Auburn Rubber Company, Inc. *and* United Rubber, Cork, Linoleum & Plastic Workers of America, AFL–CIO, Petitioner.
Case No. 28–RC–1042. January 28, 1963

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, a hearing was held before Lewis S. Harris, hearing officer. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, the Board has delegated its powers in connection with this case to a three-member panel [Chairman McCulloch and Members Rodgers and Leedom].

Upon the entire record the Board finds:

1. The Employer is a New Mexico corporation engaged in the manufacture of toys. During the year ending October 12, 1962, it purchased supplies from outside the State of New Mexico valued in excess of $50,000 and during the same period shipped finished products valued in excess of $50,000 outside the State. We find, contrary to the contentions of the Employer and the Intervenor,[1] that the Employer is engaged in commerce within the meaning of the Act and that it will effectuate the policies of the Act to assert jurisdiction.[2] The Intervenor's motion to dismiss on jurisdictional grounds is hereby denied.

2. The labor organizations involved claim to represent employees of the Employer. Although neither of the unions here involved would stipulate that the other was a labor organization, evidence was adduced at the hearing which indicates that both are labor organizations within the meaning of Section 2(5) of the Act.[3]

3. The Employer and the Intervenor moved to dismiss the petition on the ground that the current collective-bargaining agreement between them entered into May 14, 1962, for a 2-year term, is a bar to this proceeding and that even if this contract is not a bar, the petition should be dismissed because it was untimely filed in relation to the preceding contract.

Following Board certification, the Intervenor entered into a collective-bargaining agreement with the Employer on October 24,

[1] General Teamsters Industrial Employees Local Union No 292 intervened on the basis of a current collective-bargaining contract

[2] See *N L R B* v. *Reliance Fuel Oil Corporation*, 371 U S 224; *Siemons Mailing Service*, 122 NLRB 81.

[3] Petitioner claimed, in addition, that the Intervenor was not a labor organization because Central States Southwest and Southeast Area Pension Fund, a joint labor-management administered fund, holds bonds of the Employer The record indicates that the Intervenor is not affiliated with the pension fund Accordingly, we need not decide what the status of the Intervenor would be if it held bonds of the Employer

1960, for a term to expire December 31, 1962. On March 23, 1962, this contract was terminated by agreement of the contracting parties. On the same day notices were posted by the Employer informing its employees that the labor contract had been terminated and stating that unless the employees indicated a desire to change bargaining representatives, the Employer would attempt to negotiate a new contract with the Intervenor. On May 14, 1962, a new 2-year labor contract was signed which was subsequently ratified by the members of the Intervenor, 141 to 30. However, there are approximately 333 members in the unit. On October 12, 1962, the Petitioner filed its petition.

On these facts, we find that the contract executed on May 14, 1962, constitutes a premature extension of the contract terminating December 31, 1962, and that it is therefore not a bar to the present petition.[4]

The doctrine of premature extension provides that a contract with a terminal date later than that of an existing earlier agreement will not bar a petition filed at a time which would not have been barred by the earlier agreement.

In *Stubnitz Greene Corporation (Reynolds Spring Company Division)*, 116 NLRB 965, 967, the Board discussed a situation similar to that in the present case where the parties had terminated one contract and later entered into a new agreement. It was stated there:

> For purposes of applying the Board's premature extension doctrine, it is immaterial that the premature extension is embodied in an entirely new and separate agreement, as here, rather than in an amendment, supplement or extension of an existing contract.[5] The contracting parties contend that the new contract nevertheless should operate as a bar because the Petitioner had ample opportunity to file a petition during the interval between the Intervenor's notice of termination of the old contract, given on August 22, 1955, and the execution of the new contract on September 20, 1955. A similar contention was rejected by the Board in the recent *Congoleum-Nairn* case.[6] There, as here, it was contended that the premature extension doctrine should not apply where there was an interval of several weeks prior to the execution of a new contract during which there was no bar to the filing of a petition. However, there again, as here, the interval was not a predictable one, but was the result of actions by the contracting parties which could not have been reasonably anticipated by the petitioner.[7]

[5] *Congoleum-Nairn, Inc.*, 115 NLRB 1202.

[6] *Congoleum-Nairn, Inc., supra*

[7] The Employer and the Intervenor attempt to distinguish the present case from *Congoleum-Nairn* on the ground that there, unlike here, the new contract was executed prior to the actual termination of the previous contract We reject this distinction as it disregards the broad premature extension and contract-bar policy considerations upon which the decision in that case was based.

[4] *Stubnitz Greene Corporation (Reynolds Spring Company Division)*, 116 NLRB 965.

Contrary to our dissenting colleague, we do not believe that the circumstance of an employer's giving notice to employees of an intent to negotiate a new contract, including the bona fides of the parties to that contract, and the fact that there was ratification thereof by the members of the incumbent union, should be accorded overriding consideration in the application of the premature extension rule. As far back as 1942, the Board explained the purpose of the rule thusly:

> Were we to hold that the parties to a collective bargaining agreement covering a period of several years could forestall a petition for investigation and certification of representatives by entering into a supplemental agreement modifying the contract in advance of the date fixed therein for reopening negotiations, the right of the employees to seek a change of representatives after the lapse of a reasonable time might be defeated. So to hold would require of employees, desiring to change representatives, acceleration of organizational activities so that they would be ready to assert a claim of majority representation at any time the contracting parties might elect to discuss modification of the existing agreement, thus leading to disaffection and unrest under the existing agreement instead of stabilized labor relations.[5]

All-important in this statement is the vice that the Board seeks to avoid, namely, requiring employees who desire to change representatives to accelerate "organizational activities so that they would be ready to assert a claim of majority representation at any time the contracting parties *might elect* to discuss modification of the existing agreement. . . ." By the same token, the rule also furnishes outside unions which might be planning to organize the employees the degree of predictability necessary to allow them to schedule their campaign. Certainly, notice to the employees is not tantamount to notice to such outside union or unions. The position of our colleague, we believe, is not in keeping with this salutary purpose of the premature extension rule. Further, we consider the cases cited by our colleague inapposite. In *Sefton Fibre Can Company*, 109 NLRB 360, the rule was not applied, but there the new contract between the employer and union "was intended solely to implement their long considered determination to join in multiemployer bargaining and was accomplished when the time was ripe for joining in the group bargaining." 109 NLRB at 367. In *Foremost Appliance Corp.*, 128 NLRB 1033, the new contract was held not to have been prematurely extended because the earlier contract would not, under Board rules, have barred an election. We do not consider either case comparable to the instant one.

The Employer and the Intervenor also contend that, even assuming there was a premature extension, the petition was untimely as it was

[5] *Wichita Union Stockyards Company*, 40 NLRB 369, 372.

filed during the insulated period preceding the expiration of the first 2 years of the original contract. In *General Cable Corporation*,[6] the Board extended the period that a contract could bar an election from 2 to 3 years, and the Board deemed it "prudent administrative practice" to apply this new rule to proceedings pending before it for decision. Contrary to the Employer and Intervenor, we see no reason for departing in this case from this announced practice. Accordingly, although the petition was filed only 12 days before the end of the first 2 years of the October 1960 contract and would have been untimely under the Board's former rule, as there were 82 days before the contract's actual expiration date, the petition was filed within the 90- to 60-day open period fixed in *Leonard Wholesale Meats, Inc.*[7] We therefore find that the petition was timely filed and deny the motions of the Employer and Intervenor to dismiss.

A question affecting commerce exists concerning the representation of certain employees of the Employer, within Sections 9(c)(1) and 2(6) and (7) of the Act.

4. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:[8]

All production and maintenance, shipping and receiving employees, truckdrivers, plant clerical employees, and leadmen at the Employer's Deming, New Mexico, plant, excluding office clerical employees, technical employees, guards, watchmen, and supervisors as defined in the Act.

[Text of Direction of Election omitted from publication.]

CHAIRMAN MCCULLOCH, dissenting:

I disagree with my colleagues who have directed an election in this case. I do so for the following reasons:

In 1960, the Intervenor won a Board-conducted election and was certified as the collective-bargaining representative of the Employer's production and maintenance employees. Thereafter, on October 24, 1960, the Employer and the Intervenor entered into a collective-bargaining contract for a term to expire on December 31, 1962. On March 15, 1962, the Intervenor wrote the Employer that studies it had made since October 1961, including studies by an impartial consultant, of the incentive pay plan provided in the contract, indicated that the plan was unworkable and therefore it requested that the contract be canceled in its entirety. The Employer on March 23, 1962, replied that it agreed with the Intervenor's conclusions and further stated:

[6] 139 NLRB 1123.
[7] 136 NLRB 1000
[8] The unit description is in accordance with a stipulation of the parties

> We do not believe that the present system is practical or feasible, and it is not satisfactory to the company as well as being unsatisfactory from your standpoint; consequently, we hereby agree to the cancellation of our present agreement and to negotiate a new contract.[9]

Immediately upon cancellation of the old contract, the Employer posted a notice to its employees stating:

> The labor contract of October 24, 1960 . . . has proved to be unsatisfactory to both the Union and the Company.
>
> Consequently the Union and the Company have agreed to terminate the contract . . . While there is no longer any contract between the [Intervenor] and the Company . . . the [Intervenor] will continue to be recognized by the Company as bargaining agent for Auburn employees, unless the Company is notified that its employees wish to change bargaining agents.
>
> If the Company is not notified that the employees wish to change bargaining agents, its representatives will meet with representatives of [Intervenor] and attempt to negotiate a new labor contract that will be satisfactory to both the Union and the Company.

For approximately 6 weeks after the posting of the above notice, the Employer and the Intervenor engaged in negotiations for a new bargaining contract. At no time during this period of negotiations did the employees directly or through the medium of a rival union indicate that they no longer desired that the Intervenor represent them for collective-bargaining purposes. Finally the two parties reached agreement on the terms for a new contract. These terms were submitted for approval to the employees in the bargaining unit. By an overwhelming majority of those voting, after notice, the employees ratified the terms. Thereupon on May 14, 1962, the Employer

[9] The Employer's president testified as to the reasons for negotiating an entirely new contract rather than simply amending the old one:

> Number one, even to attempt to change, modify, or revise the old contract to what we wound up in the new, we would have had such a complicated document that no one would have understood it. That's what part of the difficulty was As I said, it was so lengthy and involved—you got numerous interpretations of different paragraphs in it and now if you tried to revise it by amendment or something it would really have become a long unworkable document. In addition to this there were several other factors. One of those was, there wasn't any purpose if we go—if we were going to continue to be able to operate the Company to have an agreement which [would] only be effective for the balance of the contract for a few months because there has to be a reworking and plans made for a longer period of time than that for repricing and reworking our whole product line Unless I had a long enough contract to give me at least a couple of years period in which I would be pretty well able to estimate what my actual costs and labor costs were, it would be useless to even consider it That's one of the reasons, even though I knew that the possibility of a strike—it was a calculated strike but it would be better to take that risk I thought and be able to get a contract for a long enough period of time to enable me to have an opportunity to work out a financial program for the Company and a product line based on estimated cost, which would have a reasonable expiration and be reasonably accurate

and the Intervenor signed the new bargaining agreement which is effective for 2 years until May 14, 1964. It was not until approximately 7 months after the cancellation of the 1960 contract and 5 months after the signing of the new agreement that the Petitioner indicated its interest in representing the employees involved.

I have recited the facts in detail because they show the complete bona fides of the Employer and the Intervenor in terminating the old contract and negotiating a new one, and the scrupulous care exercised by the Employer to respect the right of the employees to change their bargaining representative, if they so desired, before a new contract was negotiated and signed. There is not the slightest hint in this record that the contracting parties intended to forestall the filing of a representation petition by a rival union. The employees also had ample time, almost 2 months from the time of the cancellation of the old contract to the signing of the new, to indicate dissatisfaction with the representative status of the Intervenor. They did not do so. I agree generally with the premature extension rule. I think it is a good rule. But like all general rules its rigid application sometimes does not work out to justice or good labor relations. On at least two previous occasions the Board made exceptions to the premature extension rule.[10] I would, because of the special circumstances of this case, make another exception. I am reinforced in this conclusion by the fact that under the premature extension rule as it existed at the time the present petition was filed, the petition would have been dismissed as untimely and the 1962 contract held a bar.[11]

For all the foregoing reasons I would hold that the 1962 contract is a bar to the present petition and, instead of directing an election based thereon, would dismiss it.

[10] *Foremost Appliance Corp.*, 128 NLRB 1033; *Sefton Fibre Can Company*, 109 NLRB 360.

[11] *Pacific Coast Association of Pulp and Paper Manufacturers*, 121 NLRB 990.

Wix Corporation *and* International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, UAW, AFL–CIO. *Cases Nos. 11–CA–1841 and 11–CA–1889. January 29, 1963*

DECISION AND ORDER

On September 26, 1962, Trial Examiner Benjamin B. Lipton issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Intermediate Report. The Trial Examiner also found that the Respondent