Saint Gobain Abrasives, Inc. *and* Wayne Gregoire, Petitioner and International Union of Automobile, Aerospace & Agricultural Implement Workers of America, Region 9A, AFL–CIO. Case 1–RD–2003

July 8, 2004

DECISION ON REVIEW AND ORDER REMANDING

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN, SCHAUMBER, WALSH, AND MEISBURG

On October 2, 2003, the Regional Director for Region 1 administratively dismissed, without a hearing, the Petitioner's decertification petition, finding that the Employer's allegedly unlawful change in health insurance benefits likely caused employee disaffection with the Union. Thereafter, in accordance with Section 102.71(b) of the National Labor Relations Board's Rules and Regulations, the Petitioner filed a timely request for review. Having carefully considered the issue, we grant the request for review and conclude that this case should be remanded for a hearing on the issue of causation.

On August 29, 2003, the Union filed unfair labor practice charges against the Employer, alleging that the Employer refused to bargain in good faith by unilaterally implementing, in mid-November 2002, an interim health insurance program for 2003. The Regional Director subsequently issued a complaint in the case.[1] On February 3, 2003, the Petitioner filed the petition, seeking to decertify the Union.

The Regional Director dismissed the petition, concluding that the alleged unilateral change *caused* employees to reject the Union in January 2003. The Regional Director's finding of causal nexus was made *without a hearing*. The result is that the employees are deprived, at least for now, of their Section 7 rights on the question of union representation.

We conclude that such a factual determination of causal nexus should not be made without an evidentiary hearing. Under *Master Slack*, 271 NLRB 78 (1984), the Board resolves "the issue of causation" under a multifactor test. Here, those factors would include, at a minimum, such issues as: how many employees incurred an increase in the cost of health care; how much was the increase; how many employees enrolled in different plans as a result of the alleged unilateral change; how many employees switched care givers as a result of the change; and how many employees expressed dissatisfaction with the Union prior to the change.[2]

Master Slack and its progeny were unfair labor practice cases. That is, the employers in those cases withdrew recognition based on employee disaffection with the unions. The General Counsel established, at a hearing, that there were unfair labor practices and that there was a causal nexus between that unlawful conduct and the employee disaffection. Upon such a showing, the Board held that the employer could not rely on the disaffection, and the withdrawal of recognition was unlawful.

As noted, those cases involve an evidentiary hearing on the issue of causal nexus. The procedure in those cases was proper. Conversely, the instant case involves a finding of causal nexus, *without a hearing*. There is no reasoned basis for a lack of hearing in this situation.

We recognize that the Board has applied *Master Slack* in the context of a representation case, so as to dismiss a decertification petition without a hearing.[3] Here, however, the alleged unfair labor practice is a single unilateral change on a single subject and, as indicated above, there are significant factual issues as to the impact of that change. In such circumstances, it is not appropriate to speculate, without facts established in a hearing, that there was a causal relationship between the conduct and the disaffection. To so speculate is to deny employees their fundamental Section 7 rights. Surely, a hearing and findings are prerequisites to such a denial.[4]

Contrary to the assertion of our dissenting colleagues, we have no lack of trust in our Regional Director. Rather, we simply rely on the traditional rule that genuine factual issues require a hearing. After that hearing, the Regional Director will render a decision, and we will obviously give due consideration to whatever decision the Director reaches.

Our colleagues also suggests that we should withhold our decision here, on the view that the Board *might* affirm the judge's dismissal of the complaint in two "C" cases.[5] Of course, we do not know, at this juncture, how those cases will be resolved. In addition, we think it important, not just in this case but in future cases as well, to

[1] On April 27, 2004, Administrative Law Judge David L. Evans issued a decision dismissing the complaint allegation regarding the unilateral change in health benefits.

[2] The *Master Slack* test is an objective one and the matters set forth above can be objectively ascertained. The relevant inquiry at the hearing does not ask employees *why* they chose to reject the Union.

[3] See, e.g., *Overnite Transportation Co.*, 333 NLRB 1392 (2001); *Priority One Services,* 331 NLRB 1527 (2000).

[4] Our dissenting colleagues say that the change had the "inherent tendency" to undercut the Union's support. As indicated above, the real test is whether there is a causal nexus between the change and the loss of support for the Union. The use of a conclusionary phrase can be no substitute for an evidentiary inquiry into this matter. To the extent that *Priority One Services* is to the contrary, it is overruled.

[5] Cases 1–CA–39789 and 1–CA–40476.

tell Regional Directors and the public that factual issues like those herein should be made the subject of a hearing.

Finally, our dissenting colleagues rely on charges that were informally settled. As with the instant charges, they are unproven and there is no showing of a causal nexus between that alleged conduct and the loss of support for the Union. Moreover, the Regional Director's analysis relies only on the alleged unilateral change in the health insurance program.

Accordingly, we reverse the Regional Director's dismissal of the decertification petition, reinstate the petition, and remand this case to the Regional Director for further action consistent with this decision.

ORDER

The Regional Director's administrative dismissal of the instant decertification petition is reversed, the petition is reinstated, and the case is remanded to the Regional Director for further appropriate action consistent with this decision.

MEMBERS LIEBMAN and WALSH, dissenting.

Contrary to the majority, we would affirm the Regional Director's dismissal of the petition pursuant to the Board's decision in *Priority One Services,* 331 NLRB 1527 (2000), which the majority unwisely overrules. See also *Overnite Transportation Co.*, 333 NLRB 1392 (2001); *Penn Tank Lines, Inc*., 336 NLRB 1066 (2001). Accordingly, we dissent.

In *Priority One Services*, the Board dismissed a decertification petition based on facts substantially similar to those presented here. The Board in *Priority One Services* found that the unilateral changes, which included a 9.5-percent increase in employee health insurance premiums, were serious enough to undercut the union's ability to function as the employees' bargaining representative and to interfere with employee free choice in an election.

Similarly, the Employer here is alleged to have unilaterally implemented health insurance benefits for 2003, an act that the Regional Director found affected the entire bargaining unit, causing some employees to enroll in different health plans, raising for many the cost of health care, and requiring some employees to change their care givers. As such, the alleged unilateral change had a direct impact on employee compensation, one of the fundamental subjects about which employers must bargain pursuant to Section 8(d) of the Act. *Priority One Services*, 331 NLRB at 1527. Indeed, the "likely taint" that the change had on the decertification effort is demonstrated by the facts: the signatures for the showing of interest were collected within 2 months after the change was allegedly implemented, and the petition at issue was filed less than 3 months after the change. Id.

Accordingly, we would agree with the Regional Director that the change is of the type that would tend to cause employee disaffection with the Union, by undermining the Union's perceived authority as the employees' bargaining representative and to interfere with the employees' free choice in an election. Due to the inherent tendency of this change to undercut the Union's support, we conclude, contrary to the majority, that a hearing is unnecessary. *Priority One Services*, 331 NLRB at 1527 fn. 2.

We, therefore, agree with the Regional Director that the alleged unfair labor practice is of such a nature that it would, if proven, preclude the existence of a question concerning representation. Id. at 1527. This finding is further supported by the unlawful conduct alleged in other charges filed by the Union, which, although settled by the Employer, had not been remedied prior to the filing of the instant petition.[1]

The majority cites two published decisions in which the Board has applied *Master Slack* and, utilizing an objective test, has dismissed decertification petitions without a hearing. *Overnite Transportation*, supra; *Priority One Services*, supra. The majority ignores the fact that our Regional Directors have been making these determinations in unpublished decisions for decades without hearings, and that, with Board review, this system has worked well. Their precipitous decision to overrule *Priority One Services* and to insist on a hearing in this case betrays an alarming lack of trust in our Regional Directors, who have proven over the years that they are able to determine when alleged unfair labor practice conduct would have an inherent tendency to undermine the union's support.

[1] The Regional Director based her dismissal of the petition primarily on the complaint alleging the unilateral changes in the health insurance program, but did so with consideration for seven other charges that have been filed by the Union against the Employer, which also predated the filing of the petition. The Regional Director issued a complaint with respect to some or all of the allegations contained in those charges. The Employer subsequently entered into a settlement agreement, which resolved all but one of those charges, though the remedial actions imposed by the agreement have yet to be fully undertaken. Pursuant to the settlement agreement, the Employer agreed not to, among other things: promulgate unlawful solicitation or distribution rules; prohibit the distribution of union literature or remove such literature from employees' company mailboxes; spy on or interrogate employees engaging in union activities; threaten employees with lower compensation, the loss of benefits, or the withholding of an annual pay increase; threaten that employees who do not support the Union will receive better benefits; threaten plant closure; solicit employee grievances; direct the distribution of proemployer literature; interfere with employee labor organizations; suspend or discriminate against certain employees who actively support the Union; fail or refuse to bargain in good faith with the Union; change job tasks of unit employees without bargaining; bypass the Union and discuss such changes directly with the employees; and, fail to provide information requested by the Union.

Worse yet, a hearing in this case may very well be totally unnecessary. On April 27, 2004, an administrative law judge, in Cases 1–CA–39789 and 1–CA–40476, dismissed the allegation that the health insurance change at issue here violated Section 8(a)(5) of the Act. The General Counsel has filed exceptions to that finding, but if the Board upholds it, the decertification petition in this case will be reinstated. Thus, expeditious action on the unfair labor practice case by the Board could make a hearing in this representation case unnecessary. Instead of forcing the Region and the parties to go to the considerable expense and trouble of holding a hearing, in our view it would be more efficient for us to do our job and decide the unfair labor practice case so we can determine if such a hearing would even be necessary. Accordingly, we would deny review.