

Farrel Rochester Division of USM Corporation and Leslie J. Andrews, Petitioner and International Union, United Automobile, Aerospace and Agricultural Implement Workers of America. Case 3-RD-654

June 30, 1981

DECISION ON REVIEW AND ORDER

On September 26, 1980, the Acting Regional Director for Region 3 issued a Decision and Direction of Election in the above-entitled proceeding in which he directed a decertification election in the unit of production and maintenance employees represented by the Union. Thereafter, in accordance with Section 102.67 of the National Labor Relations Board Rules and Regulations, Series 8, as amended, the Union filed a timely request for review of the Acting Regional Director's decision contending that in finding that its recently negotiated agreement with the Employer did not operate as a bar to the petition, he departed from precedent. The election was conducted as scheduled on October 24, 1980, and the ballots were impounded pending resolution by the Board of the Union's request for review. By telegraphic order dated October 30, 1980, the National Labor Relations Board granted the request for review. Thereafter the Union and the Employer filed briefs on review.

The Board has considered the entire record in this proceeding with respect to the issue under review, including the briefs on review, and makes the following findings:

The Employer is engaged in the manufacture of heavy equipment at a facility located in Rochester, New York. The Union was certified as the collective-bargaining representative of the employees involved herein on February 6, 1979.¹

The Employer and the Union commenced contract negotiations in April. By autumn, the parties neared agreement and the pace of the negotiations accelerated. On November 15, the parties reached a tentative agreement² and signed a settlement memorandum setting forth the substance of their agreement and incorporating various other provisions previously agreed to during the course of the negotiations.³ The Employer prepared a detailed summary of the agreement which was distributed to unit employees.

On November 18, the unit employees voted not to ratify the agreement. The Union so informed the

Employer and requested a resumption of negotiations. The Employer agreed with the proviso that a mediator be present at the next meeting. The Union acceded to this condition and the parties scheduled a meeting for November 21.

The parties convened on November 21 as scheduled. Also present was Milton Goldberg, director of the New York State Mediation Service. At the start of the session Kenneth Irish, one of the Employer's negotiators, asked the Union to identify the problem areas that had caused the employees to reject the agreement. The union negotiators attributed the rejection to the absence of a paid absence program (PAP)⁴ and the failure to include a cost-of-living adjustment (COLA). The Union also informed the Employer that its membership had authorized a strike for the following Monday, November 26, if no contract had been reached by that date. Irish then stated that the offer accepted on November 15 constituted the Employer's final offer and that it did not intend to engage in substantial renegotiations at that juncture. Goldberg interjected to ask if the Employer would be amenable to making adjustments in the contract if no additional costs were involved. Irish replied that such an arrangement might be acceptable. The mediator then separated the parties and met with the union negotiators.

According to Henry Cappellino, a member of the union negotiating committee, during these discussions one of the union negotiators suggested adding a revised PAP to the contract, providing that an employee would earn 4 hours paid leave for every 200 consecutive hours worked. After completing his discussions with the Union's representatives, the mediator met with the Employer's negotiators.

According to Irish's testimony, when Goldberg met with the Employer's bargaining team he indicated that the main problem appeared to be the absence of a PAP in the proposed contract, and he then suggested adding the revised PAP and a COLA to the agreement. The mediator's proposal caught the Employer's negotiators by surprise and they raised a number of questions relating to the operation of the proposed PAP. In particular, they wanted to clarify the term "consecutive hours" and they asked Goldberg to define that term. Goldberg replied that it meant "all hours that an employee was scheduled to work." The Employer's negotiators pressed Goldberg on this point and asked if

¹ All dates are for 1979 unless otherwise indicated.

² This agreement was tentative in that its effectiveness was conditioned upon ratification of its terms by the unit employees.

³ The terms of the other provisions were set out in "sign-off sheets" which were drafted, signed, and dated by the parties during their negotiations as they reached agreement on the language of a particular contract term.

⁴ PAP referred to a program instituted by the Employer prior to the Union's certification to counter an increasing rate of employee absenteeism. Under that program, an employee earned a personal day off with pay if he or she worked 90 consecutive days with perfect attendance. Prior to November 15, the Employer had discontinued this program.

this definition included overtime; he replied that it did.⁵

After listening to Goldberg's suggestions, the Employer's negotiators indicated a willingness to add a PAP and COLA to the contract if other benefits were reduced to offset the increased costs of adding those provisions. They then asked the mediator to leave the room. Roderick Fox, manager of employee relations, proceeded to contact the Employer's general manager and explain the situation, including the possibility of a strike. The general manager, after listening to Fox's account of the negotiations, indicated that so long as the increased costs could be offset by reductions in other areas, he would have no problem with a revised agreement encompassing Goldberg's suggestions. The Employer's negotiators then recalled Goldberg and accepted his proposal on the condition that the Union agree to a reduction in certain other benefits. The mediator agreed to present this counterproposal to the Union. Approximately a half-hour later, Irish received a call from Goldberg who suggested that the parties reconvene.

Although there is a conflict in the testimony concerning what transpired after the parties reconvened, there is substantial agreement on a number of points. When the parties reassembled they discussed the proposal to add a COLA and PAP to the November 15 agreement. Furthermore, Irish and Cappellino both agree that the parties discussed in considerable detail the matter of whether the definition of consecutive hours in the PAP included overtime.⁶ At the close of the discussions, Irish drafted and the parties signed a memorandum of agreement embodying their understanding. This handwritten memorandum of agreement incorporated the terms of the November 15 agreement and added four provisions: (1) a clause decreasing a wage increase for the second year of the agreement from 8 percent to 7 percent;⁷ (2) a clause adding a

cost-of-living adjustment to employee wage rates; (3) a clause adding a PAP;⁸ and (4) a clause deleting two employee holidays from the second year of the contract. The parties also signed a second document provided by Goldberg acknowledging that they had reached a tentative agreement subject to the ratification of the unit employees.⁹ Near the close of the session Irish indicated that he would compile a formal contract document encompassing the numerous provisions that comprised the complete agreement and submit it for the Union's signature. Later that day the unit employees ratified the agreement.

On the following Monday, November 26, the Employer put into effect the new wage rates and various changes in employee fringe benefits and pension programs as spelled out in the agreement. It also prepared to implement the PAP which was to go into effect on December 1. However, early in December, not long after the Employer began to implement the PAP, a dispute arose over the administration of that program. This dispute involved the issue of whether an employee's failure to work scheduled overtime constituted a break in that employee's chain of consecutive hours worked. The Employer maintained that a failure to work scheduled overtime constituted a break in an employee's chain of consecutive hours; several of the employees affected by that ruling filed grievances challenging the Employer's interpretation and the Union backed the employees.

In an attempt to settle this dispute, representatives of the Employer and the Union met on December 13. Mediator Goldberg also attended this meeting. However, after engaging in lengthy discussions the parties were unable to resolve their differences. At a point near the close of this session, when it had become apparent that the parties had not been able to resolve the dispute, Irish stated: "Well if you have any problems in the way it is being handled, I will give you the right to grieve on this, which you have the right anyway." Later that week, on or about December 18, the Union filed another grievance challenging the Employer's interpretation of consecutive hours.¹⁰

⁵ Irish testified that the Employer had previously negotiated a mandatory overtime clause which it deemed to be very important. In questioning Goldberg about the specifics of the proposed PAP, the Employer's negotiators wanted to make sure that the PAP's provisions would not tend to undercut the mandatory overtime provision. In the Employer's view, a definition of consecutive hours that did not include overtime would have had the effect of undermining the effectiveness of the mandatory overtime provision.

⁶ However, their accounts concerning the substance of those discussions conflict. Cappellino testified that parties agreed to maintain the definitions that existed under the original PAP. In the original PAP, perfect attendance was defined as "[e]ach scheduled 8-hour work day where an employee is present for the entire shift." There is nothing in the original PAP that indicates that a refusal to work overtime breaks an employee's chain of consecutive hours worked and the original provision was apparently so interpreted by the parties. On the other hand, Irish testified that the Employer made it clear that consecutive hours in the new PAP would be defined to include scheduled overtime and that the Union acquiesced to this interpretation.

⁷ The agreement provided that its terms would be in effect for 2 years from November 12, 1979, to November 11, 1981.

⁸ The revised PAP in the November 21 memorandum of agreement provides:

3. Effective December 1, 1979, a Personal Day Paid Absence Program on the basis of 1/2 day earned absence for each 200 consecutive hours worked during each year of the agreement. Such earned time may be taken in pay or time off with one day allowed to carried over to the next year.

⁹ As noted above, the agreement reached on November 15 had also provided that the contract was to become effective upon ratification of its terms by the unit employees.

¹⁰ During December the Employer and the Union also worked out the specifics of the union-security and dues-checkoff provisions. In the No-

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In early January 1980, the Employer sent the Union a proposed draft of the complete contract and about 2 weeks later the parties assembled to discuss this proposed draft. The Union objected to the draft, contending that it did not include details of the pension and health insurance plans, did not mention certain preexisting corporatewide benefit programs, and failed to incorporate an agreement reached by the parties regarding free parking for employees. In addition, the Union objected to the provision that spelled out the Employer's obligation to supply employees with safety glasses. Finally, it objected to the PAP, claiming that the Employer's draft added terms to that provision that went beyond what was agreed upon in the November 21 agreement. Specifically, the Union objected to the Employer's insertion of a definition of consecutive hours that included scheduled overtime. After this discussion Irish revised the comprehensive agreement and submitted to the Union for its approval a revised draft which was signed by the Employer's officials. The Union, however, refused to sign the revised draft, continuing to claim that several of its provisions varied from the terms agreed upon during negotiations. On February 13, 1980, Union Negotiating Committee Member Massie Washington sent Fox proposed language for a PAP clause,¹¹ but the Employer rejected this language.

The next meeting between the parties occurred on April 2, 1980. Fox asked the Union to identify the objectionable items in the revised comprehensive draft. The union negotiators listed five problem provisions: (1) the employee free parking provision; (2) the safety glasses provision; (3) the vacation pay provision; (4) the bulletin board posting provision; and (5) the definition of consecutive hours in the PAP provision. After some discussion, the parties resolved the problems over the vacation pay and safety glasses provision. Eventually, however, the parties stalemated over the definition of consecutive hours in the PAP and the meeting broke up. Either at the close of the meeting or approximately a week later, a member of the Union's bargaining committee contacted Fox and agreed to accept the Employer's formulation on all remaining issues if the Employer would agree to accept the Union's definition of consecutive hours in the PAP.¹² The Employer rejected this proposal.

November 21 agreement the parties agreed in general terms to those provisions leaving the details to be worked out at a later date.

¹¹ Washington's proposal specifically provided that a refusal to work overtime would not constitute a break in an employee's consecutive hours worked.

¹² There is a conflict in the record as to when this offer was actually made, however, the testimony is consistent that such an offer was made by the Union in early April 1980. Fox testified that at the close of the April 2 meeting Cappellino told him that the Union would not sign the

On April 22, 1980, the Union filed a charge alleging that the Employer violated Section 8(a)(5) of the Act by refusing to reduce to writing and execute a contract containing the terms agreed to in the negotiations.¹³ The Petitioner filed the instant petition to decertify the Union on May 1, 1980. By letter dated June 6, 1980, the Regional Director dismissed the unfair labor practice charge filed by the Union on the ground that the investigation did not reveal that the parties had a meeting of the minds with respect to the detailed provisions of the PAP and, therefore, there did not appear to be agreement to all the terms of a contract. This determination was subsequently sustained on appeal to the General Counsel. Thereafter, the parties continued their discussions, meeting on July 14 and 17, 1980, and exchanging proposals in July and August 1980. The hearing in this proceeding was held on August 28, 1980. At that time, Fox indicated that an arbitration over the Employer's definition of consecutive hours under the PAP was scheduled to be held on September 30, 1980. He also testified that those provisions of the contract previously put into effect had remained in effect and that the Employer had continued to process grievances throughout the period from the date of the contract's ratification to the date of the hearing.

In concluding that there was no existing contract that would bar the instant petition, the Acting Regional Director found that, although the parties may have reached substantial agreement on November 21, a substantial agreement is not a final agreement and a partial contract will not serve to bar an election.¹⁴ Furthermore, the Acting Regional Director noted that the Board has not found a contract bar to exist in instances where the parties continued to negotiate after the agreement raised as a bar has been executed.¹⁵ Acting Regional Director concluded that the November 21 document did not represent the parties' final agreement and, therefore, could not be considered an effective collective-bargaining agreement that barred the instant petition. The Employer contends that the Acting Regional Director correctly determined that the Employer and the Union never reached a complete

contract even if the parties resolved their dispute over the definition of consecutive hours. Cappellino denied having made the statement, claiming, instead, that on the occasion in question he offered on behalf of the Union to drop its demands on the remaining points if the Employer accepted the Union's definition of consecutive hours. Fox conceded that about a week after the April 2 meeting the Union informed him that the Employer's position on all remaining issues, with the exception of the PAP, was acceptable.

¹³ Case 3-CA-9744.

¹⁴ Citing *Fort Tryon Nursing Home*, 223 NLRB 769 (1976), and *The Permanente Medical Group*, 187 NLRB 1033 (1971).

¹⁵ *Id.*

meeting of the minds on the details of the PAP. The Employer also argues that the only controverted issue of fact brought out at the hearing, involving the terms of that PAP, underscores the Acting Regional Director's finding that there was a failure to reach a mutual understanding concerning the details of that provision. Contrary to the Employer, the Union asserts that the November 21 agreement constitutes a signed contract covering substantial terms and conditions of employment and thus is a bar to the instant petition. We find merit in the Union's position.

In order for an agreement to serve as a bar to an election, the Board's well-established contract-bar rules require that such agreement satisfy certain formal and substantive requirements. The agreement must be signed by the parties prior to the filing of the petition that it would bar and it must contain substantial terms and conditions of employment sufficient to stabilize the parties' bargaining relationship. *Appalachian Shale Products Co.*, 121 NLRB 1160 (1958). The agreement, however, need not be embodied in a formal document. An informal document which nonetheless contains substantial terms and conditions of employment is sufficient if it satisfies the other contract-bar requirements.¹⁶

In *Gaylord Broadcasting*¹⁷ the Board considered the applicability of its contract-bar rules to a fact pattern that parallels the instant case in many respects. There, an informal agreement raised as a bar to a decertification petition was initialed by the employer and the union on the date they completed their negotiations, August 23, 1978. Shortly thereafter the employees ratified the agreement and the employer began implementing its provisions. Later, when the employer and the union met to reorganize and assemble the provisions making up the agreement, they discovered that they had omitted certain previously agreed-upon provisions from the pages initialed on August 23, and they added those provisions to the agreement. Also, when it was discovered that the contract language relating to employee vacations was awkward to apply, the employer and the union during the next several months engaged in negotiations over a proposed change and they finally reached agreement on revised language in late April 1979, which the employees ratified. Thereafter, the parties scheduled a session for the formal execution of their agreement, but before that process could be completed the decertification petition was filed. The Board there

held that the agreement reached on August 23 was sufficient to operate as a bar to the petition. The Board noted that it was a signed agreement—albeit by initialing—covering substantial terms and conditions of employment and was intended to be a final and binding agreement. The Board further observed that the negotiations which took place after August 23, and the minor amendments made to the agreement after that date, did “not indicate that the agreement lacked finality or that its terms were insufficient to govern the parties' relationship.” (*Id.* at 199.)

Here, the Employer and the Union affixed their signatures to the November 21 memorandum of agreement alleged as a bar to the instant petition, and it is clear that that agreement, together with the initialed documents which were incorporated by reference, covered substantial terms and conditions of employment, sufficient, in our opinion, to stabilize the bargaining relationship.¹⁸ The parties scheduled no further negotiations after November 21 and, after receiving notice that the employees had ratified the agreement, the Employer immediately began to implement its provisions. It is clear, therefore, that when the November 21 agreement was signed and ratified it was intended to be final and binding.¹⁹ The grievance provisions in the November agreement provided a means by which the contracting parties could resolve their differences concerning application of its terms, indeed, those provisions have been resorted to on several occasions to resolve successfully a number of disputes involving contract interpretation or administration.²⁰ Thus, when the dispute over the proper im-

¹⁸ The Acting Regional Director noted that the parties agreed only in general terms to a union-security clause and dues-checkoff provision on November 21, leaving the language of those provisions to be worked out at a later date. The Employer contends that this provides an additional reason for finding that the November 21 agreement did not achieve bar quality. We do not agree. Although the Board has held that certain agreements are insufficient to serve as bar (contract limited only to wages or benefits not sufficient, *J. P. Sand and Gravel Company*, *supra*; contract substantially altered or abandoned not sufficient, *Austin Power Company*, 201 NLRB 566 (1973)), the Board does not require that an agreement delineate completely every single one of its provisions in order to qualify as a bar. See *Stur-Dee Health Products, Inc. and Biorganic Brands Inc.*, 248 NLRB 1100 (1980); *Lew Strauss & Co.*, 218 NLRB 625 (1975); and *Spartan Aircraft Company*, 98 NLRB 73 (1952). What is required is that the agreement in question contain substantial terms and conditions of employment sufficient to stabilize the parties' bargaining relationship. The November 21 agreement satisfies that requirement.

¹⁹ At no time did the contracting parties condition the finality or effectiveness of the agreement upon the signing of the formal contract to be prepared.

²⁰ In *Vistainer Corp.*, 237 NLRB 257 (1978), the issue presented was whether the parties there had abandoned their agreement so as to remove its effectiveness as a bar. In finding that the contract had not been abandoned and remained effective as a bar, the Board noted not only that there had been compliance with many of the contract's terms and substantial compliance with others, but also that any breaches could be the subject of the grievance procedures which the union had successfully used before. Cf. *J. P. Sand and Gravel Company*, 222 NLRB 83 (1976).

¹⁶ *Georgia Purchasing Inc.*, 230 NLRB 1174 (1977); *The Bendix Corporation, Process Instruments Division*, 210 NLRB 1026 (1974); and *Appalachian Shale Products Co.*, *supra* at 1162.

¹⁷ *Gaylord Broadcasting Co. d/b/a Television Station WITV*, 250 NLRB 198 (1980).

plementation of the PAP arose, the Employer indicated that under the contract the Union had the right to file a grievance over the matter. The Union proceeded to file such a grievance and it was processed through Step 4. Step 5 is arbitration and was scheduled to take place about a month after the hearing held herein. Whether or not arbitration occurred as scheduled, it is clear that disputes of this nature are resolvable either through the contractual grievance procedure or through negotiations. Though not dispositive, we note that the Union has attempted to resolve the dispute over the proper implementation of PAP through both means. We conclude that the November 21 agreement operates as a bar to the instant petition.²¹

Accordingly, we shall dismiss the petition.

ORDER

It is hereby ordered that the petition filed herein be, and it hereby is, dismissed.

MEMBER JENKINS, dissenting:

This case involves the application of our long-standing requirement that to constitute a bar to an election a contract must embody agreement on substantial terms and conditions of employment so as "to chart with adequate precision the course of the bargaining relationship, and [so that] the parties can look to the actual terms and conditions of their contract for guidance in their day-to-day problems." *Appalachian Shale Products Co.*, 121 NLRB 1160, 1163 (1958). Agreement on the necessary terms and conditions, of course, means final agreement and not merely "substantial agreement." *Fort*

²¹ The cases cited by the Acting Regional Director to support his contrary conclusion are distinguishable. In *Fort Tryon Nursing Home*, *supra*, the parties never signed an agreement which at the time of its execution was understood and intended by the parties to be a final and binding agreement. Also, in that case, the union, which was the party that was contending that the agreement in question achieved bar quality, had distributed a leaflet to its unit members 2 days after the petition was filed claiming in effect that there was no final agreement because the negotiation process had not been completed. In *The Permanente Medical Group*, *supra*, the parties had not completed their negotiations at the time the petitions were filed, and there was no evidence that a signed agreement existed at that time.

The dismissal by the General Counsel of the refusal to bargain charges filed by the Union, relating to the negotiations centering on the dispute as to the proper interpretation of the PAP provisions of the November agreement, in no way is binding on the Board on the issue of whether the November 21 agreement bars the instant petition.

Tryon Nursing Home, 223 NLRB 769, 771 (1976). Thus, an informal, signed document may constitute a contract bar, but only if it is clear that the parties intend it to be a final agreement.

Here, it may be arguable that, as the majority finds, the parties thought on November 21, 1979, that they had a final agreement. By December 1979, however, a dispute had surfaced over what precisely had been agreed on with respect to the paid absence program (PAP), and in the ensuing months it became clear that the parties did not have a complete, mutually understood agreement. Therefore they resumed negotiations and their differences remained unresolved at the time the instant petition was filed.²² Unlike the situation in *Gaylord Broadcasting*,²³ the parties were still apart on significant matters and acted inconsistently with a mutual understanding that they had a final agreement.²⁴ I am not impressed with the majority's speculation that the dispute over PAP could be resolved through the grievance procedure. It might or might not be resolvable that way. But it certainly had not been resolved at the time the petition was filed, nor had the parties agreed that the dispute was merely one of interpretation of a fully-negotiated agreement.²⁵ This live dispute, over an issue that was a matter of great concern to both parties and that apparently arose with great frequency, left the parties "in a continuous state of uncertainty . . . with the direct consequence of rendering the contract incapable of providing the stability contemplated by the Act." *Appalachian Shale*, *supra*.

I would affirm the Acting Regional Director's finding that no contract bar exists and proceed with the election.

²² Cf. *Georgia Purchasing, Inc.*, 230 NLRB 1174, 1175 (1977); *The Permanente Medical Group*, 187 NLRB 1033, 1034 (1971).

²³ *Gaylord Broadcasting Co. d/b/a Television Station WFTV*, 250 NLRB 198 (1980).

²⁴ The fact that certain provisions on which agreement has been reached are put into effect while negotiations continue does not, of course, convert a tentative agreement into a final one.

²⁵ *Visitainer Corp.*, 237 NLRB 257 (1978), is inapposite. There, the issue was whether the employer's noncompliance with the contract had reached the point where the contract had been abandoned. Availability and use of the grievance procedure was deemed evidence of the contract's continued viability. No one had questioned the existence of a complete contract.