Rose Metal Products, Inc. *and* Tony Tettleton, Petitioner and Sheet Metal Workers Local 208. Case 17–UD–98

July 26, 1988

DECISION ON REVIEW AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN, BABSON, AND CRACRAFT

Following a hearing, the Regional Director on October 9, 1987, issued his Decision and Order Dismissing Petition. Thereafter the Employer filed a Request for Review of the Regional Director's decision. On December 24, 1987, the Board granted the request for review.

The National Labor Relations Board has reviewed the record in light of the request for review and has decided to affirm the Regional Director.

The Employer is engaged in the fabrication and sale of custom metal products. The Employer and the Union have had a collective-bargaining relationship for at least the past 20 years.[1] The most recent collective-bargaining agreement runs from September 1, 1987, to August 31, 1989. It contains a union-security provision.

The Petitioner, Tony Tettleton, has worked for the Employer since March 1968. He spends a minimum of 80 percent of his time performing unit work. He is a union member, pays union dues, and votes in union elections.[2] Subsequent to the filing of the deauthorization petition on September 11, 1987, the Union argued that Tettleton was a supervisor and thus ineligible to file the petition.

In his decision, the Regional Director determined that Tettleton was a statutory supervisor and was therefore ineligible to file the deauthorization petition. We agree.

We find that Tettleton is a supervisor under Section 2(11) of the Act.[3] Tettleton is responsible for assigning work to the unit employees, and he utilizes independent judgment to do so. When a work order is given to him by Foreman Keeter, Tettleton assigns the task to from six to eight employees based on his assessment of the skill level required by the work order, his knowledge of the skill level possessed by the individual employees, and the availability of the employees to work on the order. He has also transferred work from one employee to another. He can also instruct the unit employees to correct flaws in their work.

Tettleton also makes effective recommendations on discharges. He informs Foreman Keeter and Vice President Lehar of the progress of the unit employees. He also gives Keeter and Lehar his estimation of the employees' skill levels and whether they can perform the required work. After Tettleton expressed dissatisfaction with the work of employees Gates and Hamilton, they were terminated. There is no evidence that the Employer conducted an independent investigation to verify Tettleton's evaluations.

As noted, the Regional Director found that as a supervisor, Tettleton was barred from filing the deauthorization petition. We agree with the Regional Director's result but note that the Board has never directly addressed this question.[4]

After examining the language of Section 9(e) of the Act,[5] we find that a statutory supervisor is precluded from filing a deauthorization petition. This holding is consistent with our prior decisions precluding a statutory supervisor from participating in matters that concern solely the relationship between the employees and their collective-bargaining representative. Interpreting the former Section 9(e)(1) of the Act,[6] the Board in *St. Paul & Tacoma Lumber Co.*, 81 NLRB 434 (1949), concluded that supervisors could not vote in union-shop authorization elections. The Board reasoned that as Congress had decided to let only "employees" vote in an election to authorize a union-shop agreement and as a supervisor was not an employee within the meaning of the Act, the supervisor was precluded from voting in the election. Having found that

[1] The unit description in the most recent contract is. All full-time and part-time production and maintenance employees employed by Rose Metal Products, but excluding professional employees, office clerical employees, guards and supervisors as defined in the Act

[2] For purposes of our analysis, we have assumed arguendo that Tettleton is a unit member.

[3] The Regional Director also determined that Tettleton possessed apparent authority to act on behalf of the Employer and was therefore an agent of the Employer We find it unnecessary to reach this determination as we have found that Tettleton is a statutory supervisor

[4] We disavow the Regional Director's reliance on *Hydraulics Unlimited Mfg Co.*, 107 NLRB 1645 (1954), and *Helena Cable T.V.*, 249 NLRB 542 (1980), as supporting the proposition that a supervisor is ineligible to file a petition under Sec 9(e)(1) In both cases, the Board found that the individuals filing the petitions were not representatives of the employer, but were employees eligible to file a deauthorization petition In neither case did the Board decide whether a supervisor is eligible to file a deauthorization petition pursuant to Sec 9(e)(1)

[5] Sec 9(e)(1) states

> Upon the filing with the Board, by 30 per centum or more of the employees in a bargaining unit covered by an agreement between their employer and labor organization made pursuant to Section 8(a)(3), of a petition alleging they desire that such authorization be rescinded, the Board shall take a secret ballot of the employees in such unit and certify the results thereof to such labor organization and to the employer

[6] Sec 9(e) of the Act, which provided for elections to authorize and rescind union-shop agreements, was enacted by Congress as part of the Labor Management Relations Act, 1947 Former Sec 9(e)(1), which provided for elections to authorize these agreements, was repealed in 1951 Pub. L. 189–534 § (c), 65 Stat 601 (1951) Congress eliminated the necessity for these elections because they had proven expensive and burdensome for the Board, and because they had almost always resulted in a vote favoring the union shop H Rep 1082, 82d Cong, 1st Sess 2–3, *reprinted in* 1951 U S Code Cong & Ad News 2379, 2381

Congress did not intend to permit supervisors to vote in elections to authorize such agreements, we believe that it would be anomalous to conclude that Congress gave supervisors the right to file petitions to rescind such agreements.

Furthermore, the Board relied on similar reasoning to find that a supervisor could not file a decertification petition in *Doak Aircraft Co.*, 107 NLRB 924 (1954). The Board noted that Section 9(c)(1)(A),[7] which provides for the right to file a decertification petition, refers only to "employees" filing such petitions. Declaring that one purpose of the Act was to delineate supervisors as representatives of management, the Board concluded that permitting supervisors to act as employee representatives by filing such petitions would defeat the Act's purpose because supervisors would then be faced with a divided allegiance to the employees and to management.

We are persuaded that Congress was guided by the same considerations in enacting the present Section 9(e)(1). Section 9(e)(1) refers to a deauthorization petition filed by "30 per centum or more of the *employees* in a bargaining unit." (Emphasis added.) We do not discern any indication that Congress was not equally concerned with the problem of divided allegiance in the situation when a supervisor files a deauthorization petition.

We therefore reaffirm our holdings in *St. Paul & Tacoma Lumber*, and in *Doak Aircraft* and subsequent cases,[8] that Congress did not intend to include supervisors under the term "employees" in Section 9(e) and Section 9(c)(1)(A). We thereby preclude the anomalous situation of a supervisor/-petitioner being a party in decertification and deauthorization cases. As a party, the supervisor/-petitioner could call, examine and cross-examine witnesses, file objections to the elections, and file requests for review. The supervisor/petitioner would act as the representative of the unit members but simultaneously would be an agent of the employer. Our holding today precludes a conflict arising under Section 9(e), just as *Doak Aircraft* foreclosed it under Section 9(c)(1)(A).[9]

Contrary to the Employer, we do not find *Montgomery Ward*, 115 NLRB 645 (1956), and its progeny[10] controlling. In *Montgomery Ward* Supervisor DuFour was a unit member and had been allowed to vote in the representation election by agreement of the employer and the union. The Board determined that DuFour's fellow employees viewed him as "one of themselves." Therefore the Board concluded that certain statements made by DuFour did not intimidate the unit employees and were not attributable to the employer. Thus, DuFour's statements did not violate Section 8(a)(1) of the Act.

That line of cases is not inconsistent with *Doak Aircraft*, nor our holding today because the *Montgomery Ward* line of cases concern different concepts under the Act. *Montgomery Ward* concerned an alleged violation of Section 8(a)(1). The Board determined whether the employer "interfere[d] with, restrain[ed], or coerce[d] employees" in the exercise of their Section 7 rights. That determination turned on whether the supervisor's actions could coerce employees because they feared retaliation from management and, thus, whether the actions inhibited the exercise of their Section 7 rights. The finding that the employees viewed the supervisor as "one of themselves" and that management had not authorized his actions indicated that the employees could not feel coerced or intimidated. That issue is different from the one of whether a supervisor should act as a representative of the employees by filing a decertification or as here, a deauthorization petition on their behalf. The issue in *Montgomery Ward*, therefore, was employer liability for the conduct of its supervisor. As stated in *Doak Aircraft*, which we have reaffirmed today, a supervisor may not file such a petition because he is a member of management and may not engage in activities that would create the possibility of a divided allegiance. That determination is fully consistent with *Montgomery Ward*. Indeed, the Board emphasized in *Montgomery Ward* that the supervisor who was a unit member remained "an arm of management."

In light of our analysis and determination that Tettleton is a supervisor, we conclude that Tettleton was not eligible to file a deauthorization petition. Accordingly, we shall affirm the Regional Director's Decision and Order, and shall dismiss the petition.

ORDER

It is ordered that the petition is dismissed.

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[7] The pertinent language of Sec 9(c)(1)(A) is:

(c)(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—(A) by an employee or group of employees or any individual or labor organization acting in their behalf

[8] See, e g , *Times-Herald*, 253 NLRB 524 fn 1 (1980)

[9] Sec 102 83 of the Board's Rules and Regulations provides further support for our conclusion That section, in relevant part, states that a "petition to rescind the authority of a labor organization to make an agreement requiring as a condition of employment membership in such labor organization may be filed by an *employee or group of employees* on behalf of 30 percent or more of the employees in the bargaining unit covered by such an agreement." [Emphasis added]

[10] See, e g., *Craft Maid Kitchens*, 284 NLRB 1042 (1987), *A T. & K Enterprises*, 264 NLRB 1278 (1982); *Robertshaw Controls Co*, 263 NLRB 958 (1982)