer-Petitioner, the undersigned declined to isue a complaint in Case 13-CP-538, setting forth that:

> It does not appear that further proceedings on the charge are warranted inasmuch as a timely valid representation petition involving the employees of the Employer named in the charge has been filed within a reasonable time from the commencement of the picketing described in said charge, and a determination has been made that an expedited election should be conducted upon such petition in accordance with the provisions of Section 8(b)(7)(C) and 9(c) of said Act and the National Labor Relations Board Rules and Regulations A notice of such election is being issued in Case 13-RM-1480. I am therefore refusing to issue a complaint in this matter.

The election was conducted on February 16, 1987, with ballots being impounded pursuant to the Board's direction. By a letter dated March 5, 1987, from the Office of Appeals of the General Counsel for the Board, the Union's appeal of the refusal to issue a complaint in Case 13-CA-26619 was denied. Accordingly, on March 10, 1987, the impounded ballots were opened and counted in the presence of the parties, and a tally of ballots was

issued and served on the parties showing the results of the election was set forth *supra.*

POSITIONS OF THE PARTIES ON THE OBJECTION:

The Union contends that the election on the instant petition was erroneously expedited pursuant to Section 8(b)(7)(C) of the Act, arguing that Section 8(b)(7)(C) is only applicable to picketing in initial organizational campaigns. In support of its contention, the Union cited *National Labor Relations Board v. Iron Workers, Local 103 (Higdon Contracting Co.)*, 434 U.S. 335 (1978), wherein the prohibitions of Section 8(b)(7)(C) were described as being applicable to picketing in initial organizing campaigns by unions The Union also cited *Local 406, International Brotherhood of Teamsters*, an opinion by the Division of Advice of the Office of the General Counsel for the Board reported at 113 LRRM 1032 (1983), wherein the Division of Advice, in an *assuming arguendo* position, stated that Section 8(b)(7)(C) only applied to initial organizational activities and was not applicable to an incumbent union that might have lost its representative status.

Based on its contention that the election was erroneously expedited, the Union further contends that it was thereby disabled from effectively communicating its views to the employees prior to the election being conducted. In supported of its prejudice contention, the Union asserted that it could not effectively communicate with employees at the Employer-Petitioner's facility as security personnel, mostly off duty police officers, kept its representative off the Employer-Petitioner's property and away from employees as they entered or left work. The Union contends that it could only communicate with employees by leaflets and letters. Thus by a leaflet and a letter to the employees, the Union set forth that it would hold a dinner meeting with employees on February 21, 1987, at a hotel to discuss the Union's views with employees. However, the election was scheduled for February 16, 1987, before the Union could conduct the meeting, and the meeting reservation with the hotel was subsequently cancelled.

The Union in its objection also asserted that the Union was precluded from setting forth its position in a pre-election hearing by the expedited election. However, the Union presented no evidence that it was prejudiced by a lack of a hearing, which is normal to the expedited election procedures. Nor, has the Union asserted any issues that it could have properly presented at a pre-election hearing that it was precluded from doing by the expedited election procedure Accordingly, this aspect of the Union's objection is not further considered herein.

The Employer-Petitioner contends that the Union's objection to the election is improper, arguing that the Union, pursuant to Section 102.80(c) of the Board's Rules and Regulations, could have filed a request with the Board for special permission to appeal from determination to conduct an expedited election, and that the failure of the Union to do so constitutes a waiver of any objection that the election was improperly expedited. In support of its position, the Employer-Petitioner cited *National Labor Relations Board v. Delsea Iron Works, Inc.*, 334 F.2d 67 (C.A. 3, 1964) wherein the Court found that an employer's failure to seek special permission to appeal the holding of an expedited election and failure to file objections to the election constituted a waiver to its contentions that the election therein was improperly expedited.

FINDINGS AND CONCLUSION:

Without making any determinations on the issues of whether the Union's failure to make a request for special permission to appeal the expedited election determination constitutes a waiver of its objection, an issue which the Board has in the past declined to rule on,[2] it is the opinion of the undersigned that the Union has not represented any basis for finding that the election held herein was improperly expedited pursuant to Section 8(b)(7)(C) of the Act and was, therefore, invalid. The Union's objection at its core presents a purely legal issue— whether or not the election was properly expedited pursuant to picketing by the Union in violation of the prosciptions of Section 8(b)(7)(C) of the Act For, if the election was properly expedited, the rest of the Union's objection concerning the consequences flowing from the expedited election procedures must also fail as a natural consequence inherent in the proper use of a procedure authorized by the Act.

With regard to the legal issue presented by the Union's objection, I find that, after the Employer-Petitioner lawfully withdrew recognition from the Union, as I found in Case 13-CA-22619, the Union's continued picketing of the Employer-Petitioner violated the proscriptions of Section 8(b)(7)(C) of the Act. Contrary to the Union's contention, I do not find that the proscriptions of Section 8(b)(7)(C) of the Act are limited to "initial" organizational activities and that that Union was therefore privileged to picket the Employer-Petitioner because it had in the past represented its employees. The authorities cited by the Union in support of its contention are neither controlling precedent on the situation involved herein or persuasive support for its contention. Rather, I find that the language of Section 8(b)(7)(C) of the Act and the purposes for which that Section was enacted by Congress clearly emcompassed the Union's picketing after recognition was lawfully withdrawn within its proscriptions.

The Union's citation to the opinion of the Division of Advice is misplaced in the context of the instant proceeding. The opinion of the Division of Advice based upon a hypothetical condition quite simply has no precedential value or persuasive value herein as the Board itself authorized the undersigned to conduct the expedited election on the petition involved herein, setting forth only the condition that the ballots from the election be impounded pending the resolution of the Union's unfair labor practice charges. Accordingly, I find that the opinion of the Division of Advice cited by the Union offers no constraints to the determination of the validity of utilizing the expedited election procedure in the instant case.

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[2] *Service Employees International Union, Local No 227 AFL-CIO (Children's Rehabilitation Center, Inc.)*, 211 NLRB 982, fn 2 (1974)

Furthermore, I find that the Union's contention that the prohibitions of Section 8(b)(7)(C) of the Act are limited to "initial" recognitional activities is not supported by the authority cited by the Union in support its contention. The Supreme Court's decision in *Iron Workers, Local 103 (Higdon Contracting Co.) supra* does not limit the prohibitions of Section 8(b)(7)(C) to "initial" recognitional activities. The Supreme Court in that case merely found that a union which had a prehire contract with an employer privileged under Section 8(f) of the Act could not picket the employer for a recognitional object when the union never achieved representational status under Section 9(a) of the act. While the Supreme Court used the word "initial" in describing the prohibited recognitional objection of the union, the Supreme Court did not limit the prohibitions of Section 8(b)(7)(C) to this context in its decision. The Supreme Court, as other courts and the Board, used the word "initial" merely as a descriptive term of the usual context in which the conduct that is claimed to be a violation of Section 8(b)(7)(C) arose, rather than as a word of limitation. As noted by the District Court in *Penello v. Warehouse Employees Union*, reported in 56 LRRM 2530, 2532–33 (D. Md., 1964), in dealing with the same contention as raise by the Union herein with regard to the Board's use of the word "initial" in describing conduct prohibited by Section 8(b)(7)(C):

> This court finds no justification in the statute, the legislative history or the cases interpreting the statute, for limiting sec. 8(b)(7) to picketing having as it target forcing or requiring an employer's *initial* (emphasis original) acceptance of the union as the bargaining representative of his employees. Such a construction would restrict the ends which are sought to be achieved by sec. 8(b)(7)(B) as well by 8(b)(7)(C).

Accordingly, I find, as the District Court in the foregoing case found, that the prohibitions of Section 8(b)(7)(C) are not limited to "initial" recognitional activities, by that they also extend to recognitional activities by a union to re-establish lawfully withdrawn recognition of the union as the bargaining representative of the employer's employees.

This conclusion that the Union's picketing of the Employer-Petitioner violated the proscriptions of Section 8(b)(7)(C) after recognition was lawfully withdrawn is consistent with and furthers the objectives of the legislative purpose for enactment of that Section by Congress. In enacting Section 8(b)(7)(C), Congress sought "to limit 'top down' organizing campaigns, in which unions used economic weapons to force recognition from an employer regardless of the wishes of his employees." *Iron Workers, Local 103 (Higdon Contracting Co.), supra.* Thus, herein, the Union's continued picketing of the Employer-Petitioner in spite of the lawful withdrawal of recognition by the Employer-Petitioner based on the clear and unequivocal rejection of the Union's representation by the employees constitutes "top down" organizing as economic coercion aimed at the Employer-Petitioner for the purposes of re-establishing recognition and collective bargaining with the Employer-Petitioner in total disregard for the expressed desired of the employees not to be represented by the Union, and I so find. The evil that Congress sought to remedy with the enactment of Section 8(b)(7)(C) present in the situation involved herein, where the employees concerned have clearly and unequivocally rejected the Union's representation, is as great, if not greater, then it is in the normal initial organizing situation where the employees have not had the opportunity to express their desires on the union representation being forced on them.

Based on the foregoing and all of the evidence produced in connection with the proceeding herein, it is the finding and conclusion of the undersigned that the Union's picketing of the Employer-Petitioner with on-strike signs after the Employer-Petitioner's lawful withdrawal of recognition, both explicitly and implicitly, had as an object thereof to re-establish recognition from the Employer-Petitioner for formerly represented by the Union and to bargain with the Employer-Petitioner for such employees. As such, I further find and conclude that the Union's picketing violated the prohibitions of Section 8(b)(7)(C) of the Act and that the election on the petition herein was, therefore, validly expedited pursuant to provisions of Section 8(b)(7)(C). Accordingly, I hereby overrule the Union's objection to the election