UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29

FIVE STAR CARTING, INC.
Employer[1]

and

LOCAL 660, UNITED WORKERS OF AMERICA
Petitioner Case No. 29-RC-12009

and

LOCAL 890, LEAGUE OF INTERNATIONAL
FEDERATED EMPLOYEES

Intervenor[2]

LOCAL 108, RECYCLING AND GENERAL
INDUSTRIAL LABORERS, a/w
LABORERS INTERNATIONAL UNION OF NORTH AMERICA

Intervenor[3]

DECISION AND ORDER

Five Star Carting, Inc. ("the Employer") provides waste removal services to various commercial customers in New York City. On February 25, 2011, Local 660, United Workers of America ("the Petitioner" or "Local 660") filed a petition under Section 9(c) of the National Labor Relations Act ("the Act"), seeking to represent a unit

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1 The Employer's name appears as amended at the hearing.

2 Local 890, League of International Federated Employees' motion to intervene was granted, based on its status as the recognized collective bargaining representative of the petitioned-for employees.

3 Local 108's status as an intervenor in this case is based on its showing of interest.

of approximately 70 drivers, helpers, mechanics and welders employed working at (or out of) the Employer's facility in Maspeth, Queens, New York. Another union, Local 890, League of International Federated Employees ("Local 890"), is the recognized collective bargaining representative of the petitioned-for employees in two separate units: one unit of drivers, and one unit of helpers, mechanics, welders and maintenance employees.[4] The Employer and Local 890 contend that the collective bargaining agreements covering those two units bar an election at this time under the Board's "contract bar" doctrine. A third union, Local 108, Recycling and General Industrial Laborers, affiliated with Laborers International Union of North America ("Local 108"), also intervened in the case.

A hearing on the contract bar issue was held before James Kearns, a Hearing Officer of the National Labor Relations Board ("the Board"). The relevant contracts were introduced as documentary evidence. Issues at the hearing included: the expiration dates of the relevant contracts and the corresponding "open periods" for filing representation petitions; how the apparent "premature extension" of the contracts affects the open period; and whether the contracts are "members only" contracts. In support of its position that the contracts do not bar an election, the Petitioner called a former employee of Five Star Carting (Virgilio Aguirre) to testify. No other witnesses were called.

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

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[4] For the sake of brevity, the second unit will be referred to herein as "the helpers' unit," even though it also includes other classifications.

For the reasons discussed below, I conclude that Local 890's collective bargaining agreements bar elections at this time, in both of the existing units. I will therefore dismiss the petition.

FACTS

At the hearing, the Employer and Local 890 initially produced two contracts which, they contended, serve as a bar. Later in the hearing, other contracts with overlapping effective dates in the two units were introduced into evidence.

The drivers' contracts

Board Exhibit 3 is a contract covering the drivers unit, effective by its terms from January 6, 2011, to January 5, 2014 (herein called "the 2011-2014 drivers' contract"). It appears to have been executed on January 11, 2011, approximately six weeks before Local 660 filed its petition in the instant case on February 25, 2011. The Employer and Local 890 contend that the 2011-2014 drivers' contract bars an election among drivers at this time. The relevant open period for the 2011-2014 contract will not occur until late 2013 (specifically October 8, 2013, to November 6, 2013).

During the hearing, the Petitioner Local 660 called Virgilio Aguirre[5] to testify in support of its claim that the prior drivers' contract was not supposed to expire until April 30, 2011, and that Local 660's petition was filed during the correct "open period" for filing based on that date. However, Aguirre's testimony showed essentially that he *thought* the old drivers' contract would expire on April 30 because the wage increases under the new contract would be effective on May 1, 2011. (*See also* Petitioner Exhibit

5 The record indicates that Aguirre was hired as a helper in 2006, and then became a driver. After his license was suspended in August 2010, he returned to be being a helper. He was terminated on February 15, 2011. Aguirre's termination, and Local 890's alleged refusal to pursue a grievance on his

1, a copy of Local 890's proposal showing increases annually on May 1, 2011, 2012 and 2013.)

The prior drivers' contract (later admitted into evidence as Board Exhibit 8) showed effective dates of April 1, 2008 to March 31, 2011. Thus, as discussed below regarding "premature extension," the 2011-2014 drivers' contract was executed more than two months before the drivers' 2008-2011 contract was scheduled to expire. The open period for the earlier contract would have run from January 1, 2011 to January 31, 2011.

The contracts for helpers et al.

Board Exhibit 4 is a contract purporting to cover the Employer's helpers, welders and maintenance employees,[6] effective from April 12, 2008 to April 11, 2011. Thus, the open period for filing a petition for that contract would appear to run from January 2, 2011 to February 10, 2011. Local 660's petition was filed on February 25, 2011, about 45 days before Board Exhibit 4 was scheduled to expire, during the so-called "insulated period." The Employer and Local 890 contend that the petition must be dismissed on that basis.

During the hearing in the instant case, Local 108 recalled a prior case in which it filed a petition to represent Five Star Carting employees and which involved a 2008-2011 contract for the helpers' unit with different dates. The Hearing Officer then retrieved a copy of a contract submitted in connection with the earlier case, Case No. 29-RC-11755,

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behalf regarding the termination, are the subject of unfair labor practice charges in Case Nos. 29-CA-30637, 29-CA-30644 and 29-CB-14587, which are currently under investigation.

6 There appears to be no dispute that this unit also includes mechanics, although mechanics are not explicitly named in the contract. At the hearing, the parties stipulated that Local 890 has represented a unit of "helpers, mechanics, welders and maintenance employees" (Transcript p. 86, amending Bd. Ex. 2, paragraph 5, emphasis added). The Petitioner and Intervenor Local 108 also agreed to go forward in an election in a unit which would include the mechanics (Tr. 90).

and introduced it into the record herein as Board Exhibit 6. Board Exhibit 6 appears to be a contract covering helpers, welders and maintenance employees, effective from September 1, 2008 to August 31, 2011. It should be noted that, although both contracts were purportedly signed by the Employer's president Anthony Tristani, the signatures appear quite different. There was no explanation on the record as to why Local 890 had two different 2008-2011 contracts with the Employer, one from September 2008 to August 2011, and the other from April 2008 to April 2011. Nor was there any explanation of why the Employer and Local 890 did not offer the later-dated contract (i.e., the one from the earlier case) in connection with its contract bar contention in the instant case. In its post-hearing brief, the Employer contends that the later-dated contract (Bd. Ex. 6) was intended to cover the mechanics. However, the document contains no reference to mechanics whatsoever – neither in the recognition clause, nor in the wage provisions. The two contracts appear to be identical, except for the dates and the signatures.

Finally, it should be noted that the "open period" for filing a petition vis-à-vis the later-dated contract from the earlier case (Board Exhibit 6) will occur between June 3, 2011, and July 2, 2011.

Application of the contracts

The Employer introduced documentary evidence showing that at least some of the contractual terms have been applied to employees. Specifically, Employer Exhibit 1 includes dues remittance forms to Local 890 for drivers for the month of March 2011, and remittance forms to the "Life Benefit Plan" for drivers for March 2011. Employer Exhibit 1 also includes dues remittance forms for the helpers' unit for March 2011.

However, the helpers' unit does not receive health benefits. The Employer also submitted a document (Er. Ex. 3) which appears to be a letter signed both by Anthony Tristani and a Local 890 delegate, regarding Aguirre's termination as a driver and hiring as a helper in August 2010. (See footnote 4, *supra*.) However, this letter was not authenticated by any witness; Aguirre had never seen it; and he denied any knowledge of Local 890 helping him become a helper after his license was suspended.

Local 660 witness Aguirre corroborated, in some ways, that the contract terms have been applied, but disputed it in other ways. For example, he testified that he received 50-cent raises while he was a driver, which is consistent with the wage provisions of Board Exhibit 8. He also paid dues to Local 890. He received two sick days per year, plus vacation time and certain holidays consistent with the contract. At some point, he received a health benefit card, although he complained that "it didn't' work." Specifically, Aguirre stated that he could not use the card when he hurt his ankle about a year ago. Aguirre also complained that he could not use the card for dental work, although it is not clear from the record that the drivers' contract includes dental benefits. Aguirre gave hearsay testimony that other employees (including at least one driver) told him that their medical card did not work. Aguirre also complained that there is no union shop steward; and that neither Local 890 nor a supervisor gave him a copy of the contract when he asked for one.

Finally, Aguirre testified about his attempt to file a grievance regarding his termination in February 2011. Aguirre claimed that, when he went to the Local 890 office to file a grievance and to get a copy of the contract, a Local 890 employee named Tamara told him that he was no longer a member of the Local 890 as of September 2010

(i.e., around the time he returned to being a helper). Aguirre disputed this, showing Tamara his pay stubs indicating that dues continued to be deducted into February 2011. Aguirre testified that, nevertheless, despite his dues payments, Local 890 claimed that he was no longer a member, and refused to process his grievance for that reason.

DISCUSSION

Contract bar: period for filing petitions, premature extensions

In establishing the contract bar doctrine, the Board has attempted to strike a balance between preserving employees' right to freely choose their representative, and preserving some stability in the parties' collective bargaining relationship. This doctrine provides that when the contracting parties have executed a collective-bargaining agreement, they are entitled to a reasonable period of stability in their relationship without interruption. General Cable Corp., 139 NLRB 1123 (1962).

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, for non-healthcare employers, the petition must be filed between 60 and 90 days before the expiration date of the contract. Leonard Wholesale Meats, 136 NLRB 1000 (1962). The Board then gives an incumbent union and employer a 60-day "insulated period" during which they may try to negotiate and execute a new contract, without the disrupting effect of rival petitions or decertification petitions. Any petitions filed within the insulated period are dismissed. Employees who do not file their petition within the earlier "open" period take the risk that the incumbent union and employer may execute another contract during the insulated period, creating another bar for up to three years. However, if for whatever reason the

incumbent union and employer parties have *not* signed a contract by the time the prior contract expires, then employees are free to file a petition during that interim as well (i.e., after the old contract expires but before a new contract is executed). Deluxe Metal Furniture, 121 NLRB 995, 1000 (1958). Thus, although the insulated period gives an incumbent union some time to negotiate a new contract undisturbed, it is limited to the specified 60-day period. The insulated period does not indefinitely postpone the employees' rights to change representative.

Furthermore, parties to a collective bargaining agreement may not negate the relevant open period by executing another agreement before the earlier agreement is scheduled to expire. The Board has held that, when such a "premature extension" occurs, petitioners may still file a petition during the open period of the old contract, and the new contract will not bar an election. Deluxe Metal Furniture Co., *supra*, 121 NLRB at 1001-1002; New England Telephone Co., 179 NLRB 53 (1969). As the Board stated in H.L. Klion, Inc., 148 NLRB 656 (1964):

> The primary purpose of the premature-extension rule is to protect petitioners in general from being faced with prematurely executed contracts at a time when the petitioner would normally be permitted to file a petition. However, the Board's rule is not an absolute ban on premature extensions, but only subjects such extensions to the condition that if a petition is filed during the open period calculated from the expiration date of the old contract, the premature extension will not be a bar.

Id. at 660. A petition filed during the insulated period of the old contract will be dismissed. Deluxe Metal Furniture, *id.* at 1001-1002.

As for the drivers' contracts, the record indicates that the 2011-2014 contract was a premature extension of the 2008-2011 contract, inasmuch as it was executed more than two months before old contract was scheduled to expire on March 31, 2011. *If* the

Petitioner had filed its petition during the open period of the old contract (January 1, 2011 to January 30, 2011), then the new contract would not serve as a bar. However, there is no question in the instant case that the Petitioner did not file its petition during the relevant open period. Rather, the Petitioner filed its petition on February 25, 2011, during the insulated period of the old contract. Under these circumstances, the drivers' 2011-2014 indeed operates as a bar. Any party who wishes to file a petition involving the drivers will have to wait until the open period under the new contract occurs in late 2013.

The helpers' contracts present a somewhat murkier situation. Initially, when the Employer and Local 890 submitted Board Exhibit 4 (purportedly effective from April 12, 2008 to April 11, 2011), it appeared that the Petitioner's February 25 petition was filed during the insulated period of that contract. Under those circumstances, the petition would have to be dismissed and, any new contract executed by the parties during that period would presumably have been a bar. However, the contract retrieved from an earlier case file (Board Exhibit 6) raised troubling questions. As described above, Board Exhibit 6 is identical to Board Exhibit 4, except for the dates and the signatures. The record resolves neither why the Employer and Local 890 would have executed a three-year contract in September 2008 (only five months after it had executed a three-year contract in April 2008), nor why they failed to present the later-dated contract in the instant case. Furthermore, the Employer's claim that the later contract was intended for the mechanics does not appear to be supported by record evidence.

Nonetheless, and despite the uncertainties noted above, I find that the later-dated contract (Board Exhibit 6) is the relevant contract. Thus, although I am constrained to

find that Board Exhibit 6 bars an election at this time, I also note that its corresponding open period will occur in less than two months from the date of this Decision (June 3, 2011 to July 2, 2011). Accordingly, any interested employees or labor organizations will be free to file petitions involving the helpers, mechanics, welders and maintenance employees at that time.

Contract bar: "members only" contracts

Intervenor Local 108 also argues that the collective bargaining agreements covering these units cannot bar an election because they operate as "members only" contracts.

It is true that contracts benefitting only union members (as opposed to all employees in the bargaining unit) do not bar an election at any time. Appalachian Shale Products Co., 121 NLRB 1160 (1958). However, the record in the instant case does not support Local 108's characterization of the contracts as "members only" contracts. A & M Trucking, 314 NLRB 991 (1994).

Local 108 points to Virgilio Aguirre's testimony that Local 890 has refused to process a grievance regarding his termination in February 2011, on the grounds that he was no longer a union member (even though he continued to pay dues). Aguirre himself has filed a charge against Local 890 in Case No. 29-CB-14587, making the same allegation. However, the record in the instant representation case cannot resolve this unfair labor practice allegation. For purposes of the instant representation case, even assuming *arguendo* that Local 890 refused to process Aguirre's grievance based on his membership status, this alone would not suffice to prove "members only" enforcement of the contract.

Nothing on the face of the contracts themselves suggests that they apply only to union members. On their face, they expressly apply to all employees in the specific classifications ("all" drivers, "all" helpers, etc.). Furthermore, the record does not establish that the contracts have been applied on a members-only basis. As noted above, the Employer submitted documentary evidence to show that it has made benefit contributions on behalf of employees. The record contains no evidence that the Employer failed to provide health benefits for any employees who are not members of Local 890. Furthermore, although Aguirre testified that his health-benefit card "did not work," the record does not establish specifically that Aguirre's health benefits were denied based on his membership status. Finally, Aguirre himself conceded that certain contractual provisions had been applied to him, such as receiving 50-cent wage increases, and certain holidays, sick leave and vacation leave. Under the circumstances, I find insufficient evidence that the contracts covered only Local 890 members, so as to remove their bar quality.

In sum, based on all the foregoing, I conclude that collective bargaining agreements between the Employer and Local 890 bar an election among the petitioned-for employees. I will therefore dismiss the petition in the instant case. Nevertheless, as noted above, the open period for filing a petition under the most recent contract covering the helpers' unit (Board Exhibit 6) will begin on June 3, 2011.

CONCLUSIONS AND FINDINGS

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

1. The Hearing Officer's rulings are free from prejudicial error and hereby are affirmed.

2. The record indicates that Five Star Carting, Inc., is a domestic corporation, with its principal office and place of business located at 58-35 47th Street in Maspeth, Queens, New York. The parties stipulated that the Employer is engaged in providing waste removal services. During the past year, which period represents its annual operations generally, the Employer provides services valued in excess of $50,000 to customers located within the State of New York, which customers, in turn, meet the Board's direct standard for the assertion of jurisdiction.

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 all three unions involved herein are labor organizations as defined in Section 2(5) of the Act. They all claim to represent certain employees of the Employer.

4. As discussed above, I have found that Local 890's collective bargaining agreements covering the petitioned-for employees bar elections at this time. No 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.

ORDER

Accordingly, it is hereby ordered that the petition in Case No. 29-RC-12009 be, and it hereby is, dismissed.

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 **April 26, 2011.** The request may be filed electronically through the Agency's website, www.nlrb.gov,[7] but may **not** be filed by facsimile.

Dated: April 12, 2011.

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Alvin Blyer
Regional Director, Region 29
National Labor Relations Board
Two MetroTech Center, 5th Floor
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[7] To file the request for review electronically, go to www.nlrb.gov, select **File Case Documents**, click on the NLRB Case Number, and follow the detailed instructions.