Excel Corporation *and* Gloria J. Rhoads and Francisco Acosta, Petitioners, and United Food and Commercial Workers Union, Local 540. Case 16–RD–1300

November 26, 1993

DECISION ON RECONSIDERATION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

On March 17, 1993, the Regional Director dismissed the instant decertification petition on the ground that it was not supported by a sufficient showing of interest. The Petitioners filed a timely request for review. On May 28, 1993, the National Labor Relations Board issued a Ruling on Administrative Action and Order Remanding[1] in which it granted the Petitioner's request for review, reinstated the petition, and remanded the case to the Regional Director. The Union filed timely motions for reconsideration and for stay of Board Order pending reconsideration. The Union's motions are granted.

The facts are fully set forth in the Board's original decision. The Board's decision reversing the Regional Director's dismissal found that, under the unusual circumstances of the case, the purposes and provisions of the Act would best be effectuated by allowing the Petitioners a reasonable, additional period of time to provide the requisite showing of interest.[2] On further reflection, we conclude that the prior decision permitting consideration of signatures submitted by the decertification Petitioners after the expiration of the window period does not adequately protect the established bargaining relationship between the Employer and the Union and marks an ill-advised departure from both Board precedent and the Board's published Rules.

Section 101.17 of the Board's Rules and Regulations provides that a showing of interest must be submitted within 48 hours of the filing of the petition, but in no event later than the last day on which the petition might timely be filed. See *Mallinckrodt Chemical Works*, 200 NLRB 1 (1972). Section 11024.1 of the Board's Casehandling Manual sets forth a similar provision. In situations involving an established collective-bargaining relationship between an employer and an incumbent union, as is present in this case, the Board has consistently required petitioners to submit their signatures prior to the commencement of the insulated period of an existing contract, or, where the contract has expired and negotiations are ongoing, prior to the execution of a new agreement. The petitioner bears the burden of establishing an adequate showing of interest. The strict application of the Board's Rule establishes a reasonable and predictable test and discourages unsupported petitions which might cause disruptions in the existing collective-bargaining relationship, thus furthering the general policy of the Board's contract bar rules. As the Board discussed in *Crompton Co.*, 260 NLRB 417, 418 (1982), such rules:

> provide a balance between dual objectives. First, they further industrial peace and stability by assuring that the labor relations environment will not be disrupted during the term of a collective-bargaining agreement and by providing the parties with a period just before the expiration of the contract during which they can negotiate a new agreement free from such disruption. Equally important, however, the rules provide a set opportunity for employees who are disenchanted with the performance of their collective-bargaining representative to seek its removal or replacement with another representative.

In *Mallinckrodt Chemical Works*, above, the Board found the petitioner's showing of interest untimely where it was submitted 2 days after the execution of a new agreement.[3] In so finding, the Board noted that the petitioner, faced with the long bargaining history between the employer and the intervenor union and their persistent efforts to reach agreement, had adequate knowledge of the risk involved in any dilatory action, and therefore should not be relieved from compliance with the Board's Rules.

Concededly, there are some exceptions to the Rule, but, contrary to our dissenting colleague's claims, they are not applicable here. In *Rappahannock Sportswear Co.*, 163 NLRB 703 (1967), the Board created a narrow exception to the literal application of Rule 101.17 based on the special circumstances of that case. Unlike this case, in *Rappahannock* there was no existing collective-bargaining relationship, and rival unions were simultaneously engaged in initial organizing campaigns among the employer's employees. Thus, there was no incumbent union at the time of the petition, and no corresponding interest in stabilizing an enduring relationship. The employer was aware of both campaigns, and, on being notified that one of the unions had filed a petition, recognized and executed a collective-bargaining agreement with the other union. The Board accepted a showing of interest that was submitted on the date the contract was executed, on the grounds that the hasty execution of a contract should not shorten the 48-hour period that the Board ordinarily allows for the submission of a showing of interest.

[1] 311 NLRB 710.

[2] Member Raudabaugh did not participate in that decision.

[3] In that case, the petition was filed on March 24. A new contract was executed on March 25. Thus, under Sec. 101.17, the last day for submitting the showing of interest was March 25. The submission was made on March 27, and therefore was rejected as tardy.

Significantly, the Board in *Rappahannock* distinguished cases involving existing contracts, as is present here, where a petition, to be timely, must be filed prior to the insulated period, a date ascertainable in advance. In *Rappahannock*, by contrast, the deadline for filing a petition was not known until the postpetition execution of the contract. Even then, in *Rappahannock*, while the cards were submitted following the deadline, they were obtained before the deadline. Here, although the Petitioners were on notice as to the filing deadline for a showing of interest, they did not obtain additional signatures until after the deadline.

Turning to the specific facts of this case, the Regional Director found that the window period ended on February 24, 1993. Thereafter, according to the Union's motion for reconsideration, the Employer and the Union executed a successor collective-bargaining agreement which was subsequently ratified by the unit employees. In our view, permitting a decertification election based on signatures that were collected and submitted on March 1 would unjustifiably place at risk the collective-bargaining agreement and the bargaining relationship between the Employer and the Union.

In our opinion, the Board's previous decision in this case does not afford sufficient protection to established bargaining relationships. We therefore find that in the context presented here, the Petitioners are not entitled to submit additional signatures outside the window period. This interpretation of Rule 101.17 best strikes the balance between fostering labor relations stability and ensuring the adequate protection of employees' Section 7 rights.

Finally, even if the Rule is not applied and the additional signatures that were submitted following the close of the window period are counted, it appears that the Petitioners still have not presented an adequate showing of interest. Thus, although the Petitioners submitted additional signatures on March 1, the Region has found that not all of them are valid, and that the number of valid signatures apparently falls short of the required 30 percent.

The Petitioners bore the burden of submitting a timely showing of interest. They did not meet that burden. The Regional Director was correct in dismissing the petition and therefore we adopt his position.

ORDER

The Board's Ruling on Administrative Action and Order Remanding is reversed. The Regional Director's administrative dismissal of the instant petition is affirmed.

CHAIRMAN STEPHENS, dissenting.

I am not persuaded that the National Labor Relations Board's May 28, 1993[1] Ruling on Administrative Action and Order Remanding is in error. Accordingly, I would deny the Union's motion for reconsideration.

As we stated in our earlier decision, the Petitioners filed a decertification petition, supported by a significant showing of interest,[2] some 13 days before the close of the window period,[3] ample time to cure any deficiencies. However, the Petitioner was not notified of a shortfall in the showing of interest until February 26, 1993, 2 days *after* the close of the window period.[4] On that date, the Regional Office advised Petitioner Rhoads that she needed ''at least 12'' more signatures to support the petition. Only later that day did the Regional Office realize that the window period had expired on February 24, and so informed Petitioner Acosta. Meanwhile, Petitioner Rhoads proceeded to collect an additional 20 signatures and attempted to submit them on March 1. The Regional Office rejected the additional showing as untimely, even though it complied with the Regional Office's request to Rhoads to obtain the additional signatures. The Regional Office advised Rhoads that, based on the Petitioners' failure to submit a sufficient showing of interest before the close of the window period, as required in Section 101.17 of the Board's Rules and Regulations, it was dismissing the petition.

As we found in the May 28 decision, the circumstances of this case compel flexibility in the application of Section 101.17 We noted that, in addition to the size of the unit and other extenuating circumstances that inhibited speedy verification of the showing of interest, the Petitioners have acted with the utmost diligence and complied promptly with every request from the Regional Office. Thus, we found that a strict application of the Rule would be unduly harsh and reinstated the petition.

The Union's motion for reconsideration adds no new facts and directs our attention to no new cases not previously examined. Nevertheless, the majority considers our original decision to be ''an ill-considered departure from Board precedent.'' I disagree.

Section 101.17 of the Board's Rules and Regulations requires that evidence that a petition to decertify a collective-bargaining representative is supported by 30

[1] All dates are 1993 unless otherwise indicated.

[2] Although there is some dispute as to the exact size of the unit, the record shows that the unit consists of between 1394 and 1406 employees.

[3] As the majority notes, the contract between the Employer and the Union expired on April 25, 1993. The window period, therefore, expired on February 24, 1993.

[4] According to the record, the Regional Office sent the Employer a request for a list of its employees on February 12. The Regional Office received the list on February 23 (1 day before the close of the window period), with a letter from the Employer stating that the request was not received by the Employer until February 17. Given the mail delays, the high employee turnover, the extraordinarily large unit, and the problems in verifying the signatures of the petition, the Regional Office was unable to verify the showing of interest in a more timely fashion.

percent of the unit employees must be filed within 48 hours of the filing of the petition, but in no event later than the last day on which the petition might be timely filed. The Board has long held that this requirement of a showing of interest is an

> administrative matter not subject to direct or collateral attack. The showing of interest requirement merely permits the Board to screen out those cases which do not warrant the Board incurring the expense of further [processing of] the petition.

Kona Surf Hotel, 201 NLRB 139, 141–142 (1973), enf. denied on other grounds 507 F.2d 411 (9th Cir. 1974); *Sheffield Corp*., 108 NLRB 349, 350–351 (1954).[5]

The majority's decision on reconsideration is grounded on the premise that strict adherence to Section 101.17 is necessary to discourage frivolous petitions that might cause a disruption of an existing collective-bargaining relationship. As my personal footnote in the May 28 decision attests, I agree that exceptions to that Rule are to be rare indeed. I am convinced, however, that this is that rare case.

At issue here, pure and simple, is whether the Petitioners ought to be granted a reasonable additional period of time to cure a defect in their showing of interest under circumstances where, through no fault of their own, the time for filing the additional showing had expired. We do not have here a situation, as in the cases relied on by the majority,[6] in which the showing of interest was submitted *after the execution of a new agreement*. All we know from the record is that at some point after the Regional Director dismissed the petition the Union and the Employer entered into a successor collective-bargaining agreement.[7] Surely, had the parties executed a collective-bargaining agreement prior to the Petitioners' attempted submission of the additional showing of interest, or, indeed, prior to the filing of the Petitioners' request for review, we would have been made aware of that fact long before now. It is safe to assume, therefore, that when the Employer and the Union executed their successor agreement, they knew full well that a petition had been filed supported by a significant showing of interest, and that the Regional Director's dismissal of that petition was under consideration by the Board. Thus, I am not persuaded to preserve the collective-bargaining relationship to the exclusion of the ''[e]qually important'' consideration in *Crompton*, quoted by the majority, to

> provide a set opportunity for employees who are disenchanted with the performance of their collective-bargaining representative to seek its removal or replacement with another representative.[8]

Nor does this case present a situation in which the petitioner's own actions contributed to the delay in submitting an adequate showing of interest and in which the petitioner ''had adequate knowledge of the risk involved in dilatory action.''[9] Here the Petitioners acted with the utmost dispatch, first in filing the petition well within the window period, and then in curing the defect on the showing of interest not just with the 12 signatures requested, but with nearly twice that number.

In my view, the Petitioners have met their burden of demonstrating to the Board that their petition warrants further processing.[10]

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[5] See also Rules and Regulations, Sec. 101.18(a); NLRB Casehandling Manual (Part Two) Representation Proceedings, sec. 11020.

[6] *Crompton Co*., 260 NLRB 417 (1982); *Mallinckrodt Chemical Works*, 200 NLRB 1 (1972).

[7] In its brief in support of its motion for reconsideration, the Union states that ''[s]ubsequent to the Region's dismissal of the Petition, the parties negotiated a successor collective bargaining agreement which was ratified by over 70% of the bargaining unit.''

[8] *Crompton Co*., supra at 418.

[9] *Mallinckrodt Chemical Works*, supra.

[10] As for the majority's position that the additional signatures, even if accepted, apparently still would not represent an adequate showing of interest, I would leave that determination in the first instance to the Regional Director, as the record before us does not contain facts sufficient to make that determination. Even if the additional showing does not meet the 30-percent requirement, I would still find that showing to be sufficient under the circumstances. The Petitioners were told they needed at least 12 more signatures; they submitted 20, of which at least 15 were found to be valid. To now find the unit is slightly larger than previously thought, and the total of signatures submitted is therefore insufficient to meet the Board's requirement, unfairly precludes the Petitioners from demonstrating a showing of interest. Cf. *Vanity Fair Mills*, 256 NLRB 1104 (1981) (Board reinstated untimely petition where petitioner relied on erroneous information from the Regional Office). This is particularly true here where the speed with which the Petitioners were able to obtain the additional signatures suggests that they might have obtained even more at that time if they had been requested to do so.