Coinmach Laundry Corp. *and* Local 729, Coalition of Democratic Employees. Case 29–RC–9876

September 12, 2002

ORDER DENYING REVIEW

BY MEMBERS LIEBMAN, COWEN, AND BARTLETT

The National Labor Relations Board has carefully considered the Intervenor's[1] request for review of the Regional Director's Decision and Direction of Election (pertinent portions of which are attached as an appendix).[2] The request for review is denied as it raises no substantial issues warranting review. In denying review, we find that the Intervenor has failed in its request for review to set forth any facts which would warrant further examination of the fronting issue.

MEMBER BARTLETT, concurring.

I disagree with *Alto Plastics Mfg. Corp.*, 136 NLRB 850 (1962), to the extent it holds that the criminal records of, or judicial determinations of fraudulent conduct by, union officers and representatives cannot be considered relevant either to whether an organization is a labor organization within the meaning of the Act or to whether such organization may be appropriately certified by the Board. See *Harrah's Marina Hotel*, 267 NLRB 1007 (1983). Here, however, I find that the Intervenor has failed to make a sufficient threshold showing that this was a relevant and necessary inquiry in this case. Rather, it appears that the Intervenor was simply on a fishing expedition. Thus, I find that the hearing officer and the Regional Director properly refused to permit the Intervenor to inquire into the issue.

APPENDIX

REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION

The Employer, Coinmach Laundry Corp.,[1] operates a coin-operated laundry machine leasing, installment, and servicing facility, located in Syosset, New York, where it employs about 120 to 125 employees in the unit sought by the Petitioner. The Petitioner, Local 729, Coalition of Democratic Employees, filed a petition with the National Labor Relations Board under Section 9(c) of the National Labor Relations Act seeking to represent a unit of all employees, excluding all guards, supervisors, office employees, foremen, salesmen, executives, dispatchers, laundry room attendants, security employees, coin counters, and porters, employed at the Employer's Syosset facility. The Intervenor, Local 966, International Brotherhood of Teamsters, AFL–CIO, intervened on the basis of its collective-bargaining agreement with the Employer encompassing the petitioned-for unit. A hearing officer of the Board held a hearing and the Intervenor filed a brief. Pursuant to Section 3(b) of the Act, the Board has delegated its authority in this proceeding to me.

As evidenced at the hearing and in the Intervenor's brief, the parties disagree on the issue of whether the Petitioner is a labor organization within the meaning of Section 2(5) of the Act. The Intervenor takes the position that the Petitioner is not a labor organization. The Petitioner takes the contrary position, and the Employer takes no position. However, the parties stipulated that the Intervenor is a statutory labor organization, and that the unit sought by Petitioner is appropriate. Petitioner's president, Francis Gauck, was the sole witness to testify at the hearing.

I have considered the evidence and the arguments presented by the parties on the issue of Petitioner's labor organization status. As discussed below, I have concluded that the Petitioner is a labor organization. Accordingly, I have directed an election in the unit sought by the Petitioner. The facts and reasoning that support my conclusion are presented in detail below.

I. LABOR ORGANIZATION STATUS OF PETITIONER

A. Case Law

Section 2(5) of the Act provides the following definition of "labor organization":

> Any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

Under this definition, an incipient union which is not yet actually representing employees may, nevertheless, be accorded 2(5) status if it admits employees to membership and was formed for the purpose of representing them. See *Butler Mfg. Co.*, 167 NLRB 308 (1967); see also *East Dayton Tool & Die Co.*, 194 NLRB 266 (1971). Even if such a labor organization becomes inactive without ever having represented employees, it is deemed to have been a statutory labor organization if its organizational attempts "[c]learly . . . envisaged participation by employees," and if it existed "for the statutory purposes although they never came to fruition." *Comet Rice Mills*, 195 NLRB 671, 674 (1972). Moreover, "structural formalities are not prerequisites to labor organization status." *Yale New Haven Hospital*, 309 NLRB 363 (1992) (no constitution, bylaws, meetings or filings with the Department of Labor); see *Betances Health Unit*, 283 NLRB 369, 375 (1987) (no formal structure and no documents filed with the Department of Labor); *Butler Mfg Co.*, 167 NLRB at 308 (no constitution, bylaws, dues, or initiation fees); *East Dayton*, 194 NLRB at 266

[1] Local 966, International Brotherhood of Teamsters, AFL–CIO

[2] The issues presented for review are (1) whether the Board wishes to reconsider its holding in *Alto Plastics Mfg. Corp.*, 136 NLRB 850 (1962), and find that the hearing officer erred in ruling that certain subpoenaed documents allegedly necessary to show that Petitioner's officers have criminal records are irrelevant, and (2) whether the Regional Director correctly found that the Intervenor was not prejudiced by the hearing officer's refusal to permit the Intervenor to inquire about possible fronting by the Petitioner, and by the hearing officer's leading of a witness.

[1] The Employer's name appears as amended at the hearing.

(no constitution or officers). A labor organization found to be the beneficiary of unlawful employer domination, interference or assistance under Section 8(a)(2) of the Act does not thereby lose its Section 2(5) status; on the contrary, "[b]efore a finding of unlawful domination can be made under Section 8(a)(2) a finding of 'labor organization' status under Section 2(5) is required." *Electromation, Inc*., 309 NLRB 990, 994 (1992).

B. Facts

The record reflects that Local 729 had its genesis at a June 2002, meeting attended by three individuals: Theodore Sadowski, an employee of the Employer, Francis Gauck, past president (until his discharge this June) of an electrical workers' local, and William Hoberg, whose employment status, Gauck maintained, he did not know. At this June meeting, the three men "discussed formulating this local" and agreed that Gauck would be the president, Sadowski the vice president, and Hoberg the secretary-treasurer. Subsequently, the three officers drafted a set of bylaws, which they have not yet signed. No official minutes have been taken at the Petitioner's meetings.[2]

Gauck testified that the Petitioner was created to "organize, negotiate contracts regarding wages, working conditions, hours of employment . . . [and] grievance procedures." He estimated that the Petitioner is in the process of conducting organizational campaigns at five or six companies, in addition to the Employer. When soliciting authorization cards, Gauck tells employees that if elected, Local 729 will "get them a better contract, benefits that [are] above and beyond what they [are] receiving now."

Currently, the Petitioner has about 50 to 55 members, who are employees of the Employer and one of its competitors. Thus far, however, the Petitioner has not been recognized by any Employer or certified by the Board, nor has it negotiated any contracts. It is not yet receiving dues from employees or administering pension or welfare funds. Hence, it has no income, assets or paid staff, and is operating out of Gauck's residence.

C. Conclusion

The record establishes that the Petitioner meets the statutory definition of "labor organization" set forth above. The purposes articulated by Gauck are consistent with the Act and include "dealing with employers" concerning matters itemized in Section 2(5). In addition, that the Petitioner admits employees to membership is sufficient to establish that it is an "organization…in which employees participate." See *Butler Mfg. Co.*, supra; see also *Comet Rice Mills*; supra; *East Dayton Tool & Die Co*., 194 NLRB 266 (1971). That one of the Petitioner's officers, Theodore Sadowski, is an employee of the Employer, is further evidence of employee participation in Local 729.

Based on the foregoing, I find that Local 729 exists, in whole or in part, for the purpose of representing employees in dealings with their employers regarding terms and conditions of employment, and that employees participate in the functioning thereof. Accordingly, I conclude that Local 729 is a labor organization as defined in section 2(5) of the Act.

D. Brief of Intervenor

The Intervenor's brief emphasizes alleged defects in Petitioner's bylaws and minutes, and the absence of collective-bargaining agreements and dues records. However, this evidence is irrelevant to the Petitioner's 2(5) status. See *Yale New Haven Hospital*, 309 NLRB 363 (1992); *Betances Health Unit*, 283 NLRB 369, 375 (1987); *East Dayton*, 194 NLRB at 266; *Butler Mfg. Co.*, 167 NLRB at 308.

The Intervenor also relies on the Hearing Officer's alleged "refusal to permit legitimate lines of inquiry regarding the Petitioner."[3] More specifically, the Intervenor argues that its case was unfairly prejudiced when the hearing officer ruled that certain subpoenaed items were irrelevant, and when the Region denied the Intervenor's special appeal with regard to this ruling.[4] In addition, the Intervenor contends that the Hearing Officer wrongfully precluded it from pursuing certain lines of questioning.

In its special appeal, the Intervenor contended that the subpoenaed documents were necessary (1) because "documents showing any records of criminal convictions of the officers of Local 729 . . . [are] relevant,"[5] and (2) "to show that Local 729 is an organization which is fronting for a labor organization which is not qualified to represent the employees of the Employer."[6] In its brief, the Intervenor makes essentially the same

[2] Gauck testified that the Petitioner has held at least a dozen meetings with the Employer's employees. He claimed that at one of these meetings, the employees made contract proposals, which the Petitioner's three officers wrote down. However, Petitioner did not produce this list of employee proposals in response to a subpoena request for minutes from membership meetings. Rather, the Petitioner produced one small diary page of Sadowski's notes, primarily concerning meetings among the Petitioner's three officers. The record does not reveal what occurred at the other 11 membership meetings.

[3] Br. of Intervenor at 4.

[4] Although the subpoena itself is not in evidence, the record indicates that the Intervenor's special appeal pertained to the following subpoenaed items: (1) item 2: the names, departments and compensation of the petitioner's officers; (2) item 5: all documents showing any affiliation with any labor organization; (3) item 8: all LM-2 reports filed with the United States Department of Labor for the last three reporting years; (4) item 12: all documents showing the length of time of the officers' terms of office; (5) item 13: all documents showing the current number of members of the Petitioner; (6) item 14: all financial reports of the Petitioner since January 2, 2001; (7) item 15: all loan documents and/or rental agreements entered into by the Petitioner, or by its staff or officers; (8) item 16: all documents, leases, titles or deeds that show ownership or lease of property by the Petitioner; (9) item 17: all documents showing the conviction records of any officer or employee of the Petitioner; (10) item 18: all financial records of the Petitioner, including checkbooks, canceled checks, receipts, accounts payable and receivable ledgers, records of dues payments from January 1, 2001, to the present; and (11) item 19: copies of all correspondence with and any notes of conversations with Vincent Sombrotto and/or Edwin Gonzalez.

[5] Special Appeal of Intervenor, par. 4 (citing Board's Outline of Law and Procedure in Representation Cases, Sec. 6-110 (citing *Harrah's Marina Hotel*, 267 NLRB 1007 (1983)); *Mohawk Flush Doors*, 281 NLRB 410 (1986)).

[6] Special Appeal of Intervenor, par. 2 (citing Board's Outline of Law and Procedure in Representation Cases, Sec. 6-310 (citing *Iowa Packing Co.*, 125 NLRB 1408 (1959)); *National Electric Coil Division*, 199 NLRB 1017 (1972)).

arguments, with respect to both the subpoenaed documents and the examination of Gauck. For the reasons set forth below, I find these arguments to be lacking in merit.

(1) Records of criminal convictions

The instant case is similar to *Alto Plastics Mfg. Corp.*, 136 NLRB 850 (1962), in which the Board was faced with rival claims by petitioning and intervening unions. The intervenor served the petitioner with a subpoena, in an effort to uncover evidence that the petitioner was a "corrupt" union. The Board ruled the subpoenaed items irrelevant, reasoning that if a labor organization meets the statutory definition, "the fact that it is an ineffectual representative, that its contracts do not secure the same gains that other employees in the area enjoy, that certain of its officers or representatives may have criminal records, that there are betrayals of the trust and confidence of the membership, or that its funds are stolen or misused, cannot affect the [Board's] conclusion . . . that the organization is a labor organization within the meaning of the Act." *Alto Plastics*, 136 NLRB at 851–852. Rather, the Board advised, allegations regarding improper or corrupt practices in the administration of internal union affairs are more properly addressed under the Labor-Management Reporting and Disclosure Act. *Alto Plastics*, 136 NLRB at 853; see also *Family Service Agency San Francisco*, 163 F.3d 1369 (D.C. Cir. 1999); *Westside Community Mental Health Center*, 327 NLRB 661, 663 (1999); *Mohawk Flush Doors*, 281 NLRB 410 (1986) (union was a labor organization despite evidence of "extensive influence by organized crime"). This reasoning is equally applicable to the instant case.

Marina Associates, 267 NLRB 1007 (1983), cited by the Intervenor in its special appeal, is not on point. In *Marina*, the petitioning union's officers had been convicted of embezzling union funds, and were found to have operated the union and its funds "as their personal business and for their personal profit." *Marina Associates*, 267 NLRB at 1011. The fact that the petitioner was seeking certification wholly "for purposes abhorrent to the Act" compelled the conclusion that petitioner did not "exist 'in whole or in part' for the purposes set forth in the statute," as required by Section 2(5). *Marina Associates*, 267 NLRB at 1007 fn. 2, 1012. Thus, the officers' criminal convictions had a direct bearing on whether the petitioner was a statutory labor organization. The instant case, involving a newly-formed union, is not analogous to the facts in *Marina Associates*.

(2) "Fronting" allegation

In alleging that the Petitioner is "fronting," the Intervenor relies on an unpublished order issued by a United States District Court, not offered into evidence, which allegedly bars another labor organization and two individuals from representing members of the Intervenor. The record does not disclose the legal grounds underlying the District Court's ruling. Moreover, the Intervenor suggests no legal basis for finding that the authority delegated to me under Section 3(b) of the Act encompasses the power to determine whether there has been a violation of the District Court's order.

The two cases cited by the Intervenor in support of its "fronting" allegation are not on point. In *Iowa Packing Co.*, 125 NLRB 1408 (1959), the petitioner was an "adjunct or satellite" union, with only a "façade of a separate identity," created by an industrial union in an attempt to circumvent the then-applicable requirement that a union seeking craft severance "must be the one which traditionally represents that craft." *Iowa Packing*, 125 NLRB at 1409, 1410 (citing *American Potash & Chemical Corp.*, 107 NLRB 1418 (1954), overruled *by Mallinckrodt Chemical Works*, 162 NLRB 387 (1966)). In *National Electric Coil Division*, 199 NLRB 1017 (1972), a recognized union filed a certification petition as a subterfuge, for the purpose of allowing a rival union to intervene at a time when it would have been prohibited from filing its own petition under contract bar principles. *National Electric*, 199 NLRB at 1018–1019. Thus, both of these cases involved union attempts to circumvent rules governing representation cases filed under Section 9(c) of the Act. They did not involve union attempts to circumvent District Court orders such as that alluded to in the instant case. Moreover, both cases cited by the Intervenor were dismissed *despite* the Board's finding that the petitioners were Section 2(5) labor organizations.

II. CONCLUSIONS AND FINDINGS

1. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are affirmed.

. . . .

3. The Petitioner and Intervenor are labor organizations within the meaning of Section 2(5) of the Act. The labor organizations involved herein claim to represent certain employees of the Employer.

. . . .

5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

> All employees, EXCLUDING office employees, foremen, salesmen, executives, dispatchers, laundry room attendants, security employees, coin counters and porters, and guards and supervisors as defined in the Act.