

Cargill Nutrena, Inc. and Ernest Haygood Sr., Petitioner and Retail, Wholesale and Department Store Union, AFL-CIO. Case 15-UD-26

July 21, 2005

DECISION ON REVIEW AND ORDER REMANDING

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN
AND SCHAUMBER

The Employer's request for review of the Regional Director's dismissal of this "decertification" petition is granted as it raises substantial issues warranting review with regard to whether the petition was timely filed.¹ Upon careful consideration, we conclude, as explained below, that if the petition was timely mailed under the Board's "Postmark Rule," it should be processed.

The 60- to 90-day "open" period for filing a petition ran from May 3, 2005 to June 1, 2005.² The Regional Office received the petition on June 2, 2005. The Regional Director dismissed the petition as untimely filed, because it was not received in the Regional Office during the "open" period before the contract's expiration date.

The Employer contends that the Board should accept the petition as timely filed under the "Postmark Rule," Section 102.111(b) of the Board's Rules and Regulations. That Rule states as follows:

[T]he Board will accept as timely filed any document which is hand delivered to the Board on or before the official closing time of the receiving office on the due date or postmarked on the day before (or earlier than) the due date; documents which are postmarked on or after the due date are untimely. "Postmarking" shall include timely depositing the document with a delivery service that will provide a record showing that the document was tendered to the delivery service in sufficient time for delivery by the due date, but in no event later than the day before the due date.

The Employer, in an affidavit attached to its request for review, contends that the petition was postmarked on May 25, 2005, and that, pursuant to Section 102.111(b), the petition should be considered timely filed because it was postmarked earlier than the June 1 due date. We

¹ Although the Petitioner marked the union deauthorization (UD) box on the petition, the Regional Director determined that the Petitioner seeks a decertification (RD) election. Our analysis is premised on its treatment as an RD petition. Were it an actual UD petition, the following analysis would not apply because contract-bar principles are not applicable to UD petitions. See, e.g., *Great Atlantic & Pacific Tea Co.*, 100 NLRB 1494, 1495 (1952).

² *Deluxe Metal Furniture Co.*, 121 NLRB 995 (1998). The 60 days prior to the expiration of a contract is considered to be an "insulated" period during which a petition will be dismissed as untimely.

agree that if the petition was postmarked prior to the end of the open period, it is timely filed.

In *Brown Co.*, 178 NLRB 57 (1969), the Board affirmed a Regional Director's dismissal of two representation petitions as untimely filed. The petitions were mailed several days before they were due, within the "open" period, but were received by the Regional Office after the due date and within the "insulated" period. The Board stated: "The date on which a petition is received by the Regional Office was fixed as controlling for purposes of determining its timeliness in relation to the 60-day insulated period, and the Board said that all potential petitioners would be required to have their petitions on file at least 61 days before the terminal date of the contract. The Board has always strictly construed this 60-day period." *Brown Co.*, 178 NLRB at 57, citing *Deluxe Metal Furniture Co.*, 121 NLRB 995, 1000 (1958).

In *Central Supply Co. of Virginia*, 217 NLRB 642 (1975), the Board reached a different result under similar circumstances, where a petition was mailed before the due date and within the "open period," but received by the Regional Office after the due date in the "insulated" period. The Board stated that it would accept a petition as timely filed where the petitioner had been able to establish that the petition was postmarked and mailed under circumstances where it would be reasonable "to assume the petition would be timely received at the Board's Regional Office in the due course of the [United States] mails." *Id.* at 643. The Board accepted the petition in *Central Supply* as timely filed because it had been postmarked before the due date.

In *John I. Haas, Inc.*, 301 NLRB 300 (1991), the Board noted that "postmark" rule principles previously had been applied to representation petitions, citing *Central Supply*, *supra*, and unanimously decided that "Sec. 102.111(b) will be further amended to bring representation petitions within our 'postmark' rule." *Id.* at 301 fn. 7.³ The Board amended Section 102.111(b) accordingly.

³ In *John I. Haas, Inc.*, the Board, overruling precedent, determined that election objections would be timely filed if personally served in the Region by close of business on the due date or if deposited with a delivery service prior to the due date—the "postmark" rule.

The Board then revised Sec. 102.111(b) to reflect this change. The Board indicated it was revising the rule "in order to permit representation petitions and objections to Board representation elections, previously required to be actually received by the Board by a specified due date, to be accepted as timely filed if they are 'postmarked' at least one day prior to the due date. The Board is also defining the phrase 'postmarking' to encompass timely depositing documents with a delivery service that will provide a record showing that the document was tendered to the delivery service in sufficient time for filing by the due date, but in no event any later than the day before the due date." See 56 Fed. Reg. 49141-49142 (Sept. 27, 1991). The Board deleted the provision in the previous rule that "Petitions filed pursuant to [S]ection 9(c) of the

Thus, the Board in *John I. Haas, Inc.*, as codified in amended Section 102.111(b), clearly stated its intention to apply the “postmark” rule to representation petitions, and no longer to require that the timeliness of representation petitions be governed by the date on which they are received in the Regional Office.

Thus, if, as the Employer contends, the petition in this case was postmarked May 25, 2005, we would find, con-

trary to the Regional Director, that the petition was timely filed because it was postmarked earlier than the June 1 due date, even though it was received by the Region in the insulated period after the due date. Accordingly, we remand this proceeding to the Regional Director for further appropriate action.

ORDER

IT IS ORDERED that the case is remanded to the Regional Director for further appropriate action consistent with this Decision on Review.

Act” “must be received on or before the close of business of the last day for filing.”