Rapera, Inc., Employer-Petitioner *and* Hotel Employees and Restaurant Employees, Local 100, Hotel Employees and Restaurant Employees International Union, AFL–CIO. Case 2–RM–2085

May 2, 2001

DECISION ON REVIEW AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS LIEBMAN, HURTGEN, AND WALSH

On November 10, 1999, the Regional Director for Region 2 administratively dismissed the Employer's petition for an election, finding that the Union had not exhibited a present demand for recognition. Thereafter, in accordance with Section 102.67 of the National Labor Relations Board's Rules and Regulations, the Employer filed a timely request for review, which the Board granted on March 30, 2000.[1]

The Employer's request for review and the parties' briefs on review have been carefully considered by the Board. Chairman Truesdale and Member Hurtgen would reverse the Regional Director's administrative dismissal and reinstate the Employer's petition. Members Liebman and Walsh would affirm the Regional Director's administrative dismissal of the petition. Accordingly, since the Board is equally divided, and there is no majority to reverse the Regional Director's action, the Regional Director's administrative dismissal is affirmed. See *Durant v. Essex*, 74 U.S. 107 (1868); *United Health Care Services*, 326 NLRB 1379 (1998); and *Pocono Medical Center*, 305 NLRB 398 (1991).

ORDER

The Regional Director's administrative dismissal is affirmed.

CHAIRMAN TRUESDALE and MEMBER HURTGEN.

The Employer operates the employee cafeteria, restaurants, and other food and beverage facilities at the Metropolitan Opera House at Lincoln Center, New York City, pursuant to a contract with the Metropolitan Opera Association. There are approximately 95 hourly food and beverage workers in the petitioned-for bargaining unit. Since March 1999, the Union has attempted to organize the employees at the Employer's facility. During this time the Union has put pressure on the Employer to sign a neutrality/card check agreement.[2] In early March 1999, the Union made a written demand for a neutrality/card check agreement upon the Employer's parent company, Restaurant Associates. The Union thereafter also conducted demonstrations and directed picketing and leafleting near Lincoln Center.[3] The Union also sent letters to third parties requesting that they use their influence to "ensure" that the Employer sign the Union's proposed neutrality/card check agreement.[4] Simultaneously, the Union has represented in letters to specific individuals, as well as in campaign fliers and newspaper articles, that it enjoys the support of a majority of the employees in the petitioned-for unit. In addition, the Union made this claim in a union agent's affidavit submitted to the United States District Court in a case involving a related matter.[5] Based on the Union's actions, the Employer filed the instant RM petition.

We find that the Union's conduct constitutes a present demand for recognition. Accordingly, we would reverse the Regional Director's administrative dismissal and reinstate the Employer's petition.

The Board has consistently construed Section 9(c)(1)(B) of the Act as requiring evidence of a "present demand for recognition" as the majority representative of the employer's employees before an employer's petition will be processed. *New Otani Hotel & Garden*, 331 NLRB 1078, 1078 (2000); *Windee's Metal Industries*, 309 NLRB 1074, 1074 (1992).

It is undisputed that the Union has requested and continues to demand, through picketing, demonstrations, and letters to third parties, that the Employer sign the neutrality/card check agreement. Under the proposed agreement, the Employer would agree to recognize and bargain with the Union upon a showing of majority support in the form of signed authorization cards. Contemporaneously, the Union asserted in a court-filed affidavit that

[1] The Employer's and the Union's motions for receipt of additional exhibits are granted.

[2] The neutrality aspect of the agreement contains provisions which forbid the Employer from taking "any action or mak[ing] any statement that will state or imply opposition by the Employer to the selection by the employees of a collective bargaining agent." The card check aspect of the agreement requires that upon a request for recognition by the Union, the Employer will conduct a card check and will recognize the Union upon a showing of majority support.

[3] The Union held demonstrations near Lincoln Center on May 19, 1999, during the performance of the American Ballet Theatre's performance of *La Bayadere*; on September 27, 1999, and March 30, 2000, at the Metropolitan Opera House; and on June 9, 1999, at Christey's Auction House during the Metropolitan Opera Guild's benefit auction. The flier distributed during these demonstrations explains, inter alia, that the Union is trying to get the Employer to sign the neutrality/card check or "right to organize" agreement.

[4] The Union sent letters to the president of the Lincoln Center and the general manager and managing director of the Metropolitan Opera, among others.

[5] The Union submitted the agent's affidavit to the United State District Court for the Southern District of New York in a lawsuit in which the Union sought access to the Lincoln Center Plaza to picket and distribute leaflets relating to its dispute with the Employer. The Employer was not a party to this lawsuit.

it has in fact achieved majority support through signed authorization cards.

Given the unique facts of this case, we find that the Union's insistence that the Employer sign a neutrality/card check agreement combined with its sworn court statement of majority status is tantamount to a request for immediate recognition, since it is clear from the Union's own representations that as soon as the Employer signs the neutrality/card check agreement, it will be presented with signed authorization cards from a majority of the Employer's employees. Thus, we find that, when taken together, the Union's sworn statement of majority status and its demand that the Employer sign a neutrality/card check agreement constitute a present demand for recognition.

Crucial to our holding in this case is the fact that the Union has not merely made claims of majority status in the context of their promotional campaign, but that the Union's agent, in a sworn affidavit submitted to United States District Court, stated unequivocally that the Union had obtained authorization cards from 80 percent of the 95 unit workers.[6] Given the context and purpose of this statement, it cannot be dismissed as mere campaign "puffery." Affidavits submitted in courts, distinct from campaign leaflets or letters to third parties, are sworn formal statements prepared with the intent that the courts rely on the statements contained therein. Indeed, as pointed out by the Employer, a knowing misstatement of facts in such a document is perjurious.

We find that processing the Employer's petition under these circumstances would not conflict with legislative concern that an employer would use an RM petition in order to undercut a union's organizing campaign by forcing a premature vote. See S. Rept. 80-105 on S. 1126, 80th Cong., 1st Sess. 11 (1947); *Albuquerque Insulation Contractor, Inc.*, 256 NLRB 61, 63 (1981). Compare *New Otani Hotel*, 331 NLRB 1078 at 1082. The Union's claims as to majority status here are not hypothetical, conditional, or distant; they are concrete and present.

Finally, we note that our holding in this case is not inconsistent with the Board's recent decision in *New Otani Hotel*.[7] In *New Otani*, the Board found that picketing aimed at pressuring an employer to sign a neutrality/card check agreement is not, by itself, the equivalent of recognitional picketing or a present demand for recognition. Here, unlike in *New Otani*, the Union's demands for a neutrality/card check agreement were accompanied by a statement in a court affidavit that the union had already amassed a supermajority of signed authorization cards. Although such picketing alone does not constitute a present demand for recognition under *New Otani*, when such "picketing occurs in conjunction with other actions or statements establishing that the union's real object is to obtain immediate recognition as the employees' representative . . . the Board [will] find that the union's conduct is tantamount to a present demand for recognition." *New Otani*, supra, citing *Capitol Market No. 1*, 145 NLRB 1430 (1964). In the instant case, it is the combination of the Union's actions and its sworn statement to the court, and not merely its picketing activities, that establish the present demand for recognition.[8]

MEMBERS LIEBMAN AND WALSH.

We agree with the Regional Director that the record fails to establish that the Union has presented to the Employer a present demand for recognition as the majority representative of the Employer's employees and therefore that the Employer's petition for an RM election should be dismissed. Under the Board's decision in *New Otani Hotel & Garden*, 331 NLRB 1078 (2000), the Union's March 1999 request that the Employer sign a neutrality/card check agreement does not constitute a present demand for recognition. Specifically, the agreement would require the Employer to refrain from campaigning against the Union during an organizing campaign and to recognize the Union as the employees' bargaining representative upon proof that a majority of workers have signed authorization cards. In *New Otani*, the Board found that a union's 4-year picketing and boycotting campaign to pressure an employer into signing a very similar neutrality/card check agreement did not constitute a present demand for recognition precisely because the language of the agreement was conditional and concerned with future conduct. Id. at 4.[9]

[6] The June 2, 1999 affidavit stated that: "Approximately 80% of the worker[s] have signed union authorization cards expressing their desire to be represented by the Union."

[7] Member Hurtgen dissented in *New Otani*, and he adheres to that dissent. In the circumstances set forth in that case, Member Hurtgen concluded that objective considerations suggested that the union made a present demand for recognition. However, for purposes of resolving this case, Member Hurtgen accepts that the majority decision in *New Otani* represents current Board law. Nonetheless, he agrees that the instant case is distinguishable and *New Otani* does not control here.

[8] Contrary to our colleagues, we do not find it critical that the Union did not make a "direct communication" to the Employer. It was reasonably foreseeable that the Union's sworn court statement, which was filed in support of the Union's lawsuit seeking access to Lincoln Center to picket and leaflet about its dispute with the Employer, would become known to the Employer. The instant case involves not only this claim of majority status but also a demand that the Employer recognize the Union upon a card-check showing of majority status.

[9] The requirement that such a present claim of majority status or demand for recognition must be made to the employer is critical. It is clear from the legislative history of Sec. 9(c)(1)(B) of the Act that Congress added this requirement specifically because it was concerned that a union have control over its own election campaign. See *Win-*

We further find that the Union's statements to third parties that a majority of employees in the petitioned-for unit had signed authorization cards do not constitute a demand for recognition. First, a statement of majority support is not the same as a present demand for recognition. A union might, for example, announce that it had cards signed by a majority of employees, but prefer to wait to seek recognition until its support was nearly 100 percent. Second, it is uncontested that the third parties in question are not agents or representatives of the Employer. Third, there is no evidence that the Union ever presented any cards or made claims of majority status directly to the Employer. The language of the statute specifically provides that the demand must be made directly to the employer. Section 9(c)(1) provides that where a petition is filed:

> (B) 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]. (emphasis added)

See also: *New Otani*, 331 NLRB 1078 at 1081; *Windee's Metal Industries*, 309 NLRB at 1075 fn. 4.

Our colleagues find that because one of these statements of majority status was made in a court affidavit, it should be construed as a direct declaration of majority status to the Employer. Although it is true that such a statement was made in a sworn affidavit, the Employer was not a party to that lawsuit and that lawsuit did not involve the issue in this case—the Employer's right under Section 9(c)(1)(B) to file a representation petition. The Employer fails to put forth a single instance of a direct communication by the Union to the Employer or the Employer's representatives that it had majority support, let alone any instance of the Union demanding immediate recognition from the Employer. Since there is no evidence to indicate that the Union at any time conveyed to the Employer any claim, written or oral, that it represented its employees or that it was seeking immediate recognition, we affirm the Regional Director's administrative dismissal of the Employer's petition. *New Otani*, supra at 1081.[10]

dee's Metal Industries, 309 NLRB 1074, 1074–1075 (1992), and legislative history cited therein. By imposing the requirement of a demand on the employer, Congress was attempting to guard against an employer's attempt to short-circuit a union's organizing campaign by precipitating a premature election. 93 Cong. Rec. 1911, 2 Leg. Hist. LMRA 983 (1947) (Leg. Hist.) (remarks of Senator Morse).

[10] Our colleagues suggest that the Union's statement that it has attained majority status is sufficient to allow an employer to initiate an election if it is "reasonably foreseeable" that the employer would learn of the statement. As set forth above, however, Congress clearly intended to endure that unions "can time the holding of an election to suit themselves." Labor Management Relations Act, 1947 (H.R. 3020), H.R. Rep. No. 245 (80th Cong., 1st Sess.) at 35, 1 Leg. Hist. 326. Our colleagues' approach would undermine this clear expression of congressional intent by removing the §9(c)(1)(B) requirement that the union communicate a request for recognition to the employer. This result is clearly at odds with the intent of Congress to preserve a union's right to control the timing of the election. Our colleagues' approach has an additional flaw, which is that it would saddle the Board with the speculative process of determining whether it is "reasonably foreseeable" that the union's statement of majority support might eventually reach the employer's attention. To avoid this conjectural analysis, it is certainly preferable to apply the clear statutory requirement that a union must affirmatively communicate its claim of recognition to the employer before the employer is permitted to initiate an election.