Ace Car & Limousine Service, Inc. *and* Adel Manssour, Petitioner and International Association of Machinists & Aerospace Workers, District 15, Local 447. Case 29–RD–1140

August 8, 2011

DECISION ON REVIEW AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS BECKER AND HAYES

On January 12, 2010, the Regional Director for Region 29 of the National Labor Relations Board issued a Decision and Direction of Election in which he found that the collective-bargaining agreement between the Employer and the Union did not constitute a bar to the decertification petition, because it unlawfully requires employees to pay "assessments" as a condition of employment.

Thereafter, in accordance with Sec.102.67 of the Board's Rules and Regulations, the Union filed a timely request for review. By order dated February 22, 2010, the Board granted review.[1] The election was held on February 24, 2010, and the ballots were impounded.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Having carefully considered the entire record, we have decided to affirm the Regional Director's decision.

The Employer and the Union entered into a collective-bargaining agreement that is effective by its terms from May 16, 2009, through May 15, 2012. The Petitioner filed the petition on December 10, 2009, which was outside the 60-90 day "open period" for timely filing the petition. Nonetheless, the Regional Director processed the petition, finding that the contract was not a bar to an election, because it contained an unlawful union-security provision. Applying long-established precedent, we agree.

In *Paragon Products Corp*., 134 NLRB 662, 666 (1961), the Board concluded that a contract containing a union-security provision that clearly was unlawful on its face could not bar an election. A union-security clause requiring the payment of "assessments" as well as dues is unlawful because "assessments" do not fall within the meaning of "periodic dues" as used in Section 8(a)(3) of the Act. *Santa Fe Trail Transportation Co*., 139 NLRB 1513 (1962).

[1] By order dated August 27, 2010, the Board reaffirmed the grant of review.

The collective-bargaining agreement at issue contains the following union-security clause

> 7. *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.]

The Regional Director found that this provision requires employees, as a condition of their employment, to pay "assessments" to be a member in good standing. Applying the precedent discussed above, the Regional Director properly concluded that notwithstanding the untimeliness of the petition, the collective-bargaining agreement does not bar the petition, because the union-security provision unlawfully required the payment of "assessments."

The Union does not dispute that the assessment requirement is contrary to Section 8(a)(3). Rather, it contends that the agreement is preserved as a bar to an election by the introductory phrase of the first sentence of the union-security provision: "[i]n the manner and to the extent permitted by law"—a "savings clause," in the Union's view. The Regional Director rejected this contention, finding that for contract-bar purposes, this general limiting language is immaterial, given the specific—and unlawful—requirement that employees pay assessments as a condition of employment. We agree with the Regional Director.

It is undisputed that, on its face, the union-security provision here imposes an unlawful requirement on employees. Accordingly, we cannot, consistent with existing law, accept the Union's argument that the bar quality of the agreement is "saved" by the introductory language of the first sentence of the union-security provision ("[i]n the manner and to the extent permitted by law"). The Board has rejected the argument that the presence of a "savings clause" creates an exception to the Board's rule that a contract containing a facially unlawful union-security provision cannot serve to bar an election. See, e.g., *Hickey Cab Co.*, 88 NLRB 327, 329–330 fn. 5 (1950) (because the "reasonable construction to be given such a [savings] clause is that the union-security provision[] remains effective unless and until the proper tribunal determines that it is invalid," the "very existence in the contract of the union-security provision . . . acts as a

restraint upon employees desiring to refrain from union activities").[2]

Our dissenting colleague invokes the "axiom of contract construction that agreements be interpreted, when possible, in a manner that renders them lawful," characterizes the union-security provision here as ambiguous, and argues that the savings clause amounts to "curative language," making it possible to interpret the union-security provision as lawful. That position is foreclosed by Board precedent, as cited.[3] The "savings clause" here did not create an ambiguity with respect to the *meaning* of the contractual language addressing the payment of assessments: the parties clearly intended to create a requirement to pay. And certainly a reasonable employee, not versed in the details of labor law, could conclude that he would be required to pay assessments. The "savings clause" merely states a truism: that the union-security language that follows can only require what is permitted by law. That the assessment language eventually may be found invalid and, thus, not "permitted by law," does not negate its clear presence in the agreement, which is the predicate for the rule applied in *Paragon Products:* "The mere existence of a clearly unlawful union-security provision in a contract will render it no bar." 134 NLRB at 667.[4]

It is well established that the Board judges the bar quality of collective-bargaining agreements based on the face of the agreement. *Jet-Pak Corp.*, 231 NLRB 552, 552–553 (1977). Under longstanding Board precedent, the facially invalid assessment requirement in the union-security provision here precludes this agreement from barring the petition.[5]

Accordingly, we affirm the Regional Director's Decision.

ORDER

The Regional Director's Decision and Direction of Election is affirmed. The case is remanded to the Regional Director for further appropriate action.

Dated, Washington, D.C. August 8, 2011

Wilma B. Liebman, Chairman

Brian E. Hayes, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER BECKER, dissenting.

Contrary to my colleagues, I find that the specific savings language in the otherwise faulty union-security provision is sufficient to remove this case from the scope of the holding in *Paragon Products Corp*., 134 NLRB 662 (1961), and, therefore, that the otherwise concededly valid collective-bargaining agreement is a bar to the decertification petition.

In the interest of balancing employees' right periodically to revisit their choice to be represented and stability in the collective-bargaining relationships between employers and employees' chosen representatives, the Board long ago established the "contract-bar doctrine." See, e.g., *Montgomery Ward & Co.,* 137 NLRB 346 (1962). Under the doctrine, a valid collective-bargaining agreement ordinarily is a bar to a representation election during the term of the agreement, but for no longer than

[2] In *Paragon Products*, the Board reaffirmed the policy underlying *Hickey*, and similar cases, of erring on the side of employee free choice when it appears that the asserted bar to that choice contains a union-security provision that would be found unlawful in an unfair labor practice proceeding: "[I]n the administration of the Act, we believe the Board should take cognizance of unlawful union-security provisions where the illegality is clear in the explicit terms of the contract. In treating with the legality of union-security provisions in representation proceedings, the Board is concerned only that as a matter of policy it should not permit contracts containing union-security clauses explicitly forbidden by statute to govern the time when employees may exercise their freedom of choice in a Board-conducted election." 134 NLRB at 665. In fact, to that extent, *Paragon Products* merely reaffirmed *Keystone Coat, Apron & Towel Supply Co.*, 121 NLRB 880 (1958), and the Board's policy carried forward from there. See *Pine Transportation, Inc.*, 197 NLRB 256 (1972) (applying *Paragon* and *Hickey*).

[3] *NLRB v. Local 32B–32J Service Employees International Union, AFL–CIO*, 353 F.3d 197, 202 (2d Cir. 2003), relied on by the dissent for legal principles, did not involve the application of the Board's contract-bar doctrine or the effect, if any, of a savings clause on an indisputably invalid union-security clause or any other type of clause. That case, rather, turned on the interpretation of the term "authorized" in a collective-bargaining agreement provision and whether the provision was a "hot cargo" clause in violation of the Act.

[4] The dissent argues that there is no reason to "stretch" the holding of *Paragon Products* to apply it here, observing that the parties have never enforced, or attempted to enforce, the assessments requirement. But as *Paragon Products* makes clear, it is the "existence of a clearly unlawful" provision that precludes a contract bar, and not "whether it has ever been or was ever intended to be enforced by the parties." 134 NLRB at 667. Further, to the extent the dissent argues that *Paragon Products* is inapplicable when "the contract also contains a provision that clearly defers the effectiveness of the unlawful clause," we observe that the Union does not argue here that the unlawful union-security clause contains such deferral language.

[5] The sole issue we decide today with respect to the so-called savings clause is whether it "saves" the agreement or otherwise "cures" the invalid assessment language, for the purpose of deciding whether the agreement can, under applicable Board precedent, bar the petition. Our determination that there is no contract bar does not address the validity of the agreement for other purposes, and thus, we do not prejudge the obligation of any party to honor all the terms of the agreement. See e.g., *The Kroger Co.,* 165 NLRB 872 (1967).

3 years. A petition for an election may be filed from 60 to 90 days before the expiration of the contract, a time period customarily referred to as the "open period," or after 3 years or expiration, whichever comes first. *Leonard Wholesale Meats*, 136 NLRB 1000 (1962).

In *Paragon Products Corp.,* 134 NLRB at 666, the Board announced an exception to the contract bar rule, stating

> [W]e now hold that only those contracts containing a union-security provision which is clearly unlawful on its face, or which has been found to be unlawful in an unfair labor practice proceeding, may not bar a representation petition. A clearly unlawful union-security provision for this purpose is one which by its express terms clearly and unequivocally goes beyond the limited form of union-security permitted by Section 8(a)(3) of the Act, and is therefore incapable of lawful interpretation.
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> Such unlawful provisions include…those which expressly require as a condition of continued employment the payment of sums of money other than "periodic dues and initiation fees uniformly required."

In my view, the policy underlying *Paragon* is obscure. Invalid union-security provisions cannot be enforced. Their mere maintenance is an unfair labor practice. The Petitioner, having identified the offending clause, is free to file a charge and seek a declaration that it is unlawful and an order that it not be enforced and that it be excised from the contract. That would be the appropriate course of action here and would fully effectuate the policies underlying Section 8(a)(3). The contract bar doctrine, on the other hand, serves purposes wholly unrelated to union-security clauses and their limitations. I see no reason why the law limiting union-security provisions should be enforced through an exception to the contract-bar doctrine that comprises policies underlying that wholly separate doctrine.[1] No other statutory proscriptions on parties' agreements are so enforced. Thus, I would not expansively construe *Paragon* and decline to do so in this case.

In the instant matter, on December 10, 2009, 7 months after the effective date of a new 3-year contract between the Employer and the Union, unit employee Adel Mansour filed a petition for a decertification election. Because the petition was filed well before the open period, the Union argued that the contract was a bar to an election. On January 12, 2010, the Regional Director issued his Decision and Direction of Election finding that the collective-bargaining agreement did not bar the election because it contained an illegal union-security provision. I respectfully disagree.

The 2009–2012 collective-bargaining agreement between the Employer and the Union contains the following union-security clause

> 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.)

The same language has appeared in successive agreements throughout the parties' 10-year collective-bargaining relationship.

The parties agree that, on its face, this provision runs afoul of the second proviso of Section 8(a)(3) of the Act by requiring the payment of something other than periodic dues and initiation fees as a condition of continued employment, i.e., by requiring the payment of assessments.[2] However, the Union expressly and correctly contends that the facial illegality of the last sentence of the provision, read in isolation, is cured by the opening phrase, "In the manner and to the extent permitted by law." In fact, the express savings language removes the clause from the scope of the *Paragon* exception to the contract bar rule, which applies only to a clause "clearly unlawful on its face," and does not apply when "the contract also contains a provision which clearly defers the effectiveness of the unlawful clause." 134 NLRB at 666, 667. Read as a whole, including the express savings

[1] Contrary to the majority's suggestion, this case has nothing to do with employee free choice. The long-settled and unquestioned contract-bar rule provides employees with an opportunity to choose whether to continue to be represented by filing a petition during the open period. The only question here is whether that settled doctrine should contain an exception intended to enforce Sec. 8(a)(3) when that section is fully and more appropriately enforceable through the filing of a charge under Sec. 10.

[2] Sec. 8(a)(3) provides, in pertinent part

> It shall be an unfair labor practice for an employer—
>
> by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: . . . *Provided further,* That no employer shall justify any discrimination against an employee for nonmembership in a labor organization . . . if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation feed uniformly required as a condition of acquiring or retaining membership.

clause, as it must be, the union-security provision simply is not "clearly unlawful on its face," and it is certainly not "incapable of a lawful interpretation." Id. at 666.

The one paragraph union-security provision begins with the stipulation, "[i]n the manner and to the extent permitted by law," and that qualifying language extends to everything within the provision that follows. While the later language in the provision, read in isolation, exceeds the parameters set by Section 8(a)(3) by specifying the payment of assessments in addition to dues, it does so only to the extent permitted by law, i.e., not at all. Because the Act does not permit the payment of assessments as a condition of continued employment, any such requirement is null and void and unenforceable under the terms of the provision itself. The rest of the union-security provision and the contract as a whole remain intact and fully enforceable, and thus the contract bars the instant petition under ordinary contract bar principles.

Moreover, according to the Union's uncontradicted proffer, only the payment of dues and initiation fees has been required as a condition of employment during the parties' decade old collective-bargaining relationship. That no unlawful demand that employees pay assessments as a condition of employment has ever been made is an indication that the parties have understood the savings clause, read in conjunction with the law, to excise the offending phrase. No employees have been coerced or otherwise adversely affected by the presence of the faulty provision in the contract. For this reason as well, there is no reason of policy to stretch the holding in *Paragon* to apply here.

It is an axiom of contract construction that agreements be interpreted, when possible, in a manner that renders them lawful. "The law is well settled that 'ambiguously worded contracts should not be interpreted to render them illegal and unenforceable where the wording lends itself to a logically acceptable construction that renders them legal and enforceable.'" *NLRB v. Service Employees Local 32B–32J* , 353 F.3d 197, 202 (2d Cir. 2003) (quoting *Walsh v. Schlecht*, 429 U.S. 401, 408 (1976)). Indeed, the courts of appeals have so instructed the Board. "[I]n interpreting the ambiguous term . . ., the Board should not have presumed to render the clause unlawful." Id. Yet that is exactly what the majority does here. In the matter now before us, the union-security provision is capable of a lawful interpretation, must be so interpreted, and is thus not "clearly unlawful on its face."

In view of the union-security provision's curative language and the fact that the parties have never enforced, nor attempted to enforce, the provision to require the payment of assessments as a condition of continued employment, I would find that the contract is valid and that it bars the petition for an election.[3]

Dated, Washington, D.C. August 8, 2011

Craig Becker, Member

NATIONAL LABOR RELATIONS BOARD

[3] Nothing in the Board's post-*Paragon* jurisprudence is inconsistent with this conclusion. In fact, dicta in the only post-*Paragon* case to address a savings clause, *Santa Fe Trail Transportation Co.,* 139 NLRB 1513 (1962), supports it. There, the Board held that a savings clause referring only to invalidity under state law did not permit a contract containing a clause otherwise invalid under federal law to function as a bar. But the Board expressly distinguished a hypothetical contract with "a savings clause of sufficient scope" like the one at issue here. Id. at 1515. *Hickey Cab Co.,* 88 NLRB 327 (1950), cited by the majority, is not to the contrary. It was decided prior to *Paragon*, which made clear that the bar is lifted "only when the law has clearly been ignored," i.e., when the clause "by its express terms clearly and unequivocally goes beyond the limited form of union security permitted by Sec. 8(a)(3), and is therefore incapable of lawful interpretation." Id. at 667, 666. Moreover, the savings clause in *Hickey* was a generally applicable contractual savings clause, not one located in and specifically applicable to the union-security provision as in this case.