PSM Steel Construction, Inc., Employer-Petitioner *and* District Council of Northern New Jersey, International Association of Bridge, Structural and Ornamental Iron Workers and International Union of Operating Engineers, Local Union No. 825. Case 22–RM–673

December 16, 1992

DECISION ON REVIEW

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY, OVIATT, AND RAUDABAUGH

The issue is the continued validity of *Albuquerque Insulation Contractor*, 256 NLRB 61 (1981), following our decision in *John Deklewa & Sons*, 282 NLRB 1375 (1987), enfd. sub nom. *Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1987), cert. denied 488 U.S. 889 (1988). *Albuquerque Insulation* held that a union's request that an employer sign an 8(f) agreement does not support the processing of a RM petition pursuant to Section 9(c)(1)(B) of the Act. We hold that the decision in *Albuquerque Insulation* retains its validity after *Deklewa*. Accordingly, for the reasons stated here, we affirm the Regional Director's decision administratively dismissing the instant petition.

Facts[1]

From 1984 to 1989 PSM Steel Construction, Inc. (PSM or the Employer) employed a single operating engineer pursuant to its 8(f) contract with Local 825, International Union of Operating Engineers. In June 1989 the engineer was laid off and the 1987–1990 contract with Local 825 was terminated midterm by letter of August 23, 1989.[2] Since 1989, all work, including the work of the former operating engineer, has been performed by four ironworker employees. PSM has had two successive 8(f) contracts with the Iron Workers. The second of these contracts terminated June 30, 1990.[3]

By letter of June 4, Local 825 threatened to picket PSM for an 8(f) agreement at a jobsite run by a general contractor whose agreement with Local 825 required that subcontractors agree to perform work pursuant to the terms and conditions of the Local 825 contract. PSM was dismissed from the job in response to the threatened picketing.[4]

In early November, the Iron Workers sent PSM a copy of the successor 8(f) Iron Workers' contract and asked that PSM sign it. Based on this request that it sign a successor 8(f) contract, as well as the threatened picketing on June 4,[5] PSM filed a RM petition on November 23, seeking an election in a unit of all construction employees.[6]

By letter to the Regional Director dated December 3, Local 825 disclaimed interest in representing a unit of all construction employees of PSM.[7] On December 19, after gathering the above-recited facts, the Regional Director dismissed the petition based on his conclusion that no union has requested to represent a unit of all construction employees and that the unit described in the petition does not track the historical units in either of the expired contracts. The Regional Director also noted that Local 825 had expressly disclaimed representing employees in the petitioned-for unit. No evidence of a contrary intention was presented.

We granted the Employer's request for review on January 3, 1992, because of the substantial issues presented. Having considered the matter fully, we affirm the Regional Director's dismissal on the basis set forth below.

Analysis

A. *Coextensiveness of Demands with Petitioned-for Unit*

Even assuming that Operating Engineers Local 825 is demanding that PSM recognize it and sign a successor 8(f) contract, we find that Local 825 seeks recognition in a unit that would consist of employees who performed work covered by its previous contract rather than a unit composed of all the Employer's construction employees.[8] A RM petition will be processed if

[1] The facts set forth are based on the underlying administrative investigation and PSM's postappeal brief with supporting documentation. For purposes of this decision, we have assumed that PSM's assertions are accurate. Contrary to PSM's assertion that the Regional Director erred in failing to hold a hearing, we note that Regional Directors are vested with authority to dismiss petitions without holding a formal hearing when the Regional Director finds that there is not reasonable cause to believe that a question concerning representation affecting commerce exists. See Board's Rules and Regulations Secs. 102.63 and 102.71.

[2] Although Local 825 filed an 8(a)(5) charge, it was dismissed because the unit consisted of a single employee.

[3] Unless otherwise indicated all subsequent dates are in 1990.

[4] Charges filed with respect to this threat to picket were dismissed.

[5] The petition actually asserts that picketing occurred on June 4. However, other documents in the file, including PSM's brief, indicate that there was only a threat to picket on that date.

[6] The petitioned-for unit description is:

> All construction employees employed by the Employer for the installation of steel floors and roof decking and the installation of studding, including welding and related services excluding all other employees, supervisors, guards, officers, clerical employees and other statutory exclusions.

[7] The letter stated that Local 825,

> has never requested that the employer recognize Local 825 as the representative of a bargaining unit comprised of ''all construction employees'' as described in the petition, nor does Local 825 seek to represent the employees in such a bargaining unit.

[8] In a prior unfair labor practice case, Operating Engineers Local 825 (PSM Steel Construction), Cases 22–CC–1131 and 22–CP–383, the Regional Director concluded that the object of Local 825's June 4 threat to picket was to obtain an 8(f) contract in a stable one-person unit. Accordingly, the Regional Director refused to issue complaint alleging a violation of Sec. 8(b)(7)(C). PSM appealed this de-

it seeks an election in the unit for which there has been a demand for recognition.[9] Local 825 disclaimed any interest[10] in the petitioned-for unit consisting of all construction employees, and has not engaged in any conduct inconsistent with such a disclaimer. Accordingly, as to Local 825, we agree with the Regional Director's conclusion that there has been no demand in the petitioned-for unit.

With respect to the Iron Workers, PSM asserts that it assigned the work formerly performed by the engineer to an ironworker, and its entire work force currently consists of four ironworker employees. PSM asserts that the Iron Workers has forwarded a successor 8(f) contract for signature. The evidence reflects that such a contract would cover ''the claimed, recognized and assigned'' work jurisdiction as set forth in the contract including the ''erection and construction of all . . . steel . . . structures or parts thereof.'' (Art. IV, agreement between District Council of Northern New Jersey Iron Workers and Structural Steel and Ornamental Iron Association of Virginia, the Associated General Contractors of New Jersey, the Building Contractors Association of New Jersey, and Rigging Contractors of New Jersey for the period July 1, 1984, to June 30, 1987.) Accordingly, it appears that the petitioned-for unit, ''[a]ll construction employees employed by the Employer for the installation of steel floors and roof decking and the installation of studding, including welding and related services'' would consist solely of ironworkers who would be covered by the contract sought by the Iron Workers. We therefore conclude that the RM petition covers the unit in which PSM claims a demand for recognition has been made by the Iron Workers.

B. *Request to Sign 8(f) Contract as Support for RM Petition*

Since we have determined that the Iron Workers' claim is coextensive with the petitioned-for unit, the question is whether there has been a ''claim'' for recognition sufficient to support a RM petition. Our conclusion must necessarily reflect an analysis of the post-*Deklewa* validity of *Albuquerque Insulation*, supra.

1. Statutory mandate

Section 9(c)(1)(B) provides in relevant part:

> Whenever a petition shall have been filed . . . . . by an employer, alleging that one or more . . . labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a) . . . the Board shall [process the petition].

Section 9(a) provides in relevant part:

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment.

In *Albuquerque Insulation* the Board held that a union's request that an employer sign an 8(f) contract did not constitute a claim for recognition as a majority representative pursuant to Section 9(a) of the Act. Initially the Board noted that the language of Section 9(c)(1)(B) literally requires that a RM petition be supported by a union claim of majority. Because there was no request for 9(a) majority status, the petition was dismissed.

This basis for the holding in *Albuquerque Insulation* remains valid following the decision in *Deklewa*. *Deklewa* held that parties who enter into an 8(f) agreement will be required by virtue of Section 8(a)(5) and Section 8(b)(3) to comply with the agreement during its term, in the absence of a Board-conducted election where employees vote to change or reject their bargaining representative. 282 NLRB at 1377, 1385. However, following expiration of an 8(f) agreement, the union enjoys no presumption of majority status and either party may repudiate the 8(f) bargaining relationship. Id. at 1377–1378.

Deklewa noted that modification of the law of 8(f) relationships, so as to apply Section 8(a)(5) and Section 8(b)(3) implicated Section 9(a) of the Act as well. *Deklewa* rejected the contention of some parties that would vest an 8(f) union with full 9(a) status. Id. at 1384–1385. Rather, *Deklewa* conferred a limited 9(a) status on an 8(f) signatory union as follows:

> The enforceable Section 9(a) status we confer on signatory unions is also only coextensive with the bargaining agreement that is the source of its exclusive representational authority. Beyond the operative term of the contract, the signatory union

termination. However, the Regional Director's finding was upheld on appeal. PSM also asserts that Local 825 has forwarded a successor 8(f) contract for signature. This request, similarly, covers a stable one-person unit.

[9] *Bowman Transportation*, 142 NLRB 1093, 1094–1095 (1963) (one of the requirements for processing a petition in a RM proceeding is that a union must have claimed representative status in the unit covered by the petition); *Westinghouse Electric Corp.*, 129 NLRB 846, 847 (1960) (same).

[10] PSM claims that it has not received a copy of the disclaimer and that, in any event, it does not trust Local 825. We note that a Regional Office document indicates that the Regional Office forwarded the disclaimer to PSM's attorney. More importantly, PSM does not present any evidence that would indicate a contrary intention on the part of Local 825. PSM asserts that Local 825 forwarded a 1990–1993 8(f) contract for signature. However, this contract would cover the one-man unit historically represented and does not indicate an intention contrary to the disclaimer.

> acquires no other rights and privileges of a 9(a) exclusive representative. Unlike a full 9(a) representative, the 8(f) union enjoys no presumption of majority status on the contract's expiration . . . . At no time does it enjoy a presumption of majority status, rebuttable or otherwise, and its status as the employees' representative is subject to challenge at any time.

282 NLRB at 1387 (footnotes omitted). Accordingly, as the limited 9(a) status is coextensive with the contract and does not survive contract expiration, a postexpiration request for a successor 8(f) agreement cannot qualify literally under the language of the statute as a claim of majority status.

2. Legislative policy

PSM argues that the Board should entertain its petition because *Deklewa* ''sought to achieve labor stability as well as to protect employee free choice by allowing elections under Section 9(c) to occur at the expiration of Section 8(f) contract.'' In fact, *Deklewa* provides for election petitions ''only after the [8(f)] relationship has been established and is operational.''[11]

However, PSM is correct in pointing to our concern for balancing the interests of labor stability and employee free choice in selecting their bargaining representatives. In determining what policies best achieve this result, we are guided by the legislative history of Section 9(c)(1)(B) which was added to the Act in 1947. This was prior to the Board's assertion of jurisdiction over the construction industry[12] and prior to the 1959 addition of Section 8(f) to the Act. Before the addition of Section 9(c)(1)(B), employer petitions were not available except on competing claims made by two labor organizations. In amending the Act to permit employer petitions, Congress sought to prevent employers from utilizing such petitions as a means to undermine employee free choice. Accordingly, after rejecting various alternatives, Congress enacted the requirement that an election be held only if there was a majority claim,[13] and this requirement was not modified on the enactment of Section 8(f). As the Board observed in *Albuquerque Insulation*,

> There is good reason for this result. The Section 9(c)(1)(B) requirement that an employer may secure an election *only if* a claim is made by a party that it is the majority representative of the employees was placed in the statute to prevent an employer from precipitating a premature vote before a union has the opportunity to organize. [Emphasis in original.]

256 NLRB at 63 (citations omitted). *Albuquerque Insulation* was squarely predicated not only on the plain language of Section 9(c)(1)(B) of the Act but also on the underlying legislative policy.[14] *Deklewa* does not alter this basic legislative concern.[15] Moreover, we

[11] 282 NLRB at 1386 fn. 45. See also fn. 47 of *Deklewa* regarding the processing of RM petitions predicated on the fact that the employer ''is signatory to an 8(f) agreement.''

[12] Following enactment of the Taft-Hartley amendments, the Board began asserting jurisdiction over the construction industry. See, e.g., *Carpenters (Wadsworth Bldg. Co.)*, 81 NLRB 802, 804 fn. 6 (1949), enfd. 184 F.2d 60 (10th Cir. 1950), citing *Carpenters Local 74 (Watson's Specialty Store)*, 80 NLRB 533 (1948), enfd. 181 F.2d 126 (6th Cir. 1950), affd. 341 U.S. 707 (1951); *Ozark Dam Constructors*, 77 NLRB 1136 (1948).

[13] In discussing reform in representation proceedings, the Senate Report indicates these concerns:

> The one-sided character of the Board's rules [in not allowing employer petitions] has been defended on the ground that if an employer could petition at any time, he could effectively frustrate the desire of his employees to organize by asking for an election on the first day that a union organizer distributed leaflets at his plant. It should be noted that this may be a valid argument for placing some limitation upon an employer's right to petition, but it is no justification for denying it entirely. The committee has recognized this argument insofar as it has point, by giving employers a right to file a petition but not until a union has actually claimed a majority or demanded exclusive recognition. It should be observed that this amendment, like the amendment doing away with disparity of treatment on employee petitions, does not impair the Board's discretion to dismiss petitions by employers where the existence of an outstanding collective agreement or some other special condition makes an election at that time inappropriate.

S. Rep. No. 105 on S. 1126, 80th Cong., 1st Sess. at 11, 1 Leg. Hist. 417 (LMRA 1947).

[14] In *Albuquerque Insulation*, 256 NLRB at 63, the Board stated:

> Thus, the Act contemplates that a union which is not presently majority representative may decide when or whether to test its strength in an election by its decision as to when or whether to request recognition or itself petition for an election. This is important because, under Section 9(c)(3) and Section 8(b)(7)(B), a Board-conducted election has the effect of barring any further election or recognitional picketing for a full year. Until the union makes such a move, it is free to organize without the imposition of an election and, in accordance with Section 8(b)(7)(C), it may engage in recognitional picketing for a reasonable period of time not to exceed 30 days prior to filing for an election; an employer confronted with such picketing may petition for an election to force the issue. Thus, once the union seeks recognition as majority representative, the election process—with its potential risks and rewards—may be invoked by either side. But, until that time, an employer may not attempt to short-circuit the process or immunize itself from recognitional picketing by obtaining a premature election.

[15] Employer petitions based on recognitional picketing do not short-circuit the election process. On engaging in recognitional picketing, the union has indicated a present recognitional object. *Elec-Comm, Inc*., 298 NLRB 705 (1990) (representational picketing—whether for an 8(f) or 9(a) contract—constitutes a present demand for recognition pursuant to Sec. 9(c)(1)(B)). This holding is predicated on the premise that picketing for an 8(f) contract is legally indistinguishable from picketing for a 9(a) contract. Id. at 706 fn. 5; *Laborers Local 1184 (NVE Constructors)*, 296 NLRB 1325 (1989), enfd. 934 F.2d 1084 (9th Cir. 1991). We note that there was no recognitional picketing in this case.

Member Raudabaugh does not agree with *Elec-Comm*, insofar as that case teaches that picketing for an 8(f) contract will support a RM petition. Irrespective of whether a union is *picketing* for an 8(f) contract or (as in the instant case) simply *asking* for an 8(f) contract,

note that were we to entertain employer petitions based on a mere request that an 8(f) contract be signed, Section 8(f) would retain little, if any, viability. A union would have to organize prior to making such a request or face a possible election defeat. This was not the intent of Congress in its creation of Section 8(f).[16]

Conclusion

The Regional Director administratively dismissed PSM's petition. For the reasons we have articulated, we affirm the dismissal of the petition.

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the critical fact in both situations is that the union is not seeking recognition as the majority Sec. 9 representative. Thus, under the language of Sec. 9(c)(1)(B) and Sec. 9(a), there is no basis for processing a RM petition.

However, in Member Raudabaugh's view, picketing for an 8(f) contract is cognizable under Sec. 8(b)(7). That section limits picketing for a recognitional object. Unlike Sec. 9(c)(1)(B) and Sec. 9(a), the section is not limited to claims for Sec. 9 majority recognition. Member Raudabaugh expresses no view on whether a union can picket for a full 30 days for an 8(f) contract. See *NVE Constructors*, supra.

[16] In *Stockton Roofing Co.*, 304 NLRB 699 (1991), the Board (Member Raudabaugh dissenting) held that a union's petition for an election could be supported by a showing of interest consisting of an expired 8(f) contract. Id at 701. This holding is fully consistent with our holding today and in no way conflicts with the congressional concern for premature elections. The ''showing of interest'' requirement for union petitions is a purely administrative device utilized to determine whether the Board's resources should be expended to hold an election. By contrast, the requirement of a demand for recognition as a majority representative, which is mandated in Sec. 9(c)(1)(B) cannot be altered by the Board in an effort to increase its efficiency and effectiveness. Rather, the Board must interpret the statutory requirement consistent with its underlying purpose.