UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 16

FDSI d/b/a FREEMAN COMPANIES **San Antonio, Texas**

Employer

and

TEXAS CARPENTERS & MILLWRIGHTS REGIONAL COUNCIL **Case 16-RC-10877**

Petitioner

INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, DISTRICT COUNCIL 88/LOCAL UNION 756

Intervenor

DECISION AND ORDER

Texas Carpenters & Millwrights Regional Council, hereinafter referred to as Petitioner, filed a petition with the National Labor Relations Board under Section 9(c) of the National Labor Relations Act on February 20, 2009. Pursuant to a petition amended at a hearing held October 26, 2009, the Petitioner seeks to represent the following employee classifications at the Employer's facility in San Antonio, Texas: all helpers, apprentices and journeymen performing the work of preparation, handling, installation, and dismantling of trade show booths and exhibits, including warehouse workers, in Bexar and Travis County, and excluding supervisors, managers, office and clerical personnel and temporary employees provided by temporary agencies and vendors. FDSI, hereafter the Employer, objected to the petition on the ground that a current contract bars an election. The International Union of Painters and Allied Trades, hereafter the Intervenor, intervened, objecting that its current contract with the Employer, bars the election. A hearing was held on October 26, 2009 in relation to this petition.

I. ISSUE

The issue presented in this case is whether there is a contract bar to an election. Petitioner asserts that there is no contract bar on the ground that the Intervenor was not a 9(a) representative when the potentially barring contract was signed. Alternatively, the Petitioner argues that the Intervenor was a 9(a) representative; that status was formed by a recent voluntary recognition and therefore the Petitioner's petition was filed within the appropriate period under *Dana*. Conversely, the Employer and Intervenor argue that the Intervenor is and has been the 9(a) representative of the Employer's employees and that their February 16, 2009 contract (Employer's Exhibit 6) bars elections at the current time. The circumstances of this case also make it necessary to address whether the Employer is an employer engaged in the construction industry.

For the reasons set forth below, I find the Intervenor is the 9(a) representative of the Employer's employees and the contract between Employer and Intervenor acts as a bar to the present petition. I also find that the Employer is not engaged in the construction industry. To lend context to my discussion of the issue, I will provide a statement of material facts and legal analysis.

II. FACTS

The Employer is an Iowa Corporation with places of business across the United States and Canada, including a business located in San Antonio, Texas, where it provides labor, installation, dismantling and other services for trade shows, conventions, and other special events. The San Antonio location has been in existence for about 30 years.

The Intervenor has represented the San Antonio employees for about 25 years. In fact, the relationship goes back so far that none of the current employees of the Employer or the

Intervenor were employed at the time of the first contract. Neither the Employer nor the Intervenor has evidence of how the bargaining relationship began, but a series of collective bargaining agreements and oral testimony supports the length of the relationship.

In 2005, Employer and the Intervenor could not reach an agreement and this resulted in a strike. The strike was resolved after two or three months and the Employer and Intervenor entered into a contract that was effective 2005-2010. The Employer's representative at the negotiations and signing was Trisha Frank and the Intervenor's agent was James Reid. The 2005 collective bargaining agreement signed by Frank and Reid differed from previous contracts in two pertinent ways. Line one on page one of the contract reads, "This agreement is entered in pursuant to Section 8(F)" [sic] and three paragraphs later, the contract states, "The Employer hereby recognizes the Union as the exclusive bargaining representative of all helpers, apprentices and journeymen." These two statements were departures from predecessor contracts, which had never referred to the Intervenor's status as exclusive to 8(f) or to 9(a). Frank testified that she did not know why the 8(f) language was included in the contract, and that knowing little about such matters, she was not concerned about it. Frank testified that another employee had told her to put it in and that she obliged him. Reid stated that he did not object to the 8(f) statement because he knew that the contract was not in the construction industry and that 8(f) would not apply. According to Reid, he had little leverage and did not want to argue over what he considered a non sequitur.

On February 16, 2009, the Employer and Intervenor entered into a new contract, effective 2009-2012. This contract made multiple deviations from its predecessor and dropped both the 8(f) language and the "exclusive bargaining representative" language of the 2005 contract. Frank testified that the 8(f) language was dropped in the 2009 contract because she could not

figure out why it had been in the 2005 contract in the first place and wanted a clean document that she understood.

III. ANALYSIS

Contract bar generally

The burden of proving that a contract bars the processing of a petition is on the party asserting that there is a bar. *Roosevelt Memorial Park*, 187 NLRB 517 (1970). Therefore, in this case, the Employer and the Intervenor have the burden of proving the bar. In order for a collective-bargaining agreement to serve as a bar to an election, the Board's well-established contract bar rules require that the agreement satisfy certain formal and substantive requirements. Specifically, the agreement must be signed by the parties prior to the filing of the petition that it would bar and must contain substantial terms and conditions of employment to which the parties can look for guidance in resolving day-to-day problems. *Cooper Tank and Welding Corp.,* 328 NLRB 759 (1999); *Appalachian Shale Products Co.,* 121 NLRB 1160 (1958). However, an agreement need not delineate completely every one of its provisions in order to qualify as a bar. *Farrel Rochester Division of USM Corp.,* 256 NLRB 996, 999 fn. 18 (1981). The February 2009 agreement, which is asserted as the bar, was duly signed by the Employer and the Intervenor. Additionally, the contract contains substantial terms of guidance for day-to-day problems: among other things, the contract describes the scope of the agreement, the scope of the bargaining unit, the pay and benefits, grounds for discharge and includes a grievance and arbitration procedure. I, therefore, find that the Employer and Intervenor have met this threshold burden of showing that the contract itself conforms to the formal and substantive requirements of a barring contract.

The Petitioner argues, however, not that the terms, scope or signature of the contract are insufficient to act as a bar, but that the contract cannot act as a bar because the Intervenor did not represent a majority of the Employer's employees at the time it was signed.

Nonconstruction Industry

In addressing the issue of whether the Intervenor represented a majority, it is first necessary to address whether the Employer is engaged in the construction industry. This issue must be addressed because unions representing employees in the construction industry are presumed to be non-majority representing 8(f) representatives, whereas unions in nonconstruction industries are assumed to represent a majority of employees as 9(a) representatives. *James Julian, Inc.* 310 NLRB 1247 (1993). The Board, affirmed by the courts, has ruled that the trade show industry is a nonconstruction industry. *Carpenters Local 623 (Atlantic Exposition Services)* 335 NLRB 586, aff'd 320 F. 3d 385; *Pekowski Enterprises d/b/a Expo Group*, 327 NLRB 391 (1999); *Raymond F. Kravis Center for the Performing Arts*, 351 NLRB 143 (2007). Because there are no facts to differentiate the Employer's activities from the trade show industry in general, I find that the Employer is not engaged in the construction industry.

A union in a nonconstruction industry which is recognized by an employer as a 9(a) representative enjoys a conclusive presumption that it represents a majority of employees during the term of a contract and a rebuttable presumption that it represents the majority of the employees after a contract's expiration. *Auciello Iron Works Inc. v NLRB*, 517 U.S. 781, 786 (1996); *Levitz Furniture Co.*, 333 NLRB 717, 723 (2001). Furthermore, the time to challenge a nonconstruction employer's recognition of a union as a majority is within 6 months of that

recognition. *Casale Industries*, 311 NLRB 951, 953 (1993); *Raymond F. Kravis Center for the Performing Arts*, 351 NLRB 143, 144 (2007); *Saylor's Inc.* 338 NLRB 330 (2002).

Although the parties do not know the beginnings of their bargaining history and although the language of the parties' pre-2005 contracts did not define the relationship, the history of bargaining between the parties shows that the Employer has long recognized and bargained with the Intervenor as the 9(a) representative of its employees. The six month period for questioning the Employer's original recognition of that relationship has long passed. Therefore, I conclude that historically, the Intervenor enjoyed the presumption of representing the majority of the unit employees.

Effect of the 2005 Contract

Having determined that the Employer's industry is not an employer engaged in the construction industry and having determined that the Intervenor has historically been treated as the 9(a) representative, the next question to be determined is what, if any, effect the labeling of the 2005-2010 as an 8(f) agreement had.

The Petition argues, essentially, that because an 8(f) representative in the construction industry is presumed to represent less than a majority of the employees, the labeling of the 2005-2010 agreement as 8(f) was an acknowledgment of the Union's lack of majority support by both parties to the contract. In support of this argument, the Petitioner points to the failure of the strike and the lack of leverage that the Intervenor had in negotiations. The Petitioner argues that the parties acknowledged a lack of majority status in the 2005 contract and never reestablished majority; making the 2009 contract ineffectual as a bar to an election. The Employer contends that the 8(f) label was included without a clear purpose and was not meant to signal that the Intervenor had lost their majority status. The Employer argues that the Intervenor has always

been presumed to be the 9(a) representative of its employees and that the labeling of the 2005 agreement as 8(f) has not affected that presumption. The Intervenor argues that the 8(f) language was meaningless because the Employer was in a nonconstruction industry, and that it did not object to the 8(f) label because it was meaningless. Like the Employer, the Intervenor argues that it is and has been the presumptive 9(a) representative of the Employer's employees.

Parol Evidence and Equitable Estoppel Not Operative

In determining the effect of the 8(f) label on the presumption of support, I find it appropriate to look at the facts and circumstances of its inclusion. While the Petitioner argues that the parol evidence rule and equitable estoppel should prevent the parties to the contract from asserting that they meant to form an 8(f) relationship, those arguments fail.

The parol evidence rule, which prevents parties to a contract from introducing evidence "for the purpose of varying or contradicting the terms of a contract"[1] is not applicable here because the evidence is not being used to aid in the interpretation of the contract for its application. Rather, it is being used to show what the parties meant by the contract language in a context outside of that contract. Furthermore, even if the parol evidence rule were applicable, the assignment of a contract as 8(f) in an industry that is not subject to that proviso creates a patent ambiguity that can be resolved through extrinsic evidence. *Doubletree Guest Suites Santa Monica*, 347 NLRB 782, 784 (2006).

Petitioner's equitable estoppel argument also fails. The principle of equitable estoppel is premised on the notion that a party that obtains a benefit by engaging in conduct that causes a second party to rely on the "truth of certain facts" should not be permitted to later controvert those facts to the prejudice of the second party. *Strand Theatre of Shreveport Corp.*, 346 NLRB 523, 536 (2006), citing *R.P.C., Inc.*, 311 NLRB 232 (1993). The Board has laid out elements of

[1] *Doubletree Guest Suites Santa Monica*, 347 NLRB 782, 784 (2006)

equitable estoppel, but has maintained that "the key is that the estopped party, by its actions, has obtained a benefit." *Red Coats, Inc.,* 328 NLRB 205, 207 (1999). In this case, there is no evidence that the parties to the 2005 contract gained any benefit by labeling their agreement as 8(f) rather than 9(a), and so the principle of equitable estoppel is not applicable. Detrimental reliance is also lacking here. The detrimental reliance cited by the Petitioner is the reliance of the Employer's employees on the 8(f) label when they signed assessment fee authorizations and made efforts to file the petition in this case. It is unclear how the difference between 8(f) and 9(a) would have affected the employees' decisions regarding their assessment authorizations. The efforts of the employees in filing the current petition were perhaps made in reliance on the 8(f) language of the 2005 contract, but this detrimental reliance does not rise to a level that would trigger equitable principles. Thus, because the parties to the contract did not receive a benefit by labeling their contract 8(f) and no party relied on that label to serious detriment, they are not estopped from arguing that the Intervenor was a 9(a) representative.

8(f) language is not controlling

Because the Intervenor had been the recognized 9(a) representative of the Employer's employees before the expiration of the 2005 contract, there is a rebuttable presumption that it continued to be the majority representative between the contracts. The Petitioner offers evidence to rebut this presumption in the form of the 8(f) language. The Petitioner argues that while the parties may have been mistaken about which industry the Employer was in, they were not mistaken about the Intervenor's status as representing less than a majority of its employees. Therefore, the Petitioner argues that the parties entered into an invalid 8(f) contract in 2005, which acted as a revocation of majority status recognition.

The Petitioner cites *South County Sand & Gravel*, 1-CA-32959, Advice Memoranda dated December 18, 1995, for the notion that an 8(f) agreement outside of the construction industry amounts to less than 9(a) recognition. However, *South County Sand & Gravel* is distinguishable. In that case, the employer was initially in the both the quarry and construction industry and party to an 8(f) contract. The employer later discontinued its construction activity, but continued to have an 8(f) relationship with the union. The Division of Advice found that the construction industry presumption against a majority would not be altered simply because the employer ceased its construction activity. Therefore, to be recognized as a 9(a) representative, the Union would need to prove its majority status.

The two cases are quite different. Unlike the *South County* employer, which originally had an 8(f) agreement in the construction industry, the Employer here originally had a 9(a) agreement in a nonconstruction industry. Additionally, unlike the *South County* employer which changed from construction to nonconstruction, the employer here has always performed the same nonconstruction work. Thus, the effect of titling an agreement 8(f) in the context here is very different than the context of *South County*.

In the case at hand, the 8(f) language does not seem to have changed the relationship at all. Without some evidence that it was meant to indicate that the Intervenor did not have majority support, I cannot find that it was so intended. In sum, because the 8(f) language did not change the relationship and because there was no discussion of a change in majority status, I find that its inclusion was insufficient to rebut the presumption that the Intervenor held majority status in 2005. Because the Intervenor held majority status during the 2005 contract, it is conclusively presumed to have held majority status when it signed the 2009 contract. Therefore, because the Intervenor's majority status appears to have remained stable throughout its long

bargaining history with the Employer, and because the Employer and Intervenor have shown that the contract has been duly signed and governs their daily relationship, I find that they have met their burden of proving the 2009 contract operates as a bar to Petitioner's petition.

Petition not timely

Finally, because I have concluded that the Intervenor held majority status when it entered into the February 2009 agreement, I find that the February 2009 agreement acted as a bar to an election at this time. The Petitioner argues that the petition is timely under *Dana Corporation* 351 NLRB 434 (2007). However, *Dana* pertains to newly recognized Unions not incumbents, such as the Intervenor. Therefore, I find that the February 2009 agreement acted as a bar to an election at this time.

V. CONCLUSIONS AND FINDINGS

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.

2. The parties stipulated, and I, find that the Employer is an Iowa corporation with places of business across the United States and Canada including an office, warehouse and business at 3323 Pan Am Expressway, San Antonio, TX 78219. During the previous 12 months, a representative period, the Employer purchased and received goods and services valued in excess of $50,000 from sources located outside the State of Texas. Based on the foregoing, I find the Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction in this case.

3. The Petitioner claims to represent certain employees of the Employer.

VI. ORDER

The petition in this matter is dismissed.

VII. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570-0001. This request must be received by the Board in Washington by November 20, 2009**.** The request may be filed electronically through E-Gov on the Agency's website, www.nlrb.gov,[2] but may not be filed by facsimile.

DATED: November 6, 2009

/s/ Timothy L. Watson
Timothy L. Watson, Acting Regional Director
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Region 16
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Fort Worth, Texas

[2] To file the request for review electronically, go to www.nlrb.gov and select the **E-Gov** tab. Then click on the **E-Filing** link on the menu, and follow the detailed instructions. Guidance for E-filing is contained in the attachment supplied with the Regional Office's initial correspondence on this matter and is also located under "E-Gov" on the Agency's website, www.nlrb.gov.