

**UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29**

ACE CAR & LIMOUSINE SERVICE, INC.
Employer¹

and

Case No. 29-RD-1140

ADEL MANSSOUR
Petitioner

INTERNATIONAL ASSOCIATION OF
MACHINISTS & AEROSPACE WORKERS,
DISTRICT 15, LOCAL 447
Union²

DECISION AND DIRECTION OF ELECTION

Ace Car & Limousine Service, Inc. (“the Employer”) is engaged in providing limousine ride services to passengers. Its drivers have been represented for collective bargaining purposes by the International Association of Machinists & Aerospace Workers, District 15, Local 447 (“the Union”). On December 10, 2009, employee Adel Manssour (“the Petitioner”) filed a petition under Section 9(c) of the National Labor Relations Act (“the Act”), seeking to decertify the Union as representative of the bargaining unit.

The incumbent Union contends that its current collective bargaining agreement with the Employer (Board Exhibit 4, effective from 5/16/2009 through 5/15/2012) serves to bar an election at this time, under the Board’s “contract bar” policy. However,

¹ The Employer’s name appears as amended at the hearing. (See Board Exhibit 2.)

paragraph 7 of the agreement requires employees, as a condition of their employment, to pay dues and “assessments” to the Union. The only issue in this case is whether, for contract bar purposes, the agreement’s requirement of paying assessments to retain membership in “good standing” as a condition of employment is invalid.³

A hearing on this issue was held before Nancy Reibstein, a Hearing Officer of the National Labor Relations Board (“the Board”). As described in more detail below, the Union made an offer of proof in support of its position, essentially asserting that the assessments requirement has never been enforced. However, the Hearing Officer rejected the Union’s offer of proof, and closed the hearing.

Pursuant to Section 3(b) of the Act, the Board has delegated authority in this proceeding to the undersigned Regional Director.

Based on clear Board precedent, I conclude that (1) the parties’ contractual “assessments” requirement is unlawful; (2) as a result, that the current contract does not bar an election from proceeding at this time; (3) and that the Hearing Officer was correct to reject the Union’s offer of proof. Accordingly, I will direct an election below in the drivers unit.

BACKGROUND AND UNION’S OFFER OF PROOF

There is no dispute that the Union has represented the drivers employed by the Employer for approximately 10 years. The parties have entered into a succession of collective bargaining agreements throughout those years. The most recent collective bargaining agreement between the parties is a three-year contract, effective by its terms from May 16, 2009 through May 15, 2012 (Board Exhibit 4.).

² The Union’s name also appears as amended at the hearing.

³ The Employer herein did not attend the hearing, and took no position on the contract bar issue.

As noted above, the Petitioner filed the decertification petition on December 10, 2009, approximately seven months after the contract's effective date. There is no dispute that the petition was not filed during the Board's normal "open period" for filing, which will not occur until early 2012. Thus, this contract would bar an election at this time, unless it is invalid for some other reason.

Article 7 of the current agreement provides the following:

In the manner and to the extent permitted by law, membership in the Union on or after the 30th day following the date this contract is executed, or the date each driver begins driving for Ace, whichever is later, shall be required; all drivers who are now members or hereafter become members of the Union, shall as a condition of continued driving for Ace remain members in good standing during the term of this contract. For purposes of this Article, drivers shall be considered members in good standing if they tender to the Union uniformly required periodic dues and assessments (emphasis added).

At the hearing in this case, the Hearing Officer asked the Union to make an offer of proof regarding its position on the assessments requirement. According to the Union, its witness would testify that, during the 10 years of representing Ace drivers, the Union has required them to pay *only* uniform periodic union dues under the relevant union security clause. The witness would further testify that the Union has never required Ace drivers to pay assessments or even initiation fees. In other words, the witness would testify that the assessments requirement contained on the face of the parties' contracts has never been enforced. Finally, the witness would testify that, if the Union were advised that any provision of the contract were invalid, the Union would immediately deem the offending provision "null and void" and have it "removed" from the contract.

The Hearing Officer rejected the Union's offer of proof on the grounds that, for contract bar purposes, a contract's validity must be determined from the face of the

contract, and that the parties may not submit extrinsic “parol evidence” to contradict what is clear from the contract’s face, citing Jet-Pak Corporation, 231 NLRB 552 (1977).

DISCUSSION

In establishing the contract-bar doctrine, the Board has attempted to strike a balance between preserving employees' right to choose their representative freely and at reasonable intervals, and preserving some stability in the parties' collective bargaining relationship. This doctrine provides that when the contracting parties have executed a valid collective-bargaining agreement, they are entitled to a reasonable period of stability in their relationship without interruption. General Cable Corp., 139 NLRB 1123 (1962). Thus, employees who are covered by an existing contract of up to three years duration, but who wish to change or eliminate their bargaining representative, must wait until the specified open period to file their petition, specifically between 60 to 90 days before the contract’s expiration. Leonard Wholesale Meats, 136 NLRB 1000 (1962). If a rival representation petition or decertification petition is filed *before* that time in the contract, it will generally be dismissed.

Nevertheless, in order for a contract to bar an election, it must conform to certain standards. *See generally* Appalachian Shale Products Co., 121 NLRB 1160, 1161 (1958); Seton Medical Center, 317 NLRB 87 (1995). For example, the Board has held that a contract containing a union security clause which is clearly unlawful on its face does not bar an election. Paragon Products Corp., 134 NLRB 662 (1962); Electrical Workers Local 444 (Paramax Systems), 311 NLRB 1031 (1993). As the Board explained in Paragon Products, *supra*, 134 NLRB at 663, any postponement of employees’ rights to select their representative is justified *only* where a valid contract fosters labor stability.

By contrast, a contract that is itself in conflict with the policies of the Act, e.g., by containing an unlawful union security clause, “must be subordinated to employees’ freedom of choice.” Id.

The Board has specifically noted that although Section 8(a)(3) of the Act allows union-security clauses to require the payment of "periodic dues" and "initiation fees," it does not allow any other required payments such as fines or special "assessments." Therefore, a contract requiring employees to pay "assessments" as a condition of their employment is unlawful, and cannot serve to bar an election. Santa Fe Trail Transportation Co., 139 NLRB 1513 (1962). Since the contract in the instant case expressly requires employees to pay union “assessments” as a condition of employment, the union security provision is clearly unlawful on its face.

At the hearing in this case, the Union sought to offer evidence that the parties have never enforced the contract’s assessments requirement in its 10 years of representing this bargaining unit. However, as the Hearing Officer correctly indicated, the Board does not admit extrinsic evidence to contradict what is clear and unambiguous on the face of the contract. For example, in Jet-Pak Corporation, 231 NLRB 552 (1977), a decertification case, the Board found that the relevant contract’s effective date (July 1) was clear and unambiguous from the terms of the contract itself, even though the parties stipulated that agreement was not actually reached until August 27, and the contract was not executed until September 16 of the same year. The Regional Director in that case (1) considered the parties’ factual stipulation, (2) concluded that the contract’s effective date was actually retroactive; (3) concluded that its union security clause may have unlawfully denied new employees the statutorily-required 30-day grace period, and (4) concluded

therefore that the contract would not bar an election at that time. However, the Board reversed the Regional Director, stating that he erred in considering the parties' factual stipulation, rather than limiting his consideration to "the terms of the contract as they appear within the four corners." *Id.*, 231 NLRB at 553. The Board went on to find that the contract's effective date was clear and unambiguous from the contract itself, and therefore the union security clause was not facially unlawful. The Board dismissed the decertification petition in that case.

Similarly, in Waste Management of Maryland, Inc., 338 NLRB 1002 (2003), the employer and the incumbent union had exchanged letters as part of their contract negotiations. In July 2002, the employer sent the union a tentative "final agreement" including a contract term of four years. In early September 2002, the parties verbally agreed to increase the term to five years, but there was no such written notation on the document, and no economic terms for the fifth year. On September 18, the union faxed a signed letter "accepting" the employer's "final offer." Although the Regional Director found the exchange of signed documents to constitute an agreement sufficient to bar an election, the Board disagreed. Specifically, the Board found significant ambiguity as to whether the union agreed to the employer's July "final offer" with a four-year term, or the subsequent verbal offer with a five-year term. The Board concluded that, since there was no document, or set of documents, signed by both parties indicating the exact terms of what they agreed to, the purported "contract" documents cannot bar an election. The Board, citing Jet-Pak Corp., *supra* and other cases, specifically noted that a contract must sufficiently show, on its face, that it represents an offer and acceptance of its specific terms, without needing to resort to parol evidence to establish those terms. *Id.*, 338

NLRB at 103. *See also* Quality Building Contractors, Inc., 342 NLRB 429 (2004)(where contract clearly indicates a seven-county area, employer not permitted to submit extrinsic evidence that the parties “intended” it to be for only one construction site).

In sum, such cases as Paragon Products and Santa Fe Trail, *supra*, clearly establish that a contractual union security clause expressly requiring the payment of assessments as a condition employment is invalid for contract bar purposes. And such cases as Jet-Pak Corp., *supra*, further emphasize the need to evaluate a contract’s validity from the face of it, without resort to parol evidence. In light of these principles, it is obvious that the parties’ contract in this case goes beyond the statutory bounds of union security by requiring assessments payments, and that no extrinsic evidence may be submitted to show that the contractual assessments requirement has not been enforced. Such evidence would be irrelevant. In fact, the Board expressly stated in Paragon Products, *supra*: “The mere existence of a clearly unlawful union-security provision in a contract will render it no bar *regardless of whether it has ever been or was ever intended to be enforced by the parties.*” 134 NLRB at 667 (emphasis added). Accordingly, I uphold the Hearing Officer’s refusal to allow the Union to introduce evidence regarding the non-enforcement of the assessments clause.

In its post-hearing brief, the Union also argues that the union security provision’s first phrase (“In the manner and to the extent permitted by law,...”) serves to preserve the contract’s bar quality by limiting the contractual union security obligation to that which is lawful. The Union characterizes this limiting language as a “savings clause.”⁴ It appears that the Board has not addressed the effect that such limiting clauses or savings clauses

⁴ Savings clauses typically state that any specific contractual provision found to be illegal does not void the agreement’s other provisions.

would have in the contract bar context. *See, e.g., Four Seasons Solar Products Corp.*, 332 NLRB 67, fn. 8 (2000)(Board declines to address savings clause argument).

Nevertheless, in unfair labor practice cases, the Board has held that a general savings clause in a contract does not validate a particular unlawful provision. Joint Council of Teamsters No. 42 et al., 248 NLRB 808, fn. 28 (1980)(“An explicit, self-contained, and clearly illegal contractual provision ... will not be purged of its illegality by a vague and general ‘savings clause.’”)

It should be noted that this case is unlike the Marquez case, where the Supreme Court found a union security clause requiring union “membership” to be facially lawful, even though it did not specifically define the obligations of “membership,” Marquez v. Screen Actors Guild, 119 S.Ct. 292 (1998). Rather, the offending clause herein affirmatively and expressly defines membership “in good standing” in an unlawful manner, i.e., requiring the payment of assessments as a condition of employment. Thus, I conclude that the general limiting language at the beginning of the union security section does not excuse the specific, unlawful assessment requirements, in the next sentence, for contract bar purposes.

Based on the foregoing, I conclude that the parties’ 2009 – 2012 contract does not meet the Board’s standards for blocking a decertification election at this early point in the

contract's three-year term. Accordingly, I will direct an election in the drivers' unit below.

CONCLUSIONS AND FINDINGS

Based upon the entire record in this proceeding, the undersigned finds and concludes as follows:

1. The Hearing Officer's rulings made at the hearing, including her rejection of the Union's offer of proof, are free from prejudicial error and hereby are affirmed.

2. The parties stipulated that Ace Car & Limousine Service, Inc., a domestic corporation with its principal office and place of business located at 1440 39th Street, Brooklyn, New York, is engaged in providing limousine services to passengers. During the past year, which period represents its annual operations generally, the Employer derived gross revenues in excess of \$500,000. In that same time period, the Employer also purchased and received at its New York, facility products, goods and materials valued in excess of \$5,000 directly from suppliers located outside the State of New York.

Based on the foregoing, I find that the Employer is engaged in commerce within the meaning of the Act. It will therefore effectuate purposes of the Act to assert jurisdiction in this case.

3. The parties stipulated that International Association of Machinists & Aerospace Workers, District 15, Local 447, is a labor organization as defined in Section 2(5) of the Act. It claims to represent certain employees of the Employer.

4. A question concerning commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. Based on the record and the parties' stipulation, I find that the following employees constitute a unit appropriate for the purposes of collective bargaining:

All full-time and regular part-time drivers employed by Ace Car & Limousine Services Corp. out of its 1440 39th Street, Brooklyn, New York facility, but excluding all office clerical employees, guards and supervisors defined in Section 2(11) the Act.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether they wish to be represented for purposes of collective bargaining by International Association of Machinists & Aerospace Workers, District 15, Local 447. The date, time, and place of the election will be specified in the Notice of Election that the Board's Regional Office will issue subsequent to this Decision.

A. Voting Eligibility

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such a strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States who are employed in the unit may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

B. Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. Excelsior Underwear, Inc., 156 NLRB 1236 (1966); NLRB v. Wyman-Gordon Company, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. North Macon Health Care Facility, 315 NLRB 359, 361 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). This list may initially be used by me to assist in determining an adequate showing of interest. I shall, in turn, make the list available to all parties to the election.

To be timely filed, the list must be received in the Regional Office, Two MetroTech Center, 5th Floor, Brooklyn, New York 11201, on or before **January 19 2010**. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this

list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted to the Regional Office by electronic filing through the Agency's website, www.nrlb.gov,⁵ by mail, or by facsimile transmission at (718) 330-7579. The burden of establishing the timely filing and receipt of the list will continue to be placed on the sending party.

Since the list will be made available to all parties to the election, please furnish a total of **two** copies, unless the list is submitted by facsimile or e-mail, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

C. Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for at least three (3) working days prior to 12:01 of the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. Club Demonstration Services, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of

⁵ To file the eligibility list electronically, go to www.nrlb.gov and select the **E-Gov** tab. Then click on the **E-Filing** link on the menu, and follow the detailed instructions.

the election notice.

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, D.C.

20570-0001. This request must be received by the Board in Washington by 5 p.m., EST on **January 26, 2010**. The request may be filed electronically through E-Gov on the Agency's website, www.nlr.gov,⁶ but may **not** be filed by facsimile.

Dated: January 12, 2010.

/s/ "Alvin Blyer]"

⁶ To file the request for review electronically, go to www.nlr.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.nlr.gov.