

**United Health Care Services, Inc. and Angela Plada, Petitioner, and Professional, Technical and Clerical Employees Union, Local 707, an affiliate of the National Production Workers Union, Union.** Case 13–RD–2174

September 30, 1998

ORDER DENYING REVIEW

BY MEMBERS FOX, LIEBMAN, HURTGEN, AND BRAME

The Employer's request for review of the Regional Director's Decision and Order (pertinent portions of which are attached as Appendix) has been carefully considered by the Board.

Members Fox and Liebman would deny review. In denying review, they note that in contract bar cases, for ratification to be a condition precedent to the validity of the contract, the entire ratification provision must be stated by an express contractual provision. *Appalachian Shale Products*, 121 NLRB 1160, 1162–1163 (1958). "That principle means that a condition of prior ratification cannot be established by parol or other extrinsic evidence." *Merico, Inc.*, 207 NLRB 101 fn.2 (1973). The request for review only highlights the patent ambiguity here by its assertion at different points that ratification was required by "employees," "members," and the "membership." In these circumstances, absent express language requiring ratification by a particular entity or group, "[t]he condition precedent of 'ratification' means ratification as defined by the Union in its internal procedures." *Childers Products Co.*, 276 NLRB 709, 711 (1985), *enfd.* 791 F.2d 915 (3d Cir. 1986).<sup>1</sup>

Members Hurtgen and Brame would grant review. They conclude that a reasonable reading of the relevant language is that ratification by the Union's membership was a condition precedent to a contract. Since that ratification did not occur, there is no contract bar. Where, as here, contractual language is ambiguous, the Board will engage in contract interpretation to determine the effect of ratification language in a contract.<sup>2</sup> In *Merico*, the Board engaged in such contract interpretation. It con-

<sup>1</sup> Members Fox and Liebman find that their colleagues' reliance on the Board's decision in *Merico* is misplaced. In that case, the Board's finding that the ratification condition had not been satisfied was premised on the language of the contractual clause regarding ratification, which expressly provided for ratification "by the membership". Here, despite their colleagues' willingness to infer such language, Members Fox and Liebman note that the fact remains that the parties did not write such language into the contract.

<sup>2</sup> *Merico, Inc.*, 207 NLRB 101. However, that contract interpretation cannot include the examination of parol evidence. See *Merico* at fn. 2. In Members Hurtgen's and Brame's view, the more reasonable interpretation is that the Local would recommend *ratification to its members*, as distinguished from the notion that the Local would recommend *approval by the National Union*. Contrary to Members Fox and Liebman, Members Hurtgen and Brame do not read *Merico* to require the phrase "by the membership" or any other magic words. Rather, the issue turns on a reasonable common-sense interpretation of the language that *does* appear. This is the approach that they have taken here.

cluded that ratification was a condition precedent to a contract, and that there was no contract bar.

Similarly, in the instant case, Members Hurtgen and Brame conclude that the contractual language provides that the Local representatives will "recommend" the contract's "ratification." The Local contends that this language means that the Local will recommend approval by the National Union, and that such approval is a "ratification." This belated explanation was given, for the first time, at the hearing in this case.

Since ratification by the membership did not occur as of the filing of the petition on November 5, Members Hurtgen and Brame would process the petition, and they would permit the election to proceed.

Accordingly, as the Board Members are equally divided, and there is no majority to grant review, the Regional Director's Decision and Order is affirmed. See *Durant v. Essex*, 7 Wall. 107, 19 L. Ed. 154 (1869).

APPENDIX

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4. The Petitioner seeks to decertify a unit of all employees employed by the Employer, but excluding employees who regularly work less than 30 hours per week, medical services personnel, human resources department, social workers, clinical employees, administrative department employees, supervisors, managerial employees, executive support staff and confidential employees as defined in the Act.

The Union had a collective-bargaining relationship with Chicago HMO Ltd. and HMO America Ltd., the Employer's predecessor, dating back to 1982. The latest collective-bargaining agreement between the two was in effect from April 1, 1993 to March 31, 1996. The Employer, United HealthCare, acquired Chicago HMO soon after this collective-bargaining agreement was signed. The parties agreed to extend the contract through October 23, 1996. From February through October 1996, the parties met 18 to 19 times to negotiate a new agreement. On October 8, 1996, the Employer put its final proposal on the table. The Union negotiating committee stated that it did not support the proposal but would convey it to the members. The Union rejected the offer that same day. The Union met with its members on October 16 to update them on the negotiations. At that meeting, the members authorized the Union to negotiate further, get a contract and/or to proceed to a strike. The Union met again on October 30 to discuss a strike vote, but no strike deadline was set at that time.

The Employer and Union had a final meeting on November 4 which was attended by a Federal mediator. At that meeting the parties signed a handwritten document drafted by the Employer's attorney titled "Tentative Memorandum Agreement." The agreement refers to and incorporates several other documents regarding vacation benefits and health insurance. It also provides for, *inter alia*, a \$350 lump-sum payment to unit members upon ratification, a 40-hour work week commencing upon ratification, car and parking allowances, Medicaid upgrades, maintenance of seniority for unit employees, withdrawal of pending unfair labor practice charges, and vacation benefit pay-outs upon ratification. The final paragraph of the agreement, placed immediately above the signatures, states: "This Tentative Memorandum Agreement is entered into this

4th day of November, 1996 and it is agreed that the Union representatives and committee will unanimously recommend its ratification.”

After the document was signed, the Employer asked when the ratification vote would take place and if the Union committee would recommend ratification. The Union stated that it would meet with its members on November 6. Several or most of the Union representatives indicated that they would recommend ratification. The Employer agreed to let the Union use its facilities for this purpose and to refrain from discussing the agreement with employees until after the Union met with its members. After the signing on November 4, a representative of the National Union telephoned the National president and read the agreement to him and recommended its ratification. The National president approved the agreement that same day. In a letter dated November 4, the Union withdrew a pending unfair labor practice charge against the Employer. The withdrawal was approved on November 18. On November 5, the instant petition was filed.

At the November 6 meeting, the Union distributed copies of the agreement, but not the vacation benefit balances attachment, to the members. The members were told to read the document and, if they agreed with it, to sign a sheet that was passed around. Ninety-eight members indicated that they supported the agreement while four dissented. After the meeting, an Employer representative asked a Union committee member how the meeting went and was told that, of 107 members present, 98 members voted yes and 4 voted no.

The lump-sum payment was disbursed on the next payday which was November 15. Several other provisions of the agreement were also scheduled for future implementation. The 40-hour work week was scheduled to be implemented January 1, 1997 and the unused vacation pay was scheduled to be paid the first week in January. According to the Employer, if the members had voted no on November 6, it would not have implemented these prospective changes. The Union stated that if the changes were not implemented, it would file unfair labor practice charges and grievances seeking arbitration.

The Local Union constitution vests its members with voting rights except with respect to the negotiation and enforcement of collective-bargaining agreements. According to the Local representatives, its usual practice upon reaching agreement is to obtain approval of an agreement from the National Union which constitutes ratification of the collective-bargaining agreement by the Union, and that ratification by the members is unnecessary. The Local representatives stated that it usually goes to its members to explain the agreement and to ask if they accept it, although it is not required under its constitution to do so. According to the Union, once the National president approved the agreement, it was ratified. The Employer was not told of the National president's approval.

#### ANALYSIS

The only question presented in the instant case is whether an agreement between the Employer and the Union constitutes a contract bar to a Recertification. If a contract does exist and conforms to the required elements, the contract is held to be a bar to an election. *Hexton Furniture Co.*, 111 NLRB 342 (1955). The required elements are set forth in *Appalachian Shale Products Co.*, 121 NLRB 1160 (1958). In order to meet the threshold inquiry of the contract bar doctrine, the agreement must be written, signed before the rival petition is filed, contain

the substantial terms and conditions of employment, encompass the employees involved in the petition, and cover an appropriate unit. *Id.*, *Seton Medical Center*, 317 NLRB 87 (1995). Additionally, where ratification is a condition precedent to contractual validity by an express contractual provision, the contract will be ineffectual as a bar, unless it is ratified prior to the filing of a rival petition, but if the contract itself contains no express provision for prior ratification, prior ratification is not a condition precedent for the contract to constitute a bar to an election. *Appalachian Shale Products Co.*, supra at 1163. Most of the requisite elements of a contract appear to have been met as the document was written, signed, contained the substantial terms and conditions of employment, and covered employees in an appropriate unit. These factors were not points of contention at the hearing. Instead, the parties disagree over whether ratification by Union members was a required condition precedent necessary to validate the agreement signed on November 4, 1996.

The language in the agreement in dispute states “This Tentative Memorandum Agreement is entered into this 4th day of November, 1996 and it is agreed that the Union representatives and committee will unanimously recommend its ratification.” The Employer argues that the last paragraph of the Tentative Memorandum Agreement creates a requirement of prior ratification by Union members before the agreement became effective. It asserts that ratification by the members did not occur until November 6, one day after the Recertification petition was filed and thus no contract bar exists. The Union, however, contends that ratification by members was not required and that once the National president approved the agreement on November 4, it was ratified pursuant to its procedures and valid.

Similar language was used in *Merico, Inc.*, 207 NLRB 101 (1973), where the parties' final paragraph stated “The Union (committee) is Unanimous for acceptance and each member is hereby pledged to recommend this agreement for ratification by the membership at Fort Payne, Alabama, Merico Plant.” There, the Board found that this language indicated that the terms were acceptable to the Union committee, but that it did not evidence a binding contract in the absence of employee ratification. The employees subsequently rejected the agreement in that case.

The Union argues that the case is distinguishable from the instant case because, here, the agreement does not specify ratification by the members. The agreement uses the term “ratification” in several provisions, but it does not specify the entity which must grant its approval. The ambiguity is not resolved by an examination of extrinsic evidence. The Employer appears to have assumed, but not verified, that the members must ratify the agreement. It points to its inquiries about when the Union would meet with the members. Furthermore, it argues that it provided its facilities in order to expedite the ratification process. Finally, it asserts that it was not informed of the National president's approval. The Local Union constitution, however, does not require membership approval of agreements and does not vest the members with the right to vote on collective-bargaining agreements. The Union did not put other proposals to a membership vote earlier in negotiations when it rejected a “final offer” by the Employer. The Union stated that ratification is accomplished by the National president's approval of the agreement. Finally, the Union points out that it withdrew its unfair labor practice charge against the Employer on November 4 as required by the agreement.

It is well-established Board precedent that an Employer may not question internal Union procedures as to ratification. *Martin J. Barry Co.*, 241 NLRB 1011, 1013 (1979); *M&M Oldsmobile*, 156 NLRB 903, 905 (1966), *enfd.* on other grounds 377 F.2d 712 (2d Cir. 1967); *North Country Motors*, 146 NLRB 671, 673 (1964). Thus, if internal Union procedures provide for ratification by the National president, then that act is sufficient to effect the agreement. The fact that the Union later asked for employee input as to their support for the agreement is irrelevant, even though the Employer believed that this act constituted ratification.

The Employer cites *Beatrice/Hunt-Wesson, Inc.*, 302 NLRB 224 (1991), in support of its questioning of the ratification process. There, the parties signed a document which “recommended to the management of the company and members of the bargaining unit . . . ratification as soon as possible.” *Id.* at 228. The language in that agreement was found not to be a bar until ratification occurred. The Union made 3 unsuccessful efforts to obtain its members’ approval of the agreement. The Union then relied upon ratification from 1 member in a unit of approximately 100 employees. The Employer polled its employees as to their support of the agreement and refused to bargain, claiming that the Union had not abided by the agreement which required the approval of unit employees. The ALJ found merit in the Employer’s defense, and the Board adopted the ALJ’s findings without further discussion. The Employer relies upon a concurring opinion to support its questioning the petitioner’s ratification procedures. The concurring opinion distinguished between self-imposed internal ratification procedures and ratification imposed by express agreement between a union and an employer. According, to concurring opinion, the prohibition against employer’s question the ratification procedures applies to the self imposed ratification procedures but not to procedures required as part of an express agreement between a union and an employer. In *Beatrice/Hunt-Wesson, Inc.*, *supra*, according to the concurring opinion, there was express agreement for unit employees, not just union members, to ratify the agreement, which the union violated by eventually resorting to

having the ratification vote limited to the sole union member at the facility.

However, even within the framework of the analysis of the concurring opinion in *Beatrice/Hunt-Wesson*, the instant case is distinguishable and a different result is required. In *Beatrice/Hunt-Wesson*, the agreement plainly designated the members of the bargaining unit as the ratifying entity, and the Union’s actions clearly departed from the provisions of the express ratification requirements set forth in the contract. The ratification process in *Beatrice/Hunt-Wesson* was unambiguous and clearly not met. Here, the record indicates that the Union’s usual procedure is to obtain the National president’s approval. Regardless of the misunderstandings that may have developed during negotiations as to what was meant by the term “ratification”, there is no express provision in the contract requiring ratification by a specific entity, employees or union members, that was violated, as occurred in *Beatrice/Hunt-Wesson*. Here, the Union did obtain the requisite internal approval for ratification and, thus, met the express provisions of the agreement.

Furthermore, the lack of notice to the Employer on November 4 does not nullify the ratification on that date. In *Felbro, Inc.*, 274 NLRB 1268 fn. 2 (1985), the parties agreed that ratification by Union members was necessary to create a binding contract. The Board stated that the requisite ratification occurred when the membership granted their approval and it was immaterial that the Employer may not have been notified of the ratification prior to its attempt to revoke its contract offer. *Id.* Therefore, according to internal Union protocol, ratification was achieved by the National president’s approval of the agreement on November 4, despite the lack of notice to the Employer. The contract was in effect as of November 4, 1996, one day before the Recertification petition was filed. Accordingly, the contract constitutes a bar to processing the instant petition.

#### ORDER

IT IS HEREBY ORDERED that the petition filed herein be, and it hereby is, dismissed.

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