Big Three Industries, Inc. ***and*** **Tommy J. Grissom, Petitioner.** Case 15–RD–257

January 10, 1973

SUPPLEMENTAL RULING ON ADMINISTRATIVE APPEAL

On October 16, 1972, the National Labor Relations Board issued a Ruling on Administrative Appeal, affirming the Regional Director's dismissal of the petition in the above case. Upon further consideration, the Board has, *sua sponte,* reopened this matter for the purpose of reconsidering said ruling, and finds as follows:

On July 15, 1971, pursuant to an election conducted on June 2, 1971, in Case 15–RC–4650, the Regional Director for Region 15, certified General Truck Drivers, Warehousemen & Helpers Local No. 5, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Ind. (herein called the Union), as collective-bargaining representative of the Employer's production and maintenance employees at its Baton Rouge, Louisiana, cryogenics plant. Pursuant to charges filed in Cases 15–CA–4312 and 15–CA–4313, by the Union in December 1971, the Regional Director issued a complaint alleging that the Employer violated Section 8(a)(3) of the National Labor Relations Act, as amended, by the discharge of one employee and violated Section 8(a)(5) since about August 17, 1971, by "Negotiat[ing] with the Union in bad faith and with no intention of entering into any final or binding collective bargaining agreement." After a hearing during June 1972, the Administrative Law Judge on October 18, 1972, issued her decision, sustaining the allegations of the complaint and ordering, *inter alia,* the Employer to bargain in good faith with the Union.[1]

Meanwhile, on September 14, 1972, the instant petition in Case 15–RD–257 was filed by employees of the Employer seeking a new election for representation because, "it is our feeling that [the Union] has accomplished nothing in our favor, therefore we would like a new election to determine if we will continue to be represented by [the Union] or if we may represent ourselves."

The Regional Director dismissed this petition on September 20, 1972, on the ground that, "no question concerning representation exists, inasmuch as [he had] issued a complaint—alleging 8(a)(1) and (5) violations by the Employer. . . ." As stated above, the Board affirmed this dismissal.

Upon reconsideration of this case, the Board is satisfied on the basis of the foregoing facts that there is "no reasonable cause to believe" that, at this time, the petition herein raises a real question of representation, within the meaning of Section 9(c)(1) of the Act. In cases of this type, the Board recognizes that it must exercise discretion in balancing the interaction between an employer's obligation under Section 8(a)(5) of the Act to bargain with a duly designated statutory representative and the employees' right under Section 9(c) of the Act to terminate the statutory status of said representative. Here, the Union was certified as the exclusive bargaining representative and it is alleged in the complaint that, during the first year of such certification, the Employer violated the Act by engaging in surface bargaining with the Union. Thus, if the allegations of the complaint be proved, the appropriate remedy would include an affirmative bargaining order, and an extension of the certification year even though during the interim the Union may have lost its majority adherence. Indeed, at the time of the alleged refusal to bargain, the Union's certified representative status was not subject to direct or collateral attack; nor is it vulnerable during compliance with an affirmative bargaining order. In these circumstances, to find the existence of a real question concerning representation on the basis of the instant petition, in the face of the current litigation in the complaint case of the Employer's alleged refusal to bargain in good faith, would, in the Board's opinion, be contrary to the statutory scheme of the Act. The Board recognizes that this view postpones the employees' opportunity to decertify the Union herein, but believes that the orderly procedure of collective bargaining under the Act requires that the employees be bound by their choice of representatives during the period of ongoing negotiation as well as the period of litigation of the *bona fides* of an employer's bargaining efforts. As the Supreme Court said in *Ray Brooks* v. *N.L.R.B.,* 348 U.S. 96, 100, "It is scarcely conducive to bargaining in good faith for an employer to know that, if he dillydallies or subtly undermines, union strength may erode and thereby relieve him of his statutory duties at any time, while if he works conscientiously toward an agreement, the rank and file may, at the last moment, repudiate their agent."

The Board also recognizes that there may be unusual and special situations which may impel the holding of elections in the face of unremedied refusal-to-bargain charges, but no equities which

[1] That decision is now pending before the Board on appeal.

would warrant such a result are found in the present case.

Accordingly, the Board hereby affirms its prior action in sustaining the Regional Director's dismissal of the instant petition.

By direction of the Board.