NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

_____

Nos. 01-1786, 01-2205

_____

INNOVATIVE COMMUNICATIONS
CORPORATION; VIRGIN ISLANDS
TELEPHONE COMPANY and ST.
CROIX CABLE T.V.,

Petitio

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent

_____

NATIONAL LABOR RELATIONS BOARD,

Petitione

v.

INNOVATIVE COMMUNICATIONS
CORPORATION; VIRGIN ISLANDS
TELEPHONE COMPANY and ST.
CROIX CABLE T.V.,

Respondents

_____

On Petitions for Review/Enforcement
of a Decision and Order of the
National Labor Relations Board
(NLRB Docket No. 24-CA-8472)

_____

Argued April 22, 2002

Before: SCIRICA, RENDELL
and NOONAN*, Circuit Judges,

(Filed June 13, 2002)

Anthony R. Comden
Jeffrey J. Fraser [ARGUED]
Varnum, Riddering, Schmidt & Howlett
P. O. Box 352
Bridgewater Place
Grand Rapids, MI 49501

Counsel for Petitioner (01-1786)/
Respondent (01-2205)
Innovative Communications
Corporation; Virgin Islands
Telephone Company and St.
Croix Cable T.V.

Aileen A. Armstrong
Joan Hoyte [ARGUED]
Margaret A. Gaines
Darlene Haas
National Labor Relations Board
1099 14th Street, N.W.
Washington, DC 20570-0001

Counsel for Respondent (01-1786)/
Petitioner (01-2205)
National Labor Relations Board

---

* Honorable John T. Noonan, Jr., Circuit Judge of the United States Court of Appeals for the Ninth Circuit, sitting by designation.

OPINION

RENDELL, Circuit Judge.

Companies iCC, VitelCo, and St. Croix Cable petition for review of the final order of the National Labor Relations Board ("NLRB" or "Board") that found that they had violated sections 8(a)(1), (2), (3) and (5) of the National Labor Relations Act ("the Act"). The Board cross-petitions for enforcement of its order.

Whether Petitioners violated the Act turns on whether there was an "accretion" of St. Croix Cable employees into the VitelCo/United Steelworkers of America ("USW") bargaining unit. Accretion is "simply the addition of a relatively small group of employees to an existing unit where these additional employees share a sufficient community of interest with the unit employees and have no separate identity." E.g., American Med. Response, Inc., 335 N.L.R.B. No. 90 (2001).

Here, the ALJ concluded that there was no accretion, so the Act was violated. The NLRB affirmed the ALJ's findings and rulings, and adopted the ALJ's recommended order with a few modifications. For the reasons below, we conclude that substantial evidence supports the finding that there was no accretion as of August 30, 1999, and the conclusion that Petitioners thus violated the Act, and we will affirm the Board's decision in that respect.

However, because a later accretion may have taken place, portions of the order may no longer be appropriate. Accordingly, we will remand to the NLRB for it to determine if, and potentially when, accretion later occurred and to craft an appropriate remedy in light of its determination. If no accretion has taken place, we will enforce the order in full.

I.

Our jurisdiction is clear under 10(e) and 10(f) of the Act. 29 U.S.C. 160(e), (f). We apply a "substantial evidence" standard to "the Board's factual determinations and reasonable inferences derived from factual determinations." Citizens Pub'g & Printing Co. v. N.L.R.B., 263 F.3d 224, 232 (3d Cir. 2001); 29 U.S.C. 160(e). Our review of the Board's legal analysis is plenary, but we defer to its interpretation of the Act. Citizens Pub'g & Printing, 263 F.3d at 232. Although the facts here are stipulated, we will review the application of accretion policy to these facts for substantial evidence. See, e.g., N.L.R.B. v. Security-Columbian Banknote Co., 541 F.2d 135, 140-41 (3d Cir. 1976).

II.

The parent company iCC has five subsidiaries, including VitelCo and St. Croix

Cable. Although VitelCo, the largest subsidiary, had been party to a collective bargaining agreement with the USW since 1972, the employees of all of the other subsidiaries were unrepresented through at least September 22, 1999. A56.

In 1998, VitelCo decided to consolidate all of the job functions of the various subsidiaries, so began negotiating with the USW to do so. These confidential negotiations eventually resulted in agreement between VitelCo and USW on all of the issues on September 22, 1999. On September 30, 1999, VitelCo and the USW entered into a collective bargaining agreement that incorporated these changes and that became effective on October 1, 1999. A57-58.

On September 22, 1999 before the VitelCo/USW agreement became effective the St. Croix Cable employees voted unanimously to be represented by Our Virgin Islands Labor Union ("OVILU"). A56. The alleged violations occurred after this election, when petitioners treated USW as the representative of St. Croix Cable employees and applied the VitelCo/USW collective bargaining agreement to them.

III.

Petitioners argue that the St. Croix Cable employees were accreted into the USW/VitelCo bargaining unit, that the Board's remedy exceeded its authority, and that the Board's order is moot because of its later recognition that accretion occurred.

1. Accretion

The factors that must be weighed when deciding whether there has been an accretion include:

> integration of operations, centralization of managerial and administrative control, geographic proximity, similarity of working conditions, skills and functions, common control of labor relations, collective-bargaining history and interchange of employees

GHR Energy Corp., 294 N.L.R.B. 1011, 1051 (1989). The Board has said that it follows a "restrictive policy in finding accretion because it forecloses the employees' right to select their bargaining representative." Id. at 1016.

Whether accretion has occurred is evaluated on the facts in existence on the date the union demands recognition. E.g., id. at 1052 & n.37. No particular form is required for a demand for recognition; the company just needs to be reasonably informed that the union seeks to represent the company's employees. E.g., Yolo Transp., 286 N.L.R.B. 1087, 1087 n.2 (1987). Accordingly, the relevant date is when USW claimed to represent the St. Croix Cable employees, which was the date when the USW asked to intervene in the election for the representative of St. Croix Cable August 30, 1999 or, at the latest, September 22, 1999, when VitelCo and USW reached an agreement about the consolidation of job functions. A136. Both dates precede the planned consolidation of functions.

Substantial evidence in the record supports the conclusion that, as of either of those dates, no accretion had taken place. Not only had there been no corporate merger of VitelCo and St. Croix Cable, but also the employees of these two subsidiaries worked at separate facilities. VitelCo and St. Croix Cable provided services as to different products telephone and cable TV, respectively and these services were not integrated. In order to consolidate job functions, "cross-training of all employees to perform telephone, cable, cellular, and all other communication functions" would be required, A57, which indicates that the pre-consolidation job functions were separate. Finally, St. Croix Cable had its own general manager, and, although the parties agree that a human resources representative visited St. Croix Cable, there was no evidence of common control of labor relations. In sum, the facts stipulated indicate that there was a planned consolidation, but that it had not taken place as of the relevant date.

2. Remedy

The ALJ had recommended an order restoring the status quo, but because some of the unilateral changes helped and some hurt the employees, the NLRB modified the order so that restoration was conditioned on the "affirmative desires of the [employees] as expressed through their bargaining representative." A5.

Board policy is clear that when some acts are to the benefit and some to the detriment of the affected employees an order like that here is appropriate. See Children's Hosp. of San Francisco, 312 N.L.R.B. 920, 931 (1993); see also N.L.R.B. v. Rockwood Energy & Mineral Corp., 942 F.2d 169 (3d Cir. 1991) (enforcing an order that restored terms and conditions but did not order respondents to undo wage increases or benefits without request from the union).

Our review of the Board's choice of remedy is limited to asking whether a remedy goes beyond the scope of the Board's authority. See e.g., Sure-Tan, Inc. v. N.L.R.B., 467 U.S. 883, 899 (1984). The Board may issue orders that "effectuate the policies" of the Act, 29 U.S.C. 160(c), which "encompasses the requirement that a proposed remedy be tailored to the unfair labor practice it is intended to redress," but gives the Board broad discretion. Id. at 900. We do not find that this remedy exceeded this broad discretion.

3. Mootness

Finally, petitioners argue that the part of the order that commands iCC to recognize OVILU is moot because "[t]he Board has conceded that the St. Croix Cable employees were accreted into the larger VitelCo unit on November 21, 2000, the date that all employees were moved into one facility." Petitioners' Reply Brief on Appeal, at 5. The changed circumstance that would, assertedly, render this relief moot is either an intervening adjudication or the fact of the November 2000 accretion.

We need not address the effect an intervening adjudication might have here because Petitioners have provided no evidence that there has been one. The documents they submitted indicate that the Board's General Counsel and Regional Director maintained in related proceedings before the Board that accretion occurred on November 21, 2000. However, these documents show only an exercise of the prosecutorial function, not a finding of accretion by the Board, as Petitioners suggest.

Nonetheless, we cannot ignore the asserted fact that an accretion did occur in November 2000, potentially making a recognition and bargaining order inappropriate at this time. Not only has Board's counsel taken the position in other proceedings that accretion occurred in November 2000, but also Board's counsel indicated at oral argument in this case that "some accretion" later occurred and that whether the remedy was appropriate would come to light in compliance proceedings.

The Board ordered many types of relief. It ordered Petitioners to cease and desist from giving assistance and support to the USW, recognizing or bargaining with the USW as the representative of the St. Croix Cable employees, entering into or giving effect to a collective bargaining agreement with the USW that covered the St. Croix Cable employees, encouraging membership in the USW or discouraging membership in OVILU by discriminating with respect to the terms of employment, unilaterally changing employment conditions in St. Croix Cable, or otherwise interfering with the exercise of these employees' rights under the Act. It also ordered that Petitioners withdraw and withhold recognition of the USW as to the St. Croix Cable employees, recognize and bargain with OVILU as their representative, and reimburse these employees for any money withheld pursuant to the collective bargaining agreement with the USW. Finally, as discussed above, Petitioners were ordered to revoke the changes in the terms and conditions of employment implemented on October 1, 1999 (if the St. Croix Cable employees, through their OVILU representative, so desired) and to make employees whole for any losses suffered because of these changes. While some of the damages ordered may continue to be appropriate, many of the other types of remedies may need to be modified in light of a later accretion, if in fact, accretion did occur.

For the reasons above, we will affirm the Board's finding that accretion had not occurred as of August 30, 1999, and that Petitioners thus violated the Act. However, the case will be remanded to the Board for it to determine if an accretion has since occurred. If not, the order will be enforced in full, and the petition for review will be denied. If so the Board should craft the remedies appropriate in such changed circumstances. TO THE CLERK OF

Please file the foregoing Not Precedential Opinion.

/s/ Majorie O. Rendell
Circuit Judge