

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

COVANTA ESSEX CO.,

Employer,

and

INTERNATIONAL UNION OF OPERATING
ENGINEERS, AFL-CIO, LOCAL 68,

Union,

and

GEORGE BANCI,

Petitioner.

Case No. 22-RD-199469

**REQUEST FOR REVIEW
OF THE ACTION OF THE REGIONAL DIRECTOR
DISMISSING THE INSTANT PETITION
AND
MOTION FOR EXPEDITED CONSIDERATION OF THE REQUEST**

The Employer hereby requests, pursuant to Section 102.67(c) of the Board's Rules and Regulations, review of a December 5, 2017 decision of the Regional Director for Region 22 to dismiss the petition in the above-referenced matter. The Request is made in that the Regional Director's decision: (1) raises a substantial question of law or policy because of a departure from officially reported Board precedent, particularly with regard to *Total Security Management*, 364 NLRB No. 106 (2016); (2) the Regional Director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party; and (3) there are compelling reasons for reconsideration of an important Board rule or policy.

Pursuant to Section 102.67(j), the Employer respectfully moves for expedited consideration of this request for review in order to avoid further delay to an election and unnecessary litigation of the underlying unfair labor practice complaint.

SUMMARY OF FACTS

A. Procedural Background

As recited in the Regional Director's decision, the Union, IUOE Local 68, was certified as the exclusive collective bargaining representative of certain employees of the Employer on May 20, 2016. On May 24, 2017, the Petitioner, George Banci, filed the instant petition to decertify the Union. On October 27, 2017, in response to a series of unfair labor practice charges filed by the Union, the Regional Director for Region 22 issued a complaint against the Employer in Case Nos. 22-CA-199293 and 22-CA-199926, attached hereto as Exhibit A (the "Complaint"). On December 5, 2017, the Regional Director issued a decision to dismiss the instant petition based on the allegations in the Complaint (attached hereto as Exhibit B).

The Regional Director made no finding that the instant petition was tainted by the Employer's alleged unfair labor practices or any conclusion of causation between the alleged unfair labor practices and the instant petition.

B. The Allegations of the Complaint

The allegations in the Complaint, which led to the blocking and ultimate dismissal of the instant petition, may be summarized as follows:

- A. The Employer failed to notify and give the Union an opportunity to demand bargaining about the discharge of two employees, in violation of *Total Security Management*, 364 NLRB No. 106 (2016). (Complaint, paras. 15-19).
- B. On May 24, 2017 (the day of the filing of the instant petition), the Employer provided the Union with an incomplete response to a May 19, 2017 request for information, in violation of Section 8(a)(5) of the Act, by failing to provide information in response to subparagraph “(iv)” of the May 19, 2017 request. (Complaint, paras. 10-14).

C. Additional Relevant Facts

With regard to the *Total Security Management* allegations, the General Counsel admits that notice was, in fact, provided prior to the discharges occurring. To wit, on May 18, 2017, the Employer advised the Union of its intent to discharge two employees. (Complaint, para. 16). Our understanding of the General Counsel’s concern is not that notice was not given but, rather, an insufficient amount of notice was provided to allow the Union an opportunity to demand bargaining prior to the making of the discharge decision.

With regard to the information request allegation, the petition was filed on the same day (May 24) as the date of the Employer’s information response. As such, there can be no legitimate basis to argue that the allegedly insufficient information response was a catalyst for the instant petition.

ARGUMENT

A. *Total Security Management* Was Incorrectly Decided

As explained in thorough and well-reasoned detail in Member Miscimarra's dissenting opinion in *Total Security Management, supra* at 17-41, the requirement for pre-imposition bargaining over the application of discipline during initial contract negotiations is an incorrect interpretation of the Act in light of prior case law. Indeed, the General Counsel has indicated doubt over the continuing validity of *Total Security Management* in *NLRB GC Memorandum 18-02* (December 1, 2017), which requires the mandatory submission to the Division of Advice of all charges alleging a violation of the law as articulated in that decision. (GC Memo, p. 4).

As such, we respectfully urge the Board to overturn *Total Security Management*. Upon such a reversal, the Complaint allegations based on that decision must be dismissed and, consequently, cannot form a basis upon which to deny the right of the petitioning employee and his coworkers to an election to exercise their Section 7 rights.

Failing to reverse *Total Security Management* on the instant Request for Review would cause unnecessary litigation of the underlying unfair labor practice charge until exceptions to a potentially adverse Administrative Law Judge decision could be filed. The petitioner has already waited nearly seven months for his petition to be processed. There is no justification to further delaying that petition on the dubious continuing validity of *Total Security Management*.

B. Assuming, *arguendo*, the Continuing Validity of *Total Security Management*, No Basis Existed for Dismissing the Petition

1. The Employer Complied with *Total Security Management*

Assuming *arguendo* the continuing validity of *Total Security Management*, the Employer complied with the decision's requirements. The Complaint admits that the Employer notified the

Union of its “intention” to terminate two individuals in a phone call. (Complaint, para. 16). The Union had an opportunity, in the moment or thereafter, to demand bargaining prior to the discharges occurring or even to request a delay in making the discharges until it could consider the issue. It failed to do so.

For how long is an employer required to wait for a response under *Total Security Management* when a Union is advised, in the course of a verbal communication, of the intent to discharge an employee? The flawed majority decision in *Total Security Management* provides no guidance, making the reversal of the decision even more compelling. Regardless, the fact that the Union was provided with notice of the intent to discharge and an opportunity to demand bargaining (even if no such demand was made by the Union) places the Employer’s action in compliance with the requirements of *Total Security Management*.

2. The Alleged *Total Security Management* Violation Cannot Be a Basis to Dismiss the Petition

A *Total Security Management* violation cannot be a basis upon which to deny Section 7 rights to employees. Even under the rationale of that decision, an employer who is committed to discharging an employee may do so, without the agreement of the union. The only violation is that of denying the union the opportunity to demand to first bargain about the discharge (which the Union did not do here).

Such a violation cannot be found to impede employee free choice as it is highly unlikely that employees would be impacted by, to the extent they even had knowledge of, a highly technical aspect of the labor law. Again, the Union had no ability to stop the discharges of the two individuals under *Total Security Management*. In that there can be no showing that such a

violation would interfere with employee free choice, it was improper for the Regional Director to dismiss the instant petition.

C. The Information Request Allegation Must Not Prevent an Election

1. The Regional Director Erred in his Factual Finding

While the General Counsel alleges that the requested information on employee disciplines was not provided following May 19, 2017, the Complaint omits the essential fact that the requested information had been previously provided to the Union. In fact, such information was provided contemporaneously with the intent to implement the disciplines. Such information was provided to the Regional Director in the course of the investigation, with only one discipline (Jack Grant, March 15, 2017) preceding the May 19, 2017 information request. (Exhibit C, August 18, 2017 e-mail; Exhibit D, August 24, 2017 e-mail). The Regional Director had been asked for the identity of which discipline(s) the Union alleged was not previously provided. (Exhibit D). No such discipline(s) were identified.

Therefore, the Employer had already provided to the Union all of the information requested in subparagraph (iv) of the May 19, 2017 information request. By relying on the allegation of the Complaint, which is drafted on this claim to reference only Employer actions following May 19, the Regional Director's decision to dismiss was clearly erroneous in that the information was, in fact, provided to the Union. *Cf.*, *NLRB GC Advice Memorandum, SBC/Ameritech*, 30-CA-16442-1 (February 13, 2004) (Employer that previously provided requested information only required to provide it again in response to an information request because the first disclosure was to the International Union, while the second requested disclosure was to the Local Union, who had a contractual right to make the request).

2. The Information Request Is Not a Basis to Deny the Exercise of Section 7 Rights

At its core, the information request allegation is that the Employer should have repeated its prior delivery of information to the Union. The Union already possessed the information it requested and, as such, could not have been limited in its ability to represent its members.

Assuming *arguendo* the existence of a Section 8(a)(5) violation in this instance, it cannot be found to warrant dismissal of the instant petition. In short, there is no basis to conclude that a failure to provide the Union with the information, again, impedes the ability of employees to exercise free choice in an election.

D. The Complaint Should Not Block an Election

As Members Kaplan and Emanuel noted in *Westrock Services, Inc.*, 10-RD-195447 (October 27, 2017), it is time to reconsider the Board's policy on blocking charges. Member Emanuel has previously opined that "an employee's petition for an election should generally not be dismissed based on contested and unproven allegations of unfair labor practices." *Westrock*, n. 1. *See, also*, the dissenting opinion in *Cablevision Systems Corp.*, 29-RD-138839 (June 30, 2016) (calling for the avoidance of delay in conducting decertification elections by reason of the current blocking charge policy). *See, also*, *Calportland Company, d/b/a Calportland Arizona Materials Division*, 28-RD-206696 (pending Request for Review).

It is directly contrary to the Act to deny the ability of independent employees to exercise Section 7 rights based on alleged, disputed conduct of their employer of which they have no reason to be aware. As noted by Member Miscimarra during his dissent to the 2014 election rules, the policy of blocking elections in cases of Type I allegations creates "the anomalous situation in which some conduct that would not be found to interfere with employee free choice if alleged in objections, because it occurs, would nevertheless be the basis for substantially

delaying holding any election at all.” *National Labor Relations Board – Representation Case Procedures*, 79 FR No. 240, 74456 (December 15, 2014). The basic purpose of the Act – to protect the rights of employees to exercise collective action – is not served by denying them that right due to unproven conduct of which they are unaware.

Significantly, in his December 5, 2017 decision, the Regional Director made no finding of any connection between the alleged unfair labor practices and employee disaffection with the Union. Indeed, the Regional Director undertook no hearing under *Saint Gobain Abrasives, Inc.*, 342 NLRB 434 (2004). Further, he made no finding on causation, nor articulated any evidence in support of causation, as required by *Master Slack*, 271 NLRB 78 (1984). In short, the Regional Director dismissed the instant petition based on contested claims over a matter where there was no element of causation (or, given the nature and timing of the alleged conduct, any reasonable basis to argue there even could be a causal relationship) between the alleged unfair labor practices and disaffection with the Union.

The Regional Director relies on *NLRB Case Handling Manual*, secs. 11730.3(b) and 11733.2(a)(2) to conclude that the petition be dismissed. Such reliance is misplaced in the instant matter. The rules set forth therein require a conclusion of causation, which was not found by the Regional Director. The Regional Director noted only the existence of alleged Section 8(a)(5) violations and a possible remedy for same.¹

Likewise, the decisions in *Big Three Industries*, 201 NLRB 197 (1973) and *Brannan Sand & Gravel*, 308 NLRB 922 (1993), also relied upon by the Regional Director, are

¹ *Mar-Jac Poultry Company*, 136 NLRB 785 (1962), as establishing a possible remedy and cited by the Regional Director, is immaterial. The only unfair labor practice alleged to have occurred during the certification year arises under the improper articulation of law in *Total Security Management* which, as addressed earlier, should be reversed.

distinguishable. In *Big Three Industries*, the employer was alleged to have engaged in surface bargaining. In *Brannan Sand & Gravel*, the employer was alleged to have refused to meet with the union, implemented unilateral changes and dealt directly with employees. In the cases relied upon by the Regional Director, the Section 8(a)(5) violations had a self-evident impact on employee dissatisfaction with their unions. In the instant matter, the allegations of an incomplete information response and violation of *Total Security Management* do not share the same quantum of effect on employees.

The Regional Director's analysis, noting no causation between the alleged unfair labor practices and the petition, effectively concludes that any Section 8(a)(5) complaint will result in the dismissal of a petition. The Act does not allow for a speculative, implied conclusion of causation. Such a conclusion is patently improper under existing Board policy.

CONCLUSION

Based on the foregoing, the Employer respectfully requests that its Request for Review be granted, the petition reinstated, an election scheduled forthwith, and the Employer be provided such other and further relief as may be just and proper.

Dated: New York, New York
December 19, 2017

Respectfully submitted,
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