Custom Deliveries, Inc. *and* Highway, City and Air Freight Drivers, Dockmen, Marine Officers Association, Dairy Workers and Helpers Local Union No. 600, affiliated with the International Brotherhood of Teamsters, AFL–CIO, Petitioner. Case 14–RC–11332

December 16, 1994

DECISION ON REVIEW AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS, DEVANEY, BROWNING, AND COHEN

On June 30, 1994, the Regional Director for Region 14 of the National Labor Relations Board issued a Decision and Direction of Election in the above-captioned proceeding in which he found that the Employer's recognition of the Intervenor[1] did not constitute a bar to the instant petition. Thereafter, in accordance with Section 102.67 of the Board's Rules and Regulations, the Employer and the Intervenor filed timely requests for review of the Regional Director's decision. The Board[2] granted the requests for review.[3]

The sole issue presented is whether the Employer's voluntary recognition of the Intervenor, based on a valid card majority, bars the subsequent petition filed by the Petitioner, a union which had represented the petitioned-for unit under the predecessor.[4] The Board has considered the record as a whole, including the Employer's brief on review and the positions of the parties; has reconsidered *Rheingold Breweries*, 162 NLRB 384 (1966), the case upon which the Regional Director relied; and has decided to reverse the Regional Director's decision.[5]

The Employer provides truck delivery service to General Motors. The Employer has 60 drivers domiciled at its Hazelwood, Missouri facility and an undisclosed number in locations outside the St. Louis area. The Employer's predecessor employer, Ryder, employed 48 drivers at Hazelwood who were represented by the Petitioner, and 32 drivers domiciled in outlying areas who were represented by the Intervenor. The Employer obtained its contract with General Motors in August 1993.[6] The Employer accepted applications from former Ryder drivers, and offered employment to 25 drivers who had been employed by Ryder at Hazelwood. It trained 10 or 11 of those drivers who attended a training session on October 24 especially for former Ryder drivers, and eventually employed 3 of them in its initial work force at Hazelwood. The Employer began operations on October 29, with 60 employees.

The Intervenor began organizing in mid-October. On October 29, the day operations began, the Intervenor demanded recognition. Upon verification by a third party that the Intervenor possessed a card majority, the Employer voluntarily recognized the Intervenor and executed a recognition agreement recognizing the Intervenor as the exclusive bargaining representative for all full-time drivers at Hazelwood. In January 1994, the Intervenor and the Employer executed a collective-bargaining agreement.

On October 20, the Petitioner distributed authorization cards to six individuals at the union hall; only one of the six had accepted employment with the Employer. The first authorization cards for the Petitioner were signed on October 30. The Petitioner continued soliciting cards, and on November 18, after securing cards from a majority of the unit employees, it filed the instant petition.

The Regional Director found that the petition was not barred by the Employer's voluntary recognition of the Intervenor, relying on *Rheingold Breweries*, supra. In that case, the Board established a two-prong test for determining whether an employer's recognition of a union could bar the petition of a nonstranger union. The Board held that a recognition agreement will not bar the petition where a petitioning union: (1) has a substantial claim of interest; and (2) was not afforded prior opportunity to demonstrate the extent of its interest by means of an election or through other appropriate procedures. *Rheingold Breweries*, 162 NLRB at 386. There, the Board found that the nonstranger petitioner had evidenced a substantial claim of interest where the employer had recently acquired the assets of a brewery and had reemployed 5 or 6 salesmen who had been represented by the petitioner, out of a current unit of 25 employees. The Board stated that had the employer revealed the petitioner's possible interest in the unit to the state board that had conducted the card check that led to the recognition agreement, the petitioner would have been given the opportunity to make known the extent of its interest. Id.

[1] District 2A, Transportation, Technical, Warehouse, Industrial and Service Employees Union, affiliated with the American Maritime Officers.

[2] Members Devaney and Browning; Member Stephens, dissenting, would have denied the requests for review.

[3] The Board's August 8, 1994 Order provided that the Intervenor's request for review was granted. On November 2, 1994, an amended Order issued, correcting an inadvertent error by indicating that both the Employer's and Intervenor's requests for review were granted.

[4] Under the general principle of recognition bar, an employer's recognition of a majority union bars a challenge to the union's majority status for a reasonable period. *Keller Plastics Eastern*, 157 NLRB 583 (1966). See also *Sound Contractors*, 162 NLRB 364 (1966).

[5] The Regional Director found that the Petitioner was not actively campaigning at the time of the Employer's recognition of the Intervenor, and, therefore, did not meet the requirements of the *Rollins Transportation System*, 296 NLRB 793 (1989), exception to recognition bar. The Board currently is reconsidering *Rollins*. *Smith's Food & Drug Centers*, 21–RC–19312, review granted May 31, 1994. Our resolution of the instant case, involving a ''nonstranger'' union, is independent of the analysis in *Rollins* situations, and we express no view herein on *Rollins*.

[6] All dates are in 1993 unless otherwise indicated.

In the instant case, the Regional Director found that the Petitioner had a ''substantial'' claim of interest. In so finding, the Regional Director relied on the Petitioner being a nonstranger union—it had represented employees performing unit work prior to the Employer's recognition of the Intervenor, albeit when those employees were employed by a predecessor employer. The Regional Director further noted that if all employees to whom the Employer tendered offers had accepted employment, the Petitioner likely would have remained the bargaining representative; that the Employer had trained 10 or 11 employees represented by the Petitioner, and actually hired 3; and that the Petitioner was prepared, prior to recognition of the Intervenor, to reestablish its historical majority through active campaigning, and within 10 days after the Employer's recognition of Intervenor had authorization cards from 29 or more drivers. The Regional Director did not address the second prong of *Rheingold*, i.e., the Petitioner's opportunity to demonstrate the extent of its interest.

The Employer contends that the Regional Director erred in finding that *Rheingold* established a separate standard for recognition bar in cases involving nonstranger unions, and that, in any event, the Petitioner did not meet the *Rheingold* standard. The Intervenor contends that the Regional Director's reliance on *Rheingold* was misplaced, because that case assumes that a substantial complement of the predecessor's employees continues in employment with the successor.

The instant case is the first published Board decision since *Rheingold* which clearly raises the issue presented there.[7] We therefore have decided to reexamine the *Rheingold* doctrine. In *Rheingold*, the Board distinguished between situations in which the petitioning union is a stranger to the unit employees and those in which the petitioning union has previously represented those employees. The underlying rationale for this distinction continues to be valid today. The Act protects the interests of employees in choosing or rejecting a collective-bargaining representative. At the same time, the Board is charged with promoting stability in labor relations. The Board seeks to balance these interests. Where the petitioning union is a ''stranger'' union, the question of continuity of a prior bargaining relationship is not in issue. However, where the petitioning union has been representing the unit employees, the choice of the successor's employees as expressed through authorization cards does not exist in isolation but must be weighed against the interests of employees currently or recently represented by the petitioner and the value to be given an established bargaining relationship.

The Board's decision in *Rheingold* sought to give proper weight to the petitioner's status as the incumbent representative of employees in the petitioned-for unit prior to the new employer's acquisition of the company. The Board found that the presence of a number of previously represented employees, constituting a significant portion of the then-present unit, showed there was substantial interest among the unit employees in continuing with the labor organization which had been representing the unit employees, and that the determination of the bargaining representative should be resolved by an election, rather than by the employer's voluntary recognition of a rival union. We agree with this reasoning. Therefore, we reaffirm the validity of *Rheingold's* primary holding: that demonstration by a nonstranger union of a continued substantial claim of interest in representing the unit precludes a recognition agreement from acting as a bar to a petition for certification subsequently filed by the nonstranger union. In doing so, however, we modify *Rheingold* to clarify the term ''substantial claim of interest.'' In *Rheingold*, the Board found a substantial claim of interest where 5 or 6 of 25 unit employees had been represented by petitioner, i.e., 20 to 24 percent of the unit. We find that a more appropriate minimum is 30 percent—a figure used by the Board in a number of representation cases areas to demonstrate sufficient employee interest in union representation to warrant an election.[8] Thus, we hold that a recognition agreement between an employer and a union that would otherwise constitute a bar to an election will not do so where, as of the date of recognition, 30 percent or more of the recognized unit consists of employees previously represented by the petitioning nonstranger union. If the nonstranger union has represented 30 percent or more of the unit, it is entitled to an opportunity to demonstrate the extent of current employee support.

[7] In *Superior Furniture*, 167 NLRB 309 (1967), the Board cited *Rheingold* without detail in a footnote to its finding that both the petitioning union and the intervenor were actively organizing, but there both unions were stranger unions and both were actually organizing. In *General Electric Co.*, 173 NLRB 511 (1968), the Board found *Rheingold* inapplicable in a contract bar context where the petitioner had no representation among the unit employees in the other facility. In *Whitemarsh Nursing Center*, 209 NLRB 873 (1974), a case involving a stranger union, the Board applied the principle of *Keller Plastics* in finding that the recognition operated as a bar, but cited *Rheingold* for comparison without explanation.

[8] For example, in order to justify further proceedings on its petition, a petitioner must demonstrate designation by at least 30 percent of the employees in the unit it claims appropriate. NLRB Casehandling Manual, Sec. 11022.3(a). In cases involving representation petitions in expanding bargaining units, the Board in general finds that if approximately 30 percent of the eventual employee complement is employed (and 50 percent of the eventual job classifications are filled), then the employee complement is substantial and representative and an election is appropriate. *K-P Hydraulics Co.*, 219 NLRB 138 (1975) (petition dismissed where work force constituted 28 percent of eventual employee complement and less than 50 percent of job classifications). In using these figures, the Board drew guidance from the standards enunciated for contract bar purposes in *General Extrusion Co.*, 121 NLRB 1165 (1958).

The Board has held in analogous accretion cases that a merger between groups which have been represented by different labor organizations raises a question of representation unless one of the represented unions clearly predominates. *Martin Marietta Corp.*, 270 NLRB 821 (1984); *Boston Gas Co.*, 221 NLRB 628 (1975). The principle here is the same: if there is more than one union which claims to represent the employees, one union will not be allowed to ''trump'' the other by obtaining recognition if the employees who were previously represented by the other union are not overwhelmingly predominated by the employees represented by the union which has entered into the recognition agreement. In such a case, we will find that a question concerning recognition exists. The only difference is that in cases involving the issue of whether there is a bar to an election, we conclude that a more definite yardstick is necessary to measure the extent of the support for the petitioning union which is necessary to raise the question concerning representation. See *General Extrusion*, supra at 1167. By analogy to the accretion cases, therefore, we hold here that if a nonstranger union has represented 30 percent or more of the bargaining unit, that union has a substantial claim of interest in representing the unit employees.

We further find that with this clarification of ''substantial interest'' it becomes unnecessary to determine whether a petitioner had the opportunity to demonstrate the extent of its interest, and therefore we will no longer apply the second prong of the *Rheingold* test. In deciding it is unnecessary to continue relying on the ''opportunity'' factor, we note that the evidentiary burden in proving, or disproving, ''opportunity'' to demonstrate interest is difficult and invites prolonged litigation. Rather, we find that reliance on 30 percent alone forecloses uncertainty with regard to a petitioner's substantial interest. It is an objective fact that is readily ascertained.

Applying the modified *Rheingold* test to the facts here, we conclude that the instant petition is barred by the recognition agreement between the Employer and the Intervenor. Thus, as of the time of recognition, October 29, only 3 of the 60 unit employees (5 percent) formerly had been represented by the Petitioner. This figure falls far short of the 30 percent which we have determined demonstrates a substantial claim of interest by the nonstranger union in representing the Employer's employees. We reject reliance on any of the other measures relied upon by the Regional Director as evidence of substantial interest: the Employer's tender of offers of employment to and the training of employees who had been represented by the Petitioner when these employees did not become part of the unit; prerecognition preparation to reestablish its historical majority status; and postrecognition securing of a substantial number of authorization cards. Accordingly, we shall reverse the Regional Director's Decision and Direction of Election, and dismiss the petition.

ORDER

The Regional Director's Decision is reversed, the Direction of Election is vacated, and the petition is dismissed.