Stockton Roofing Company *and* United Union of Roofers, Waterproofers & Allied Workers, Local 6, Petitioner. Case 32–RC–3330

August 27, 1991

DECISION ON REVIEW AND ORDER

BY MEMBERS CRACRAFT, OVIATT, AND RAUDABAUGH

On October 26, 1990, the Regional Director for Region 32 administratively dismissed the petition. The Petitioner filed a timely Request for Review.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has duly considered this matter and has decided to grant review and reverse the Regional Director's dismissal.

The Regional Director found that the petition was filed without an adequate showing of interest. For the reasons set forth below, we find that the Petitioner's recently expired 8(f) contract constitutes an adequate showing of interest.

For several decades, the Employer, who engages in construction, and the Petitioner were parties to a series of collective-bargaining agreements covering the Employer's roofers. The last of the agreements expired on September 7, 1990.[1] Prior to the contract's expiration, the parties unsuccessfully negotiated for a new agreement. On September 8, the Employer informed the Petitioner that it was terminating the bargaining relationship.

Thirteen days later, on September 21, the Petitioner filed the instant petition seeking an election in a unit of all roofing employees working for the Employer. Pursuant to the Regional Office's request for a showing of interest to support the petition, on September 26 the Petitioner submitted a copy of its recently expired 8(f) contract. The Regional Office informed the Petitioner that the expired contract was not an adequate showing of interest. As authorization cards provided by the Petitioner proved to be inadequate,[2] the Regional Director dismissed the petition.

The Board's showing-of-interest requirement is an administrative matter not subject to litigation. *Modern Plastics Corp.*, 169 NLRB 716 (1986). It is thus exclusively within the Board's discretion to determine whether a party's showing of interest is sufficient to warrant processing the petition. *S. H. Kress & Co.*, 137 NLRB 1244, 1248 (1962). The purpose of a showing of interest is to save the time and expense of an election where there is insufficient employee interest in the representation issue to warrant an election. Id. In this case, we must decide whether the Board's resources can best be utilized to effectuate the Act's policies by permitting a union to use its recently expired 8(f) contract as a showing of interest in support of its petition.

When an employer withdraws recognition from an established Section 9(a) representative, the union need not obtain a 30-percent showing of interest to support its RC petition. Rather, a union in this situation can satisfy the showing of interest requirement by submitting a recently expired collective-bargaining agreement.[3] This application of our showing-of-interest requirement predates the Board's decision in *John Deklewa & Sons*, 282 NLRB 1375 (1987), enfd. 843 F.2d 770 (3d Cir. 1988), however, and does not specifically address the 8(f) situation. Thus, the question is whether there are compelling reasons for treating recently expired 8(f) and 9(a) contracts differently for showing-of-interest purposes.

The Board's decision in *Deklewa* guides us to our answer. In *Deklewa*, the Board announced new rules governing contractual and bargaining obligations under Section 8(f) of the Act. Among other things, the decision requires parties to an 8(f) agreement ''to comply with that agreement unless the employees vote, in a Board-conducted election, to reject (decertify) or change their bargaining representative [footnote omitted].'' Id. at 1385. The Board stressed that the new rule: (1) assures employees ''the constant availability of an electoral mechanism for expressing their representational desires'';[4] and (2) fulfills the Act's ''policy of labor relations stability . . . .'' Id. at 1386.

Recognizing a recently expired 8(f) contract as a showing of interest accords with the Board's rationale in *Deklewa.* Thus, rather than permitting the employer, in effect if not in fact, to ''decertify'' the union, we ensure the ''constant availability of an electoral mechanism'' to allow the employees to decide whether the union will continue as their bargaining representative. Further, after an 8(f) contract expires, an employer has the absolute right to withdraw from the bargaining relationship for reasons unrelated to the union's sup-

[1] All dates are in 1990, unless otherwise specified.

[2] The dissent's implication that there is no showing that the Union ever had the support of a single unit employee is contrary to the administrative record.

[3] In an effort to distinguish the instant case, the dissent argues that an employer may withdraw recognition whenever the union loses majority support and that does not require a showing that less than 30-percent support the union. That argument ignores the fact that a union may base a showing of interest solely on a recently expired collective-bargaining agreement even if no unit employee supports the union.

A plausible basis for explaining the genesis of this rule is that the Board thought an incumbent union that had bargained for, and administered, a contract would have gained sufficient support among the employees to warrant holding an election on the contract's expiration. If that is the case, then as a practical matter a construction union with an expired 8(f) contract stands in no different a position for showing-of-interest purposes than does a 9(a) union.

[4] This effectuates the policy making an election the preferred route for resolving representation issues. See *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 596 (1960) (''the most commonly traveled route for a union to obtain recognition as the exclusive bargaining representative . . . is through the Board's election and certification procedures under Sec. 9(c) of the Act; it is also, from the Board's point of view, the preferred route.'')

port—or lack thereof—among the employees (*Deklewa*, supra at 1386). Holding an election based on the expired 8(f) contract permits the expeditious clarification of the union's representative status. Accepting the 8(f) contract as support for an election streamlines the election process to resolve any doubt concerning the union's majority status and thus diminishes the possibility of labor strife. ''[L]abor relations stability,'' a primary concern of the statute (*Deklewa*, supra), is thereby encouraged.

Relying on a recently expired 8(f) contract as an adequate showing of interest also recognizes the realities of the construction workplace. A union that has bargained for an 8(f) contract, and has administered that contract, is ''not a stranger to the employees.'' *Deklewa*, supra at 1387 fn. 52. Rather, the contract it negotiated has governed the employees' wages and benefits as well as their conditions of employment and their relations with the employer. Under that 8(f) contract, the union will often be the ''initial employment referral source for most of the employees the employer hires.'' Id. Indeed, in describing labor relations in the construction industry, Congress observed that:

> . . . the employer must be able to have available a supply of skilled craftsmen ready for quick referral. A substantial majority of skilled employees in this industry constitute a pool of such help centered about the appropriate craft union. If the employer relies upon this pool of skilled craftsmen, members of the union, there is no doubt under these circumstances that the union will in fact represent a majority of the employees eventually hired. S. Rep., 1 Leg. Hist. 424 [quoted in *Deklewa*, supra at 1387 fn. 51].[5]

Thus, it is likely that a substantial number of employees in a unit where there is a recently expired 8(f) contract will be interested in union representation.[6]

Our conclusion that sufficient employee interest in representation is shown by submission of a recently expired 8(f) agreement to warrant processing of a representation petition is supported by a Board study of elections conducted during the period July 18, 1989, through January 20, 1990. The Board's Regional Offices were directed, on an interim basis, to accept either a current or recently expired 8(f) contract from a union signatory as a showing of interest in support of the union's election petition, and to keep data on the election results. These data show that, in the 25 elections where the petition was supported just with a current or recently expired 8(f) contract, unions won 68 percent of the time, and that in another 79 cases the employer voluntarily recognized the union without an election. In the four instances in the study where the union supported its petition with a recently expired 8(f) contract, the union won two elections, lost one, and was voluntarily recognized in one. Although the data is limited, it tends to confirm the use of both current and recently expired 8(f) agreements as an indicator of a level of employee interest warranting the processing of a petition.

Our dissenting colleague would equate the situation where a union petitioner tenders its recently expired 8(f) contract as a showing of interest to one where a stranger union files an RC petition. How the petitioner here, who has bargained for, and administered, contracts for several decades could be considered in the eyes of the employees to be equivalent to a union who has never represented them, our dissenting colleague does not explain.[7]

Our dissenting colleague also relies on the Board's statement in *Deklewa*, supra at 1385 fn. 42, that the Board intends to apply in 8(f) situations the Board's existing eligibility and election rules to the extent feasible. As previously discussed, we are applying the Board's existing showing-of-interest rules which permit a petitioning 9(a) union to use its recently expired contract as a showing of interest. We also note that the Board does not require an employer filing an RM petition during the term of an 8(f) contract to support that petition with the traditional ''objective considerations.'' The Board stated in *Deklewa* that: ''[a]n RM petitioner . . . need only demonstrate that it is signatory to an 8(f) agreement to satisfy the 'objective considerations' requirement.''[8] *Deklewa*, supra at 1385 fn. 42. In this way, an employer can easily test the union's majority status during the term of its 8(f) contract. Elemental fairness dictates that the Board use the same flexible approach in considering what should be an adequate showing to support the petition of a union that has bargained for, and recently administered, a contract covering the petitioned-for employees, and

[5] See also Member (now Chairman) Stephens' concurrence in *Deklewa*, supra at 1396. The dissent appears inconsistent with Congress' judgment in this respect.

[6] Our dissenting colleague challenges this assumption, however, on the basis that the union must refer members and nonmembers on a nondiscriminatory basis. This argument assumes the existence of an *exclusive* hiring hall, which often is not the case. See *Carpenters and Joiners, Local 537 (Du Pont & Co.)*, 303 NLRB 419 (1991). (Union may legitimately refuse to refer nonmember through nonexclusive hiring hall.) Be that as it may, our experience has been that many, if not most, of the workers referred through construction union hiring halls are union members. And even those nonmembers referred out of the union's hiring hall may well be sympathetic to a union that has aided them in attaining employment. See *NLRB v. Curtin Matheson Scientific, Inc.*, 110 S.Ct. 1542, 1552–1553 (1990).

[7] The Board has held that a collective-bargaining history on the basis of an 8(f) relationship is a relevant, and even a determinative, factor in deciding the appropriateness of a unit in the construction industry. *P. J. Dick Contracting*, 290 NLRB 150 (1988). The use of a recently expired 8(f) contract to support a showing of interest where there has been, as here, an extensive bargaining history, is as reasonable.

[8] This is a procedure the dissent does not attack, although we do not require any objective showing to support a belief that employees have any desire to sunder the relationship.

that believes it has majority support among them.[9] Just as an employer may insist on an election to resolve any lingering doubts about the wishes of its employees despite otherwise overwhelming evidence, quickly processing a signatory union's election petition in the aftermath of an 8(f) relationship, without first requiring a 30-percent interest showing, will clear the air and will resolve any lingering doubt about the wishes of the employees formerly represented under Section 8(f), thus forestalling future strife based on misconceptions.

We conclude that the Board's resources can most efficiently be utilized in furtherance of the Act's policies, as those policies are articulated in *Deklewa*, by the Board's accepting a recently expired 8(f) contract submitted by a union signatory as a sufficient showing of interest to process its election petition. As the 8(f) agreement here had recently expired—it was submitted in support of the election petition within 3 weeks of its expiration—we accept it as a sufficient showing of interest in support of the petition. The Regional Director's rejection of the petition for lack of showing of interest is reversed.[10] The case is remanded to the Regional Director for further appropriate action.

MEMBER RAUDABAUGH, dissenting.

The Board has a well-established general rule which provides that when a union seeks to become the Section 9 representative of a unit of employees, that union must support its RC petition with a showing of interest, i.e., a showing that 30 percent of the unit employees support the petition. The Union in this case filed a Section 9 petition. The Union sought to secure a 30-percent showing. It did not succeed. There is no representational tie, of any kind, between the Union and the unit employees. The Union has never been the Section 9 representative of the unit employees. Despite all of this, my colleagues permit the processing of the petition. As there is no basis in fact, law, or policy for this result, I dissent.

The majority believes that the recently expired 8(f) contract is sufficient to establish the showing of interest. The law is to the contrary. An 8(f) contract exists without regard to the representational desires of a single unit employee.[1]

Further, in the instant case, not only has the contract expired, but also the bargaining relationship has come to an end. The Employer lawfully withdrew recognition. My colleagues respond to this fact by noting that, prior to termination, the relationship had endured for a substantial period of time. This fact adds nothing. An 8(f) relationship can endure forever without the support of a single employee.

My colleagues seek to make up for this deficiency by asserting that ''our experience has been that many, if not most, of the workers referred through construction union hiring halls are union members.'' My colleagues cite no empirical studies or any other evidence to support this bald assertion. In addition, the law provides that a union must refer members and nonmembers alike from its hiring hall.[2] More importantly, the Union in the instant case tried to secure a 30-percent showing of interest. It did not succeed.

My colleagues' quotation from the legislative history cited in *Deklewa* does not support their position. The quotation states that if the employer relies on a ''pool of skilled craftsmen, *members of the union*, there is no doubt under these circumstances that the union will in fact represent a majority of the employees eventually hired.'' (Emphasis supplied.) Concededly, if a pool is comprised of members of the union, it is reasonably clear that the union is the majority choice. However, in the instant case, there is no evidence that the Employer's pool of employees was in fact comprised wholly, or even mostly, of union members.

The majority also asserts that where an employer has lawfully withdrawn recognition from a Section 9 representative, that union need not obtain a 30- percent showing of interest to support an RC petition aimed at resecuring Section 9 status. Although my colleagues cite no case in support of this proposition, I am willing to assume arguendo that it is correct. The distinction between that hypothetical scenario and the facts of the instant case is obvious. In the hypothetical, the Section 9 union once had majority support. The fact that the employer lawfully withdrew recognition merely means that the union has lost majority status or the employer has an objective basis for believing that majority was lost. But this is not the same as saying that the union, previously the majority representative, now has less than 30-percent support within the unit. Hence, I assume arguendo that the petition can be processed. By contrast, the Union in the instant case was only the 8(f) representative of the employees. As discussed above, such a relationship can exist without regard to the representational desires of a single unit employee. Despite this, my colleagues would process a petition even if a union never had the support of a single unit employee. In the instant case, they process a petition

[9] See *Elec-Comm, Inc*., 298 NLRB 705 (1990) (picketing for 8(f) recognition legally indistinguishable from picketing for 9(a) relationship, and thus RM petition under Sec. 9(c)(1)(B) processed).

[10] Because we deem adequate to support a showing of interest a recently expired 8(f) contract between the Petitioner and the Employer, we find it unnecessary to consider showing-of-interest issues with respect to *Daniel* eligibility formula employees and their authorization cards.

[1] See *John Deklewa & Sons*, 282 NLRB 1375 (1987), enfd. 843 F.2d 770 (3d Cir. 1988).

Contrary to the claim of the majority, I am not implying that the Union in this case had no support within the unit. The Union sought to secure a 30-percent showing of support, and did not succeed.

[2] My colleagues speculate that a hiring hall may be a nonexclusive one from which, according to them, a union can discriminate against nonmembers. Whatever the validity of these assertions, the fact is that the contract here required that the Union's employment lists be nondiscriminatory.

from a union that sought, and failed to secure, the support of 30 percent of the employees.

My colleagues also believe that where a union-party to an 8(f) contract files an RC petition during the life of that contract, the union need not present a 30-percent showing of interest. Again, I am willing to assume arguendo that this is so. However, once again, the difference between the hypothetical situation and the instant case is obvious. The union in the hypothetical is the incumbent and is party to a contract which is enforceable under Section 8(a)(5). The Union in the instant case has no contract and is not the representative, under 8(f) or 9(a), of the unit employees.

In sum, contrary to the hypothetical situations, the Union is not the previous Section 9 representative and is not the current 8(f) representative. The Union is a nonincumbent which seeks Section 9 status for the first time. Accordingly, like all unions in that situation, it must present a 30-percent showing of interest.

The majority concedes that, under *Deklewa*, representation cases in an 8(f) context are subject to ''existing eligibility and election rules to the extent feasible.'' As discussed above, under existing rules, where a nonincumbent union seeks to become the Section 9 representative for the first time, the union must present a 30-percent showing of interest. Hence, under *Deklewa*, the existing rule should be applied to this case.[3] My colleagues assert that it is I, not they, who seek to change the existing rules. However, they point to no case in which, as here, a union seeks to become the Section 9 representative for the first time and is excused from the 30-percent requirement.

My colleagues also point to data which, in their view, support the proposition that a 30-percent showing of interest is unnecessary. My colleagues concede that the data are limited. Indeed, there were only four elections in which the union's petition was supported by an expired 8(f) contract. Clearly, one cannot rest broad policy on such a statistically slender reed. More importantly, I know of no other situation in which the showing-of-interest requirement is abandoned simply because the union has won a given percentage of elections in a particular industry. Rather, the Board inquires into the extent of employee interest in the unit involved.

Finally, my colleagues point to the language in *Deklewa* concerning the ''constant availability of the electoral mechanism.'' The language follows a sentence which speaks of ''a meaningful and enforceable contractual relationship'' between the employer and the union. Obviously, the Board was saying that, under *Deklewa*, the employer and union can have a ''meaningful and enforceable contractual relationship'' and yet, under *Deklewa*, the employees can oust the union even during the term of that contract. The language cannot be taken out of context to apply to the wholly different situation where the contract and relationship have ended and the union seeks to become the representative. More importantly, the language does not even hint that, in either situation, the 30-percent requirement can be abandoned. Indeed, the language does not even address that issue.

In sum, the Union in this case was never the Section 9 representative. It has no current representational ties, 8(f) or 9(a), to the unit employees. It has tried to secure a 30-percent showing and it has failed. There is therefore no basis whatever for abandoning the 30-percent requirement and processing this petition.[4]

[3] In circumstances where the *Deklewa* Board intended to depart from existing rules, it expressly provided for this departure. Thus, the Board expressly said that an employer-party to an 8(f) contract need not support an RM petition with a showing of good-faith doubt of majority status. Because the union, in that situation, is not the majority representative in the first place, there is obviously no reason to require a showing of good-faith doubt of majority status. By contrast, the Board did not provide for any exception to the 30-percent showing-of-interest rule.

[4] I do not believe that the 30-percent requirement would impose an undue burden on unions, like the Petitioner, who obviously were the 8(f) representative of employees. Indeed, if, as my colleagues suggest, such unions likely have substantial support, there is hardly a burden at all. On the other hand, if there is little or no support, there is no warrant for imposing a burden on the Board to expend scarce public resources to conduct an election.