ALJUD Licensed Home Care Services *and* Local 348S, United Food and Commercial Workers Union,[1] Petitioner. Case 29–RC–10183

September 30, 2005

DECISION ON REVIEW AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On May 19, 2004, the Regional Director for Region 29 issued an Order Dismissing Petition, in which he dismissed the petition filed by Local 348S, United Food and Commercial Workers Union (Petitioner) seeking to represent certain employees of ALJUD Licensed Home Care Services (Employer). The Regional Director found that the petition was barred by an automatically renewed agreement between the Employer and District 6, International Union of Industrial, Service, Transport and Health Employees (Intervenor). Thereafter, in accordance with Section 102.67 of the National Labor Relations Board Rules and Regulations, the Petitioner filed a timely request for review, contending that the automatically renewed agreement did not constitute a contract bar to the petition. By Order dated July 15, 2004, the Board panel majority granted the Petitioner's request for review.[2]

Having carefully considered the matter and the record, we affirm the Regional Director, find that the automatically renewed agreement constitutes a contract bar to the petition, and dismiss the petition.

The Employer and the Intervenor were parties to a 3-year agreement from March 1, 2001, to February 28, 2004. The agreement, which covers the petitioned-for employees, contained an automatic renewal clause that provides:

> This agreement shall automatically be renewed for an additional period of three (3) years unless either party notifies the other in writing, by certified mail, return receipt requested, of its intention not to renew, not less than 90 days and not more than 105 days prior to the expiration of the Agreement.

Neither party notified the other of any intent not to renew the contract. Consequently, the agreement was renewed for 3 years from March 1, 2004, to February 28, 2007. The Petitioner filed the petition on March 25, 2004, 24 days into the first year of the 2004–2007 renewed agreement.

The Regional Director found that this evidence demonstrated that there was a current contract in existence and no question concerning representation could be raised at the time of filing of the petition. He therefore dismissed the petition. In its request for review, the Petitioner contends that there was no contract bar to the petition. The issue presented, therefore, is whether an automatically renewed agreement constitutes a contract bar to the filing of the petition.

Automatic renewal provisions have been widely used in collective-bargaining agreements since the inception of the Act,[3] and the Board has long held that an automatically renewed agreement bars an election petition filed during the renewal period. The Board explicitly recognized the bar quality of automatically renewed agreements when it determined the Board's contract bar "rules" in *Deluxe Metal Furniture*, 121 NLRB 995 (1958).[4] In subsequent cases, the Board has barred election petitions filed during the term of the automatic renewal. In each of those cases, the agreement automatically renewed, and the Board imposed no requirement, as would the dissent, that the parties' renewal take the form of a newly executed document. See, e.g., *Empire Screen Printing, Inc.*, 249 NLRB 718 (1980); *Road Materials*, 193 NLRB 990 (1971); *Moore Drop Forging Co*., 168 NLRB 984 (1967); *Ellison Bros. Oyster Co*., 124 NLRB 1225 (1959); and *University Lithoprinters*, 123 NLRB 1865 (1959).

The Chairman's dissent asserts that *Empire Screen*, *Moore Drop Forging*, *Ellison Brothers*, and *University Lithoprinters* did not involve the issue he raises. These decisions illustrate, however, that the bar quality of an automatically renewed agreement is well established. In each case, a petition was dismissed on the basis of such an agreement, after the Board determined that the agree-

[1] We have amended the caption to reflect the disaffiliation of the United Food and Commercial Workers Union from the AFL–CIO, effective July 29, 2005.

[2] Member Schaumber and former Member Meisburg voted to grant review, while Member Liebman voted to deny review.

[3] See, e.g., *Waterfront Employers Assn.*, 4 NLRB 1199, 1201 (1938); *Mill B*, 40 NLRB 346, 350 (1942); 1 Hardin & Higgins, *Developing Labor Law* 969 (4th ed. 2001).

[4] A three-member Board has traditionally declined to change Board precedent.

When our dissenting colleague argues that extant Board law, which treats an automatically renewed contract as a bar to a petition filed during the renewal period, wrongly forecloses employee free choice, he overstates the impact of an automatic renewal. Board precedent explicitly provides employees with an opportunity to file a petition during the open 60- to 90-day period prior to the expiration of a contract, including a contract containing an automatic renewal clause. See *Crompton Co.*, 260 NLRB 417 (1982) ("[T]he contract-bar rules provide for an open period from 60 to 90 days prior to the expiration of the existing contract during which the existence of the contract will not act as a bar to a petition for an election within the unit covered by the contract."). That window period is readily apparent from the face of the contract and requires no resort to parole evidence.

Member Schaumber agrees with the Chairman that the Board should use care when finding a contract bar because of its impact on employee choice. Without expressing a view on the position the Chairman has taken in his dissent, he finds it inconsistent with extant Board law for the reasons discussed above.

ment had, in fact, been automatically renewed. While the facts recited in each case strongly suggest that no written memorialization of the renewal was in existence, no party argued that the automatic renewal was ineffective without a written memorialization of it occurring. That the issue was not raised is not entirely surprising. Apart from the fact that the *automatic* renewal of an agreement, whether a collective bargaining agreement or a lease, means just what the words connote—to be self-acting or self-executing—the Board in *Deluxe Metal Furniture*, supra, mentioned a newly executed document for contract-bar purposes only if the parties took action to forestall the operation of an automatic renewal clause.

> If the contract contains no automatic renewal clause or the parties have forestalled automatic renewal and no new or amended agreement has been executed within the 60-day period, a petition will be timely filed after the terminal date of the old contract and before the execution or effective date of any new contract, whichever is later. [*Deluxe Metal Furniture*, supra at 1000.]

Thus, our colleague's position is inconsistent with extant Board contract-bar law, to which we, a three-member Board, are bound. The majority adheres to that existing precedent in our decision today.

Thus, pursuant to extant Board precedent described above, we find that the 2004–2007 renewed agreement bars the petition. It is undisputed that the parties' 2001–2004 agreement contained an automatic renewal clause that extends the agreement for 3 years, and neither party to the contract forestalled the renewal of the agreement. Further, it is undisputed that the petition was filed on March 25, 2004, during the first year of the renewal period. Accordingly, we affirm the Regional Director's Order dismissing the petition.

ORDER

The Regional Director's Order Dismissing Petition is affirmed.

CHAIRMAN BATTISTA, dissenting.

The issue in this case is one of contract bar. Since a finding of contract bar operates to preclude employee choice, we must be careful in its application. My colleagues find a bar. I would not.

The contract between the Employer and District 6 ran from March 1, 2001, to February 28, 2004. The contract contained an automatic renewal clause. That is, absent a timely notice to be given 90–105 days before February 28, 2004, the contract would automatically renew for another 3 years. No such notice was given. Thus, the current contract runs from March 1, 2004, to February 28, 2007. The RC petition was filed on March 25, 2004.[1]

I do not question the legality of a contract with a provision for automatic renewal absent notice. Nor do I question the bar quality of such a contract for its initial 3-year term. Further, if no notice is given, I agree that the parties are obligated to sign a renewal contract. Where they do so, that new contract operates as a bar. However, where, as here, the parties have not signed a renewal contract, there is no document to which a petitioner can turn to determine whether the 2001–2004 contract came to an end or renewed itself. As the Board explained in *Cind-R-Lite*, 239 NLRB 1255, 1256 (1979), "it is well settled . . . that the expiration term must be apparent from the face of the contract without resort to parol evidence, before the contract can serve as a bar."

I recognize the value of industrial stability that is provided by a contract. That stability is similarly provided by a renewed contract. Stability is the basis for the contract-bar doctrine. My only point is that potential petitioners should be able to glean, from the face of the contract, that the contract is a bar. They cannot do so here.

The cases relied upon by my colleagues are not to the contrary. Indeed, they do not even raise the issue. In *Empire Screen*, 249 NLRB 718 (1980), and *Moore Drop*, 168 NLRB 984 (1967), the issue was whether the union's failure to give a timely notice was waived because the employer and union began bargaining despite the absence of notice. The Board held that there was no waiver. However, waiver is not the issue here. Similarly, in *University Lithoprinting,* 123 NLRB 1865*,* the sole contention was that the renewal clause was "indefinite and ambiguous." My point here is not based on any such argument. My point is simply that there is no contract which, on its face, bars the petition. Finally, in *Ellison Bros.*, 124 NLRB 1225, the Board simply rejected a contention that a notice to renew the *wage* provision of a contract removed the contract as a bar.

My colleagues claim that I am changing Board law. I disagree. As discussed, there is no case which even deals with the concern that I have raised. My approach leads to an expression of free employee choice. Their approach forecloses that expression for 3 more years. To be sure, the value of employee free choice must be balanced against the value of industrial stability. However, I believe that there is greater industrial stability in the

[1] My colleagues refer to the 60–90-day open period of the contract that ran from March 1, 2001, to February 28, 2004. However, that is *not* the contract that is here being urged as a bar. I address myself to that contract.

certainty of a signed renewed contract than there is a contract that has not been signed.[2]

In sum, I would simply enforce the rule that a person or organization should be able to glean, from the face of the contract, whether it is a bar. The oral representations of the contractual parties, who may have an interest adverse to that of the petitioner and whose testimony may be suspect, are no substitute for a document that is plain on its face. I believe that this approach balances industrial stability and employee free choice. The parties are free to have "automatic renewal" periods, and to execute a new contract (which will be a bar) if no notice is sent. Conversely, if the parties do not execute a new contract, there should be no bar to the exercise of employee free choice.

[2] As my colleagues concede, under *Deluxe Metal Furniture,* 121 NLRB 995 (1958), a new agreement that is entered into without an automatic renewal must be signed in order to be a bar, even if it is substantively the same contract. However, for reasons not fully explained, they hold that the new but same agreement entered into by virtue of an automatic renewal need not be signed in order to be a bar.