Brunswick Bowling Products, LLC and Scott A. Cooley *and* District Lodge 60, International Association of Machinists and Aerospace Workers, AFL–CIO. Case 07–RD–169464

August 25, 2016

DECISION ON REVIEW AND ORDER

BY MEMBERS MISCIMARRA, HIROZAWA, AND MCFERRAN

The issue presented is whether the Regional Director properly dismissed the Petitioner's decertification petition on the ground that the collective-bargaining agreement between the Employer and the Union is a bar to an election, even though the Union's statement of position asserting a contract bar was untimely served on the Employer and the Petitioner by 3 hours and 20 minutes.

On March 4, 2016, the Regional Director issued a Decision and Order dismissing the petition. Thereafter, in accordance with Section 102.67 of the National Labor Relations Board's Rules and Regulations, the Employer and the Petitioner filed timely requests for review of the Regional Director's decision, contending, among other things, that in consequence of the Union's service infraction the Union's statement of position "and its assertions"—specifically that the collective-bargaining agreement barred the petition—should have been entirely "precluded from consideration at the hearing."

The Requests for Review of the Regional Director's Decision and Order are granted as they raise a substantial issue solely with regard to the preclusive effect of the Union's untimely statement of position under the Board's Rules and Regulations, as amended.[1] On review, for the reasons stated below, we affirm the Regional Director's dismissal of the petition but modify her rationale.

I. FACTS

Since 1968, the Union has been the certified collective-bargaining representative of a unit of storekeepers, inspectors, assemblers, and related employees employed at the Employer's facility in Muskegon, Michigan. The Employer and the Union have negotiated a series of collective-bargaining agreements, including one in effect from January 10, 2012, to January 9, 2015, which the parties agreed to extend to January 8, 2016.[2] On January 27, the Union executed a successor collective-bargaining agreement, and the Employer did the same on January 28. It is undisputed that the current collective-bargaining agreement is a valid contract.

On February 11, the Petitioner filed the instant decertification petition. The petition described the unit as "[a]ll employees covered under current contract." In response to the petition, the Employer and the Union each filed a statement of position pursuant to Section 102.63(b)(3) of the Board's Rules and Regulations. The Union's statement of position asserts that the petition is barred by the parties' current collective-bargaining agreement; the Employer's statement of position states that there is no bar to an election.

The Union filed its statement of position with the Region before 12 noon on Friday, February 19, the business day immediately preceding the opening of the hearing, as required by Section 102.63(b)(3). The Union's service on the Employer and the Petitioner was not timely, however, as it was served on them via email at 3:20 p.m.

Before the hearing opened, the parties stipulated that, on January 27 and 28, respectively, the Union and the Employer executed a collective-bargaining agreement, which has a term of January 9, 2016, through January 11, 2019. At the hearing, the stipulation was received into evidence, with no objection by any party. Later at the hearing, the Employer objected to the receipt of the Union's statement of position into evidence based on its untimely service. The Employer argued not only that the Union was precluded from presenting any evidence to support its position but, in effect, that no evidence with respect to the contract bar was admissible. The hearing officer overruled the Employer's objection, received the Union's statement of position into evidence, and allowed the Union to present its argument regarding the contract-bar issue.[3]

II. THE REGIONAL DIRECTOR'S DECISION AND THE REQUESTS FOR REVIEW

The Regional Director affirmed the hearing officer's ruling. She found that the Union's statement of position "was filed enough in advance to provide notice to the other parties and to make clear before the hearing the issue at hand." She further found that the "delay [was] not particularly significant given . . . the very low likelihood that the other parties were harmed by such delay or unfairly disadvantaged at the hearing." She concluded that receiving the Union's untimely statement of position

[1] The Requests for Review are denied in all other respects, as they raise no other substantial issues warranting review.

[2] All dates are in 2016 unless otherwise noted.

[3] The hearing officer also allowed the Employer to present arguments and evidence in support of its untimely service argument, and the Employer noted a continuing objection to any consideration of the Union's position.

into evidence would not frustrate the purpose of the statement-of-position requirement, namely, clarifying the issue(s) being litigated in order to give the other parties a chance to prepare a response. The Regional Director also found that, in any event, it was "prudent to fully explore that issue upon the record" where, as here, a party at or before the hearing notified the Region that a recently negotiated collective-bargaining agreement was in place, which would suggest a contract bar. Finally, the Regional Director observed that even if the Union's statement of position were not received into evidence, the extant collective-bargaining agreement is material to this matter and essential in the consideration of processing the instant decertification petition, and was appropriately received into evidence and considered.

Having found that the parties' collective-bargaining agreement was appropriately received into evidence, the Regional Director concluded that the Union met its burden of establishing a contract bar because the current agreement was executed January 28, and the petition was filed February 11.

In its Request for Review, the Employer renews its argument, which the Regional Director rejected, that the Union's statement of position and all related contract-bar evidence should be precluded from consideration. The Petitioner's Request for Review also cites the Union's "late" statement of position.

III. DISCUSSION

Under Section 102.66(d) of the Board's Rules and Regulations, as amended, "[a] *party* shall be precluded from raising any issue, presenting any evidence relating to any issue, cross-examining any witness concerning any issue, and presenting argument concerning any issue that the party failed to raise in its *timely* Statement of Position or to place in dispute in response to another party's Statement of Position" (emphasis added). To be considered timely under Section 102.63(b)(3), the statement of position must be filed with the Region and served upon the parties by 12 noon on the business day immediately preceding the opening of the hearing.

Section 102.66(b) further provides: "The hearing officer shall not receive evidence concerning any issue as to which parties have not taken adverse positions, except that this provision shall not preclude the receipt of evidence regarding the Board's jurisdiction over the employer or limit the regional director's discretion to direct the receipt of evidence concerning any issue, such as the appropriateness of the proposed unit, as to which the regional director determines that that record evidence is necessary."

The requirement of a statement of position was introduced in the 2014 amendments of the Board's rules in order to narrow the scope of the pre-election hearing, focus the parties' attention on the issues that are actually in dispute, permit all parties to prepare for the hearing, and facilitate the negotiation of an election agreement, which would make a hearing unnecessary. The requirement thus saves time and resources for the parties and the government by reducing unnecessary litigation and making litigation that does occur more efficient. See 79 Fed. Reg. 74309, 74362–74364 (Dec. 15, 2014). Of course, the intended savings can be achieved only if the parties complete the statement in good faith, and file and serve it within the time frame established to permit the parties to prepare for the hearing and engage in election-agreement discussions. The accompanying preclusion provision of the rules provides an incentive for parties to complete the form in good faith and serve it on the other parties in a timely manner. Id. at 74424 & fn. 518.

We find that the Regional Director erred by receiving into evidence the Union's statement of position and by not precluding the Union from raising the contract bar issue. The hearing in this matter was scheduled to open on Monday, February 22; accordingly, the parties' statements of position were due by 12 noon on Friday, February 19. As noted, however, the Union did not serve its statement of position upon the Employer and the Petitioner until 3:20 p.m. on February 19. The Union did not file a motion for an extension of time to file and serve its statement of position, and provided no explanation for failing to serve its statement of position in a timely manner. Section 102.66(d) does not require that prejudice to another party be shown to have resulted from a failure to comply with the statement-of-position requirement in order for preclusion to be imposed. In these circumstances, we find that the Regional Director erred by excusing the Union's failure to comply with the service requirement of the rule based on her finding that no party had been prejudiced by the delay.

We conclude, however, that the Regional Director's error in failing to apply the preclusion provision to the Union did not affect the validity of her conclusion that the petition was barred by the collective-bargaining agreement between the Employer and the Union. Section 102.66 governs the conduct of the hearing, and Section 102.66(d), the preclusion provision, specifically precludes a defaulting "party" from raising an issue it was required to but failed to timely raise. The rule does not, however, preclude any other party from raising an issue, nor does it preclude the regional director from addressing an issue. This is clear from the plain language of Section 102.66(d), which places no limitation on any person other than the defaulting party. It is also clear from the context of the provision within the structure of the Act and

the Rules, including Section 102.66(b), which authorizes the regional director to direct the receipt of evidence concerning any issue as to which she determines that record evidence is necessary, even if the parties have not taken adverse positions on the issue.

The statement-of-position requirement that the preclusion provision enforces and the hearing that it affects are only parts of the larger representation proceeding, which has historically been investigative in nature. The amendments to the Board's Rules did not change this. Once a petition is filed, the regional director is charged with the responsibility to investigate the petition and ultimately to determine whether a question concerning representation exists. These are the regional director's statutory responsibilities under Section 3(b) of the Act; the amended rules did not—and could not—change them.

We conclude that the Regional Director did not abuse her discretion in receiving evidence regarding the existence of a contract bar, and did not err in finding that the petition was barred by the contract. The contract bar issue was raised by the Petitioner on the face of the petition, which stated that there was a current collective-bargaining agreement covering the unit. The Regional office then obtained a copy of that contract in the course of its prehearing investigation. The Petitioner and the Employer further confirmed the existence of the contract before the opening of the hearing when they signed a stipulation to that effect. The stipulation was received into evidence at the hearing, with no objection by any party, before any mention of the Union's statement of position.

In these circumstances, the Union's failure to timely serve a statement of position raising the issue of contract bar did not preclude the Regional Director from finding, based on her own investigation of the issue raised by the Petitioner on the face of his petition, that there was no question concerning representation in light of the existence of a collective-bargaining agreement sufficient to bar the petition. The Union's service infraction did not require her to ignore the dispositive evidence that she had obtained in her prehearing investigation.[4] The Regional Director's dismissal of the petition based on the contract bar was therefore appropriate.[5]

[4] In light of the investigation of the issue that the Regional Director had already conducted, the hearing officer's ruling permitting the Union to state its position regarding the contract-bar issue at the hearing was harmless error.

[5] We find it unnecessary to address our colleague's characterization of today's decision, which speaks for itself.

Dated, Washington, D.C. August 25, 2016

Kent Y. Hirozawa, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, concurring in part and dissenting in part.

This case involves an important issue involving NLRB-conducted elections, and the Board here is unanimous: notwithstanding a party's failure to comply with the Statement of Position requirements set forth in the Board's Election Rule,[1] if any relevant issue exists—indeed, even if the resolution of the issue is controlling—then (i) the issue may be fully investigated by the Region, (ii) it may be the subject of evidence introduced at the hearing, and (iii) the Regional Director and the Board may fully consider and resolve the issue in favor of the non-complying party, even if the issue's resolution requires dismissal of the election petition itself.

For good reason, the Election Rule makes all this explicit. Section 102.66(b) of the Board's Rules and Regulations, as amended, states that the regional director has "*discretion to direct the receipt of evidence concerning any issue . . . as to which the director determines that record evidence is necessary*" (emphasis added). It is most important in election cases that Regional Directors apply their expertise when investigating, considering, and resolving all relevant election issues. It is equally important, of course, for *the Board's* resolution to turn on relevant facts and the proper application of legal principles. Although the Election Rule can be read to state otherwise, the Board in today's decision rightly places substance over form. We uphold the Regional Director's decision to reach and decide an outcome-determinative issue, even though the party in whose favor the Regional Director ruled failed to timely serve its Statement of Position in conformity with the Election Rule.

Many of the Election Rule's requirements are highly technical, and during the rulemaking process, significant attention was devoted to the Election Rule's Statement of

[1] See 79 Fed. Reg. 74308 (Dec. 15, 2014) (Election Rule). Former member Johnson and I dissented from the Election Rule, and I adhere to the views expressed in our dissenting views. See id. at 74430–74460 (dissenting views of Members Miscimarra and Johnson).

Position requirement and the principle of preclusion (i.e., the consequences of a party's non-compliance). However, for the benefit of those who may still find these concepts confusing, I will address in slightly more detail several matters mentioned by my colleagues.

First, the Board determines in this case that a contract bar defense warrants dismissal of the election petition.[2] We resolve the contract bar issue in favor of the non-petitioning party (upon whom the Election Rule imposes the Statement of Position requirement), even though it did not preserve the contract bar defense in a validly filed and served Statement of Position, as required by the Election Rule.[3]

Second, we uphold the Regional Director's resolution of this issue in favor of the non-petitioning party notwithstanding the Election Rule's preclusion principle, referenced above, which states that non-compliance with the Statement of Position requirement will preclude non-complying parties "from litigating issues as to which they have failed to take positions required . . . as part of a Statement of Position or in response to a Statement of Position."[4]

Third, the Election Rule explicitly indicates that a contract bar defense *must* be raised in a timely filed and served Statement of Position in order to be preserved.[5] And the nonpetitioning party here (the Union) failed to comply with Statement of Position requirements in *multiple* ways: (i) it failed to serve its Statement of Position by the specified deadline (noon on the day preceding the hearing); (ii) it did not request an extension of time to serve the Statement or a postponement of the hearing itself;[6] and (iii) even now, it has not provided *any* explanation of the reason or reasons the Statement of Position was not served as required by the Election Rule. In other words, there can hardly be a clearer case of non-compliance: the Election Rule mandates that the defense in question (the existence of a contract bar) must be raised in a validly filed and served Statement of Position, and the non-petitioning party—the party required to file and serve a Statement of Position—failed to satisfy this requirement. Nonetheless, the Board finds it was permissible and appropriate for the Regional Director (i) to investigate, consider, and rule on the defense, (ii) to resolve the defense in favor of the non-complying party, and (iii) to find that the defense requires dismissal of the petition.

Fourth, the Election Rule makes clear that the Statement of Position requirements and the principle of preclusion—i.e., that the party who fails to comply with these requirements may not litigate any issue required to be addressed in the Statement of Position—apply to the non-petitioning party regardless of whether the non-petitioning party is a union or an employer.[7]

[2] Under the contract bar doctrine, collective-bargaining agreements of definite duration "for terms up to 3 years will bar an election for their entire period," and "contracts having longer fixed terms will be treated for bar purposes as 3-year agreements and will preclude an election for only their initial 3 years." *General Cable Corp.*, 139 NLRB 1123, 1125 (1962). The existence of a contract does not mean it will bar an election. The contract must satisfy certain basic requirements, which the Board set forth in *Appalachian Shale Products Co.*, 121 NLRB 1160 (1958). In addition, during the term of a contract that would be a bar, the Board will process any petition filed during the 30-day period that falls between 60 and 90 days prior to the date the contract expires or its third anniversary date, whichever is sooner. See *General Cable*, 139 NLRB at 1128 fn. 16. Also, a contract will not bar an election if the contract contains an unlawful dues-checkoff or union-security provision. *Four Seasons Solar Products Corp.*, 332 NLRB 67, 67–70 (2000). A successful contract bar defense will result in dismissal of the election petition.

[3] The Election Rule states that the responsible party must file and serve a Statement of Position by noon on the business day before the opening of the hearing. 79 Fed. Reg. at 74393–74394. Under the "preclusion" principle, if a party fails to satisfy this requirement, or if it fails to raise a relevant issue or defense in a validly filed and served Statement of Position, the party is precluded from litigating that issue or defense. See fn. 4, infra.

[4] 79 Fed. Reg. at 74394. See also id. ("[T]he requirements of the Statement of Position and responses, permitting identification of the issues in dispute, together with the preclusion of evidence of issues not timely raised, substantially improves the Board's procedures by saving the parties and the Board the time and expense of wasteful litigation."); id. at 74361, 74363 (The Statement of Position has a "binding nature," and there are "consequences [for] failing to complete it."); id. at 74399 (preclusion appropriate even where "significant issues" are inadvertently omitted from a Statement of Position).

[5] Id. at 74374 (even if a contract-bar defense did not exist with regard to the bargaining unit identified in the original petition, the non-petitioning party must "amend" the Statement of Position to raise a contract bar defense if the petitioner amends the petition in a manner that gives rise to a potential contract bar). The Board's Statement of Position form even has a separate numbered section that asks, "Is there a bar to conducting an election in this case?" See https://www.nlrb.gov/sites/default/files/attachments/basic-page/node-3040/Form%20NLRB-505%20-%20Statement%20of%20Position.pdf. This question is followed by an additional instruction: "If yes, state the basis for your position." Id. The Election Rule contains two exclusions from the Statement of Position requirements and the preclusive consequences of failing to comply with those requirements. The contract bar defense is not among these exclusions. See 79 Fed. Reg. at 74362, 74394 (lack of statutory jurisdiction and challenges to eligibility of particular voters may be litigated notwithstanding failure to raise those issues in Statement of Position).

[6] Id. at 74361 fn. 271 ("[T]he regional director may postpone the due date for filing and service of the Statement of Position up to 2 business days upon request of a party showing special circumstances, and for more than 2 business days upon request of a party showing extraordinary circumstances."); see also id. at 74374 ("[T]he regional director may permit parties to amend their Statements of Position in a timely manner for good cause.").

[7] In this regard, the Election Rule states: "The Statements of Position to be completed by labor organizations in RM and RD cases are similar to the Statements of Position that employers must complete in RC cases. . . . *[T]he important point is that the final rule treats nonpeti-*

Fifth, my colleagues identify certain reasons that prompt the Board to consider and resolve the merits of the contract bar defense at issue here, notwithstanding noncompliance with the Statement of Position requirement. However, it is important to point out that these reasons do not limit Regional Directors in their investigation, consideration, and resolution of *any and all* relevant issues, even though the resolution of such issues may favor a nonpetitioning party that has failed to comply with the Statement of Position requirement. Again, the Election Rule states that the Regional Director may "direct the receipt of evidence concerning *any issue* . . . as to which the director determines that record evidence is necessary."[8]

Sixth, several observations are in order regarding the reasons that my colleagues and I have reached this outcome. My colleagues state that the "contract bar issue was raised . . . on the face of the petition, which stated that there was a current collective-bargaining agreement covering the unit," that the contract was obtained by the Region "in the course of its prehearing investigation," and that the contract was mentioned in a stipulation that "was received into evidence at the hearing." A few important additional points should be kept in mind.

- The only party in this proceeding that stood to benefit from the contract bar defense reached and decided here was the non-petitioning party, which failed to comply with the Statement of Position requirement and which is therefore precluded from litigating a contract bar defense.
- My colleagues attach significance to the fact that the Region and the parties may have understood that a contract existed. However, regardless of what particular parties may have understood, noncompliance with the Statement of Position requirement meant there was no valid notice in advance of the hearing *that anyone was invoking a contract bar defense*.
- I disagree with my colleagues' statement that "the contract bar issue was raised . . . on the face of the petition." This is not correct. The only reference to a contract that appeared on the face of the petition was contained in the description of the bargaining unit, as follows: "All employees covered under current contract." This statement does not establish *either* that a contract actually existed, *or* that, if a contract did exist, it gave rise to a contract bar warranting dismissal of the petition, *or* that any party was invoking a contract bar defense.[9]

Every election petition "on its face" provides many types of information, and the information may be true or untrue, relevant or irrelevant. Also, on the face of every petition, the bargaining unit will be defined by reference to the type of work performed; positions sought to be included or excluded; particular locations or shifts; full-time, part-time, temporary or supervisory status; and other variables. Using the same rationale that my colleagues and I approve today, many other petitions will provide a reasonable basis for relevant issues to be investigated, considered and resolved by Regional Directors and the Board, notwithstanding a party's failure to satisfy the Statement of Position requirement. As the instant case illustrates, these issues may be resolved in favor of the noncomplying party, and these principles should ob-

tioning employers the same as nonpetitioning labor organizations." Id. at 74425 fn. 519 (emphasis added). The Election Rule is equally explicit when discussing the preclusion principle:

> The preclusion provisions do not just apply in RC cases where the employer is the nonpetitioner and must complete the Statement of Position form. Rather, . . . *the preclusion provisions apply in all cases, without distinction, including RD (decertification cases) as well as RM cases, where the individual or labor organization . . . is the nonpetitioner and is responsible for completing a Statement of Position form*.

Id. at 74400 (emphasis added).

[8] Sec. 102.66(b) of the Board's Rules and Regulations, as amended (emphasis added).

[9] The petition here was a decertification petition filed by an hourly receiving dock employee. An employee might describe the bargaining unit as the same unit covered by the "current contract," even if no contract existed. This is especially likely because the unit described in a decertification petition must be the same as the existing unit, which many employee-petitioners might describe as employees covered by the "current contract." Moreover, there are many circumstances where a "current contract," even if in effect, would not constitute a contract bar to an election—for example, where the petition was filed during the 30-day "window period" between 60 and 90 days prior to expiration of the contract, or where the petition was filed during the fourth year of a 4-year agreement. See, e.g., *Arlan's Department Store of Michigan, Inc*., 131 NLRB 565, 567 (1961) (decertification case where Board directs an election although unit is described as employees covered by "current contract" and "supplemental agreement"); *Calorator Manufacturing Corp.*, 129 NLRB 704, 704 fns. 2 & 3 (1960) (Board notes that the bargaining unit in a decertification proceeding must conform to the existing unit, and finds that union's "current contract" did not bar the petition); *Lindmart Jewelry Mfg. Co.*, 119 NLRB 651, 651 fn. 2 (1957) (Board directs decertification election and rejects union's contention that "current contract" constitutes a bar); *Seaporcel Metals, Inc*., 115 NLRB 960, 960–961 (1956) (Board directs decertification election and rejects union's argument that "current contract" constitutes a bar to the election); *Fisherman's Cooperative Association*, 128 NLRB 62, 64 fn. 12 (1960) (Board directs election and rejects union's assertion that "current contracts" constitute contract bar, where union did not enter contracts into evidence). See also fn. 2, supra.

viously be applied the same way regardless of whether the party is a union or an employer. See fn. 7, supra.

Because today's decision represents an important clarification and significant improvement regarding the Election Rule's treatment of the Statement of Position requirement and the principle of preclusion, I concur with my colleagues as to the matters addressed above. However, I continue to adhere to my dissenting views regarding the Election Rule generally, including my objections to the Statement of Position requirement and the preclusion principle.[10] For these reasons, I respectfully dissent in part from today's decision.

Dated, Washington, D.C. August 25, 2016

Philip A. Miscimarra, Member

NATIONAL LABOR RELATIONS BOARD

[10] 79 Fed. Reg. at 74430–74460 (dissenting views of Members Miscimarra and Johnson); id. at 74442–74444 (dissenting views regarding the Statement of Position requirement).