Liberty Fabrics, Inc. *and* Priscilla Breeden. Case 5–RD–1177

October 30, 1998

ORDER

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

On August 25, 1997, the National Labor Relations Board granted review of the Regional Director's Decision and Direction of Election in order to consider whether the petition should have been dismissed based on a non-Board settlement agreement of unfair labor practice charges.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

After careful consideration, we have decided that the petition should have been dismissed.

Facts

The Employer is a textile manufacturer located in Gordonsville, Virginia. Since 1977 it has had a collective-bargaining relationship with Union of Needle Trades, Industrial and Textile Employees, AFL–CIO, CLC (the Union) covering a unit of approximately 300 employees. The most recent collective-bargaining agreement was effective August 20, 1993, to June 30, 1996.

On April 26, 1996, the instant decertification petition was timely filed during the open window period preceding the expiration of the agreement. Processing of this petition was blocked by unfair labor practice charges filed by the Union on May 13, 1996, in Case 5–CA–26258 and amended on May 20 and 29, 1996. The essence of these charges was that the Employer violated Section 8(a)(5) by closing down a production line and temporarily laying off employees because of a reduction in business, without bargaining with the Union concerning the decision or the effects of the action; by bypassing the Union and dealing directly with unit employees in soliciting them to enter into severance agreements; and by laying off unit employees without notice to or bargaining with the Union. The conduct was alleged to have taken place on or before April 15, 1996, thus predating the filing of this petition.

On September 15, 1996, the Regional Director issued a complaint as to these allegations. In the meantime, the Union and the Employer began negotiations for a new collective-bargaining agreement. Agreement was reached, and one of the terms provided for withdrawal of the charges.[1] On December 18, 1996, the Employer and the Union submitted a letter to the Regional Director advising of this agreement and including a request by the Union for withdrawal of the charges.

The Regional Director approved this request by Order on February 12, 1997.

At the hearing on the instant petition on March 28, 1997, the Union moved for dismissal of the petition on the grounds of the settlement agreement and contract bar. The Employer and the Petitioner opposed. In his Decision and Direction of Election, the Regional Director denied the Union's motion, finding that since the unfair labor practice charge blocking the petition was unconditionally withdrawn, based on a non-Board agreement, it did not bar the processing of the petition.

Analysis

In *Douglas Randall, Inc*., 320 NLRB 431 (1995), the Board reversed prior decisions and returned to a policy of dismissing decertification petitions which are filed subsequent to alleged unfair labor practice conduct where those charges are resolved by a Board settlement agreement in which the employer agrees to recognize and bargain with the Union. In so doing, the Board relied on the policies of *Poole Foundry & Machine Co*., 95 NLRB 34 (1951), enfd. 192 F.2d 740 (4th Cir. 1951), cert. denied 342 U.S. 954 (1952).

The instant case presents an issue left open by *Douglas Randall*, i.e., whether this policy should apply where the resolution of the unfair labor practices is through a private settlement agreement between the parties rather than through a Board settlement agreement approved by the Regional Director. After careful consideration, we have decided that it would be inconsistent with the underlying rationale of *Douglas-Randall, Poole Foundry*, and *Dick Bros.,* 110 NLRB 451 (1954), to process the instant petition in the face of the parties' settlement agreement.

We begin by noting that the alleged unfair labor practices predate the petition, thus giving rise to the presumption that the decertification effort was influenced by the alleged misconduct.[2] Further, this alleged conduct was in derogation of the bargaining relationship, and the Regional Director found that there was sufficient basis to warrant issuance of an unfair labor practice complaint.[3]

The parties thereafter worked out a mutually satisfactory resolution of their dispute through collective-bargaining, which has resulted in the execution of a contract.

In short, the only difference between this case and *Douglas-Randall* is that the parties resolved their dispute by means of a non-Board settlement agreement rather than a Board settlement agreement. We do not believe that this difference should result in any lesser effect be-

[1] At the hearing on the instant petition, the sole witness, Union Associate Regional Director Harold Bock testified that the agreement, inter alia, provided for 1-year recall rights for the laid-off workers, that this was a "new" contract provision "and in return for working that out, part of the deal was that we was to agree to jointly submit that to the Board and ask them to withdraw the charge." The joint letter to the Regional Director seeking withdrawal of the charges provided that these recall rights were effective whether or not the unit employees ratified the new agreement.

[2] Compare *Douglas-Randall*, 320 NLRB at 432 fn. 5.

[3] Thus, the complaint alleges the type of unfair labor practices that would preclude a question concerning representation under *Douglas-Randall*.

ing given to the parties' agreement to resolve their differences and withdraw the charges where that agreement resolves an unfair labor practice proceeding in which the General Counsel has decided to issue a complaint.

While we recognize that the Board stated in *Douglas-Randall* that a petition should not be dismissed where a blocking charge has been "unconditionally withdrawn without Board settlement,"[4] we do not find it logical to apply that language where the parties, as here, have resolved their dispute and, as part of that resolution, have agreed on a resolution of the unfair labor practices that recognizes the Employer's bargaining obligation to the Union—a resolution that the Regional Director found acceptable. Rather, the Board's reference to blocking charges being "unconditionally withdrawn without Board settlement," in the context in which the Board used the phrase, referred to situations where there was no showing that the parties had resolved their dispute, i.e., where a request for withdrawal was based on nothing more than a charging party's decision not to proceed. That clearly is not what happened here. Rather, as noted, the parties bargained and reached a mutual agreement; an agreement that has a definite legal intent, that will safeguard the public interest in this proceeding and, on which, the Regional Director relied in approving the withdrawal of the charges.

As noted above, it has long been this Agency's policy to scrutinize requests to withdraw unfair labor practice charges to assure that their approval will not undermine the Act's purposes, particularly in situations in which the Regional Director has determined, after investigation, that, absent settlement, an unfair labor practice complaint is warranted. Whether the withdrawal request is based on a non-Board settlement agreement or a Board settlement agreement, the Regional Director's review is designed to give effect to these statutory purposes.[5] It would be a disservice to these purposes to affect a different result where the only difference is the parties' resolution of their dispute by means other than execution of a Board settlement agreement form.

Accordingly, because the settlement agreement here resolved unfair labor practice charges through the parties' collective bargaining, the Employer and the Union as part of that settlement agreed to a collective-bargaining agreement which precludes a question concerning representation, and as those charges were based on conduct that predated the petition,[6] the Regional Director's Decision and Direction of Election is reversed and the petition is dismissed.[7]

MEMBER HURTGEN, dissenting.

For the reasons set forth in the dissent in *Douglas-Randall, Inc.*, 320 NLRB 431, 435 (1995), I would not dismiss the petition here. The issue is not whether a settlement agreement should be approved. Rather, the issue is whether a decertification petition, filed before the settlement agreement, should be dismissed. In deference to the Section 7 rights of employees to seek decertification, and in light of the fact that no unlawful "tainting" conduct had been found, I would process the petition.

My colleagues begin their analysis with a presumption that the decertification effort was influenced by the alleged misconduct. That is a fatal flaw in *Douglas-Randall* and a fatal flaw here. Even assuming arguendo that there is a nexus between the alleged misconduct and the decertification effort, the alleged misconduct is simply that, i.e., conduct that is not shown to be unlawful. I do not understand how conduct that is not shown to be unlawful can result in the tainting of a decertification petition.

In the instant case, *Douglas-Randall* is reaffirmed and, to make matters worse, it is extended to non-Board settlements. A non-Board settlement does not establish that unlawful conduct has been committed, any more than does a Board settlement. And, because of its private nature, a non-Board settlement involves less scrutiny than does a settlement that has the Board's imprimatur. Thus, my colleagues permit a private settlement, between the Employer and the Union, to defeat the Section 7 rights of the employees to seek decertification. My colleagues' reason that the settlement agreement should be given effect because it resolves the differences, and stabilizes a collective-bargaining relationship, between the Employer and the Union. However, the issue is not whether the settlement agreement should be approved. The issue is whether that agreement should result in the dismissal of the antecedent decertification petition of the employees. That result is flatly inconsistent with the statutory policy of protecting the Section 7 rights of employees to refrain from union activity if they choose. I would honor those Section 7 rights.[1]

[4] 320 NLRB at 432.

[5] The Board's commitment to giving effect to private settlements also is reflected in the Board's practice of extending the certification year based on a private settlement agreement resolving allegations of refusal to bargain during the certification year. See *Accurate Web, Inc.*, 279 NLRB 193 (1987), enfd. 818 F.2d 273 (2d Cir. 1987); *Strauss Communications*, 246 NLRB 846 (1979), enfd. 625 F.2d 458 2d Cir. 1980).

[6] See *The BOC Group*, 323 NLRB 1100 (June 27, 1997).

[7] The Union also sought review of the Regional Director's refusal to permit the Petitioner to withdraw the petition in the absence of evidence that a majority of the employees signing the showing of interest agreed with the withdrawal request. In light of our decision here, we find it unnecessary to reach this issue.

[1] I agree with the Regional Director's decision to refuse to allow withdrawal of the decertification petition in the absence of some indication that the employee-supporters of that petition also desire withdrawal.