Sequoias Portola Valley *and* National Union of Healthcare Workers, Petitioner, and Laborers International Union, Local 270, Intervenor. Case 20–RC–18240

August 31, 2009

DECISION ON REVIEW AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBER SCHAUMBER

On April 1, 2009,[1] the National Union of Healthcare Workers (the Petitioner) filed a petition seeking to represent a unit of 75 healthcare employees employed by Sequoias Portola Valley (the Employer) in Portola Valley, California. By letter dated April 6, the Regional Director for Region 20 informed the Employer and the Petitioner that he would hold the petition in abeyance pending the outcome of an investigation of a charge filed on or about March 5 by the Service Employees International Union (SEIU) against Clinton Reilly Holdings (Clinton Reilly), an unrelated employer. The charge alleges that Clinton Reilly violated Section 8(a)(2) of the Act by unlawfully dominating the Petitioner by making in-kind and financial contributions to the Petitioner through the Fund for Union Democracy and Reform (FUDR). The Petitioner requests review of the Regional Director's decision to hold the petition in abeyance.

Having carefully considered the matter, we grant review, reverse the Regional Director, and reinstate the petition.[2]

The sole issue raised in this proceeding is whether this representation petition should be held in abeyance pending the investigation of an unfair labor practice charge filed by a union other than the Petitioner against an employer other than the Employer here. This is a novel issue. After due consideration, including balancing the Act's interest in permitting employees to choose union representation versus the gravity of the alleged unfair labor practice charges, we find, as explained below, that the petition should be processed. We further hold that if the Petitioner is found, at a later date, not to be a labor organization under the Act and it shall have been certified as the unit employees' bargaining representative, the Board shall take such action as required by the Act and Board law, such as the revocation of the Petitioner's certification.

The Board's general policy is to "block," or delay the processing of a representation petition when there is a pending unfair labor practice case. See, e.g., *Bally's Atlantic City*, 338 NLRB 443 (2002). "[T]he blocking charge policy is premised solely on the Agency's intention to protect the free choice of employees in the election process." NLRB Casehandling Manual, Part Two, Representation Proceedings, Sec. 11730. Holding a petition in abeyance rather than processing it in the face of unresolved unfair labor practices preserves the laboratory conditions that the Board requires for all elections and insures that employees may vote in an atmosphere free of unfair labor practices.[3]

Here, the Regional Director has blocked the representation petition filed by the Petitioner while he investigates 8(a)(2) allegations that do not involve the current employer. It appears that the Regional Director has done so on the basis that if the relationship between the Petitioner and Clinton Reilly is in violation of Section 8(a)(2), then he would find that any petition filed by the Petitioner must be dismissed because that union can no longer be certified to represent employees at any employer.

There is no specific guidance on this issue from either prior Board decisions or the NLRB Casehandling Manual. However, we are reluctant to see this novel theory of law delay the processing of this petition for an indefinite period of time. Allowing the unrelated employer-domination charge to block the representation petition here, before any such determination has been made with respect to either the Petitioner or the current Employer, delays, for an indeterminate, and possibly lengthy amount of time, the employees' opportunity to exercise their Section 7 rights. Therefore, we find that, in these circumstances, the better practice is to process the representation petition and leave the determination of whether a union is dominated, as alleged, to a later date when that allegation and its impact, including whether the Peti-

[1] All dates are in 2009, unless otherwise noted.

[2] Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Liebman and Member Schaumber constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act. See *Snell Island SNF LLC v. NLRB*, 568 F.3d 410 (2d Cir. 2009); *New Process Steel v. NLRB*, 564 F.3d 840 (7th Cir. 2009), petition for cert. filed 77 U.S.L.W. 3670 (U.S. May 22, 2009) (No. 08-1457); *Northeastern Land Services v. NLRB*, 560 F.3d 36 (1st Cir. 2009), rehearing denied No. 08-1878 (May 20, 2009). But see *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469 (D.C. Cir. 2009), petitions for rehearing denied Nos. 08-1162, 08-1214 (July 1, 2009).

[3] For an in-depth discussion of the Board's blocking charge policy, see NLRB Casehandling Manual, Part Two, Representation Proceedings, Sec. 11730.

tioner is barred from representing any employees of any employer, is fully litigated in the unfair labor practice proceeding.

Our approach here is not unlike the one adopted by the Board in *Handy Andy, Inc.*, 228 NLRB 447 (1977). There, the issue was whether a union's alleged discriminatory practices—as revealed by several court cases in which contracts with other employers were found to be unlawful because they perpetuated the effects of the employer's past discrimination—should preclude the union from being certified in a representation case. The Board concluded that it should not. The Board considered, inter alia, the nonadversary nature of representation proceedings, the "paramount importance of avoidance of delay in [such] . . . cases, [and] the procedural safeguards afforded in unfair labor practice proceedings which are not available in representation cases. . . . " Id. at 456. As a result, it held that "the policies of the Act are better effectuated by considering allegations that a labor organization practices invidious discrimination in appropriate unfair labor practice . . . proceedings." Id. at 448.[4]

Similarly, here we find that the issue of domination of the Petitioner by another employer is one that is better considered in the unfair labor context. As stated above, if, after the Sec. 8(a)(2) allegation has been litigated, and the Petitioner is found not to be a labor organization, the Board shall take such action as required by the Act and Board law, such as the revocation of Petitioner's certification. To deny, however, the petitioned-for employees their right to choose union representation prior to such a determination is premature and does not best effectuate the purposes and policies of the Act.

Accordingly, for the reasons stated above, we reverse the Regional Director, reinstate the petition, and remand this case to the Regional Director for further appropriate action.

ORDER

IT IS ORDERED that the petition be reinstated, and that this matter be remanded to the Regional Director for further appropriate action.

Dated, Washington, D.C. August 31, 2009

Wilma B. Liebman, Chairman

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[4] The Board pointed out that it would consider allegations of unlawful discrimination in representation cases "only when required to fulfill our primary obligation of protecting employees from interference in exercising their right to select a bargaining representative." Id. at 454.