

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 29

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QUALITY KING DISTRIBUTORS, INC.	:	
Employer	:	
(29-RD-071819)	:	
(29-RD-071777)	:	
and	:	Case Nos.
CLAUDIA SORTO	:	29-RD-071819
An Individual Petitioner	:	29-RD-071777
	:	29-RD-071754
	:	29-RD-071757
	:	29-RD-071824
and	:	
UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 348-S, CTW	:	
Intervenor	:	
and	:	
LOCAL 25, UNION DE TRABAJADORES DE QUALITY KING	:	
Intervenor	:	
PRO'S CHOICE BEAUTY CARE, INC.	:	
Employer	:	
(29-RD-071754)	:	
(29-RD-071757)	:	
and	:	
CLAUDIA SORTO	:	
An Individual Petitioner	:	
and	:	

UNITED FOOD AND COMMERCIAL WORKERS :
UNION, LOCAL 348-S, CTW :

Intervenor :

and :

LOCAL 25, UNION DE TRABAJADORES DE :
QUALITY KING :

Intervenor :

and :

PERFUMANIA HOLDINGS, INC. :

Employer :
(29-RD-071824) :

and :

CLAUDIA SORTO :

An Individual Petitioner :

and :

UNITED FOOD AND COMMERCIAL WORKERS :
UNION, LOCAL 348-S, CTW :

Intervenor :

and :

LOCAL 25, UNION DE TRABAJADORES DE :
QUALITY KING :

Intervenor :

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POST-HEARING BRIEF OF INTERVENOR
UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 348-S, CTW

PRELIMINARY STATEMENT ¹

Incumbent Union Intervenor United Food and Commercial Workers Union, Local 348-S, CTW (“Local 348-S”) represents Pro’s Choice Beauty Care, Inc.’s (“Employer” or “Pro’s Choice”) in two separate units, referred to as Pro’s Choice Warehouse and Pro’s Choice Re-pak. Local 348-S also represents Quality King Distributors, Inc. employees in two separate units, referred to herein as Quality King Warehouse and Quality King Re-pak. Claudia Sorto filed a decertification petition in these units on on January 4, 2012.² At the time that Sorto filed her petitions, and continuing to date, a valid contract existed in all units involved herein, which bar elections at this time.

During the January 4 hearing regarding the Pro’s Choice units, Petitioners advanced two arguments as to why the contracts do not bar an election: 1) the contracts do not exist and /or were not being enforced; and 2) that the contracts cannot bar an election because Local 348-S failed to ratify them. As to the first argument, there is ample record evidence that the contract is being enforced and that Local 348-S is actively involved in representing unit members. As to the second argument, the record reflects that the contracts were ratified by the membership. But in any event, the contracts do not require ratification. Therefore, the petitions must be dismissed.

¹We cite to the transcript in Pro’s Choice as “PC Tr. __”, in Quality King as “QK Tr. __”, and in Perfumania as PM Tr. __;” and to exhibits by transcript and party designation (“348-S”, “Employer”, Local 223) followed by “Ex. __”.

² Petitions filed by Local 223, Amalgamated Industrial Toys, Novelties and Productions Workers (“Local 223”)were withdrawn on January 13, 2012 . (1/13/12 Tr. at 9). A single decertification petition was filed by Sorto on December 16, 2011 (29-RD-070847), which was withdrawn and replaced by new decertification petitions at the opening of the consolidated hearing on January 4, 2012 for all units involved herein.

During the hearings on January 13 regarding the Quality King units, and that concerning the Perfumania unit, Petitioner Sorto advanced only the implausible argument that no contracts existed. Local 223 did not participate as it had withdrawn its petitions.

The contracts in the Pro's Choice Warehouse unit and the Quality King Warehouse unit are identical in all material respects. The contracts in the Pro's Choice Re-pak unit and the Quality King Re-pak unit are also identical in all material respects. The Perfumania contract differs from the other contracts.

Subsequent to the hearing in Pro's Choice closing on January 4, 2012, the parties learned that the Region was considering whether the contracts contained unlawful union security clauses.

In addition, on January 13, after the Pro's Choice hearings closed, Local 25, Union de Trabajadores de Quality King sought to intervene in these proceedings. We submit that Local 25's motion to intervene be denied on two grounds: 1) Local 25 is not a labor organization within the meaning of the Act, and 2) even assuming Local 25 is a labor organization, it sought to intervene after the close of the hearing, which under Board law is too late.

FACTS³

The parties stipulated as to the units involved in the petitions at issue in this hearing. In all cases the unit descriptions coincided with the contracts currently in effect in each unit. PC Tr. 15-17; PC Ex. 1 & 3; QK Tr. ____; Ex. XX; PM Tr. __; Ex. XX.

The Employers and Local 348-S are parties to five collective bargaining agreements that are at issue in this proceeding. Mark Garrett, COO of Pro's Choice and Quality King, negotiated and executed the contracts on behalf of the Employers, and John Fazio, Jr. then secretary-

³ The hearing officer informed the parties that the Region would take administrative notice of the transcript in the respective hearings this matter. QK Tr. 39; PM Tr. 7.

treasurer of Local 348-S executed the agreements on behalf of Local 348-S and was the lead negotiator. Perfumania was negotiated separately by John Fazio and Perfumania's chief officer.

On November 1, 2011, the International Union of the UFCW placed Local 348-S under Trusteeship. John Fazio was removed from office and was prohibited by the UFCW and by court order of the U.S. District Court for the Southern District of New York from conducting any business on behalf of Local 348-S. Local 348-S Ex. 1.

The Pro's Choice and Quality King Warehouse Contracts.

The CBAs for the warehouse units provide that the term of the agreement is August 3, 2010 through July 31, 2012. (Article 38 ER. Ex. 1 at 24). They state in their introductory paragraphs that the contracts were made and entered into on August 4, 2010. (ER. Ex.1 at 1). The contracts on their face do not require ratification. Article VII, the wage provision, provides that the Employer pay employees a \$500 signing bonus. Prior to executing the contract, the parties reached an MOA that contained the terms of the contract. Local 223 Ex. 1. One paragraph of the MOA made the Employer's obligation to pay the signing bonus contingent upon ratification. Following the implementation of the contracts, the Employer paid the employees the bonus. The employees received the bonus. The Employer also began paying to Local 348-S on behalf of the employees the new, increased rates for the health and welfare fund, as well as for the pension fund. The Employer also continues to check off dues from the employees' pay and forward them to the Union.

Pro's Choice and Quality King Re-pak Contract

The contract for the re-pak units provide that the term of the agreement is from May 9, 2011 through May 8, 2015. It states that it was made and entered into on May 16, 2011. It was

executed by Garrett and Fazio on June 15, 2011. The contract on its face does not require ratification.

The wage provision of the contract provides that the Employer pay employees a \$100 signing bonus. Following the implementation of the contract, the Employer paid the employees the bonus. Employees received the bonus. The Employer also began paying to Local 348-S on behalf of the employees the new rates for the health and welfare fund, as well as for the pension fund. The Employer also continues to check off dues from the employees pay and forward them to the union.

The Perfumania Contract

The Perfumania contract provides that the term of the agreement is from May 16, 2011 through April 30, 2015. PM 348-S Ex. 1. It states that it was made and entered into on May 16, 2011.

Employees received the wage increases that were called for in the agreement. The Employer paid the increased rates to the health and welfare fund and pension funds called for in the agreement. PM Tr. 15-16.

Union Representation

Ed Cordero is the field representative for all of the Quality King units involved herein. Jose Merced also serviced the shops before he resigned his position in mid- December 2011. Cordero testified that he organized an initial meeting for all employees and then also formed negotiating committees for the Pro's Choice warehouse unit, Quality King unit, and Perfumania unit. The committees met with him and other Union officials and attended negotiations. He also testified that he serviced all the units, and met with shop stewards, since the contract went

into effect. Regarding the Perfumania unit, since the new contract went into effect, Cordero filed grievances and the Union filed an unfair labor practice. PM Tr. at 16-17; PM Ex. 2.

Hearing Dates and Intervention:

The Hearing in Pro's Choice Beauty (warehouse and re-pak units) was held on January 4, 2012. The record was closed on January 4, 2012. On January 10, 2012, the Employer moved to reopen the record "for the limited purpose of accepting evidence... on an issue of contract bar" as concerned the re-pak unit. Bd. Ex. XX. On January 13, the Region granted the motion and reopened the record "for the limited purpose of allowing the Employer to make an offer of proof regarding the evidence it intends to submit with respect to this issue." 1/13/21 PC Tr. at p. 11, l. 12-14. The hearing officer rejected the offer of proof and the hearing was closed. The hearing was open for a total of 10 minutes. 1/13/12 PC Tr. at 1 & 10. Petitioner was not present during the hearing. Tr. at p. 5, l. 20-24. Local 25 de Trabajadores de Quality King ("Local 25") did not seek to intervene in the proceedings during the Pro's Choice hearing on January 4, 2012, nor was it present during the short time that the Pro's Choice hearing was reopened for a limited purpose on January 13, 2012. See 1/13/12 PC Tr. passim; QK Tr. at 10, l. 12-13 (Hearing Officer, "we've closed the record for Pro's Choice regular and Pro's Choice repack.")

Prior to January 13, the hearing officer instructed the parties that, in the January 13 hearings, he would proceed as follows: first address the Employer's motion to re-open the record in Pro's Choice, next hold a hearing in the Quality King Units (Warehouse and Re-pack), and last hold a hearing in Perfumania.

On January 13, the hearing officer opened the record in Quality King, which includes a warehouse and repak unit.⁴ At the outset of the hearing, Cesar Alarcon, asserting that he was President of Local 25, sought to intervene in all proceedings that involve Quality King employees. Tr. at 11 - 12. The Hearing Officer recessed to investigate the showing of interest and granted limited intervenor status to Local 25 with response to Quality King Distribution (warehouse), Perfumania, and Pro's Choice Beauty Care, Inc., both the warehouse and re-pak units. Tr. at 12. He did not grant intervenor status in the Quality King re-pack unit. His explanation for granting intervenor status in the Pro's Choice units, the hearing for which had closed, was that Local 25 was not presented with a notice of hearing in that matter. Tr. 12-13.

Local 25

According to its alleged "president" Cesar Alarcon, Local 25 was formed two hours before Alarcon appeared at the Quality King Distribution hearing on the afternoon of January 13, 2012. QK Tr. 17. Local 25 represents no employees other than those it purports to represent at the various Quality King companies. Local 25 has never negotiated on behalf of any employees with any employer and does not have collective bargaining agreements with any employer. QK Tr. 17. Local 25 has no constitution, bylaws, or officers other than Alarcon. The only evidence of employee participation was Alarcon's testimony that he held one election among employees, which was for the sole purpose of electing him president of Local 25. The election was held off-site, near the Bellport facility, QK Tr, at 24; no election was held at the Ronkonoma facility. QK Tr. at 24-25. Alacaron refused to state how many employees voted in the alleged election, QK Tr. at 19, and who those employees were. Alarcon claimed that employees from all units voted

⁴ The Transcript notes that the hearing opened at 12:06 pm, but we move to have the record corrected to reflect that the time had to be after 1:10 pm. Tr. 1.

in the election. Tr. at 23. However, all Quality King warehouse and all Quality King re-pack workers are located in Ronkonkoma; none work in Bellport. QK Tr. at 36. Alarcon failed to explain how, in the space of two hours, he was able to: drive from Brooklyn to Bellport; make arrangements for employees from the various Bellport units to be released by the Employer to attend an off-site election; arrange for the release of Quality King warehouse and Quality King re-pak employees from work and arrange their transportation from Ronkonoma to Bellport; hold an election for union office; and drive back to Brooklyn.

There is no evidence that workers employed by Quality King companies decided to band together in order to participate in these proceedings (or for any other Section 7 purpose). There is no evidence that employees designated Local 25 as their representative for any purpose. The only evidence of employee involvement is Individual Petitioner Claudia Sorto's filing of her petition. Even if Alarcon's testimony is to be credited, the election he described was not for the purpose of employees voting whether they would act together with regard to their employer; nor was it for the purpose of designating Local 25 to represent them; that election was held by Alarcon- not the workers themselves - for the sole purpose of electing him president of his purported "Local 25".

Finally, there is no record evidence that Local 25 has engaged in any activities of a labor organization, i.e., it held no meetings among employees, had no grievance meetings with any employer, held no negotiations. QK Tr. at 15-28. Indeed, Alarcon admitted that, apart from the officer election, there has been no employee participation in Local 25. Employee participation is purely hypothetical; it is only as Alarcon's claimed "intention" to have such activity at an unspecified time in the future. QK Tr. at 27-28.

ARGUMENT

I. **The Contracts Bar an Election in all Units; all Petitions Should be Dismissed.**

A. The contracts were in effect prior to the filing of the petitions and are being enforced.

All contracts involved herein were executed by both parties prior to the date the petitions were first filed in mid December 2011. Garrett testified that he executed the Pro's Choice and Quality King warehouse contracts in August 2010. The contracts in the Re-pak units have signature dates of June 15, 2011. Similarly, the Perfumania contract was executed on June 27, 2011. The fact that Fazio was removed from office on November 1, 2011 establishes that he signed all contracts prior to that date.

In addition, contrary to Petitioner's argument, there is ample record evidence that all contract are in effect. The Employer is actively complying with all new requirements in the agreements and Local 348-S is enforcing the contracts and servicing the shops.

B. The Pro's Choice and Quality King warehouse contracts did not Require Ratification.

Under Board law, an existing bargaining contract is a bar to an election unless (1) the existing bargaining contract contains an *express* term within it stating that prior ratification is a condition precedent to the contract's validity and (2) that contract has not been ratified prior to the filing of the challenging decertification petition. Appalachian Shale Products Co., 121 NLRB 1160, 1162 (1958). The Board will not consider parol or other extrinsic evidence when determining whether an existing bargaining contract expressly requires prior ratification as a condition precedent to contractual validity. Merico, Inc. 207 NLRB 101, 101 (1973).

At the Pro's Choice hearing the Petitioner argued that the warehouse contract required ratification and that none occurred. However, neither the Pro's Choice nor the Quality King contracts require ratification on their face. Moreover, Garrett so testified. PC Tr. at 110-113.

The MOA made only the bonus payment contingent upon ratification. Under Appalachian Shale Products, such a requirement does not render the entire contract subject to ratification.

Moreover, the record evidence amply supports that a ratification vote occurred. Petitioners presented no argument that ratification was required in the other units.

C. The Union-Security Clause is Not Applied Retroactively and is Lawful on its Face.

A contract containing a union-security clause which does not afford new employees or incumbent non-members the statutory 30-day grace period to become members set forth in Section 8(a)(3) of the Act is unlawful. See 29 U.S.C. § 158; Paragon Prod. Corp., 134 NLRB 662, 666 (1961). Contracts that show on their face that they are applied retroactively may run afoul of the statutory requirement if the union-security clauses are applied retroactively from their effective dates and cease to provide the statutory grace period. Standard Molding Corp., 137 NLRB 1515 (1962). However, a contract is not retroactively effective when it explicitly states that it becomes effective on a certain date even if the contract shows on its face that it was signed subsequent to the effective date. Four Seasons Solar Prod. Corp., 332 NLRB 67 (2000); Federal-Mogul Corp., 176 NLRB 619 (1969).

The contracts involved herein all involve union security clauses that give employees the statutory period to join Local 348-S. Thus, in the Pro's Choice and Quality King warehouse units, the union security clause provides employees with 31 days from the date of hire to become and remain members in good standing. See Article II. As the contract was made and entered into one day after its effective date, employees are granted the statutory period.

Similarly, the Perfumania union security clause provides employees with 31 days from the date of hire to become and remain members in good standing. See Article II. As the contract was made and entered into on the same date that it was effective, employees have the full

statutory period within which to join the Union. Any argument that the signature date, which follows the effective date by one month, causes the contract to be retroactive must be rejected. Parties to agreements routinely execute contracts after the date on which they reached agreement. The Board has long held that the effective date of an agreement is governed by its express statement not its signature date. See e.g., Superior Laundry Service LLC, 29-RC-12093 (November 9, 2011) citing Four Seasons Solar Prod. Corp., 332 NLRB 67 (2000).

In both the Pro's Choice and Quality King re-pak units, the contract also contains a union security clause that provide employees with 31 days from date of hire to join the Union. While the contract was entered into seven days after its effective date, there is no clear language in the agreement that it is to be applied retroactively. We join in the Employer's proffer of evidence that the clause was not enforced nor did it affect any employees and ask the Region to consider said evidence. In such circumstances, the contract should maintain its bar quality.

II. Local 25 is not a Labor Organization and not Entitled to Intervene

A. Local 25 is not a labor organization

Under Board law, a labor organization must meet two requirements: it must be an organization in which employees participate, and it must exist for the purpose of dealing with employers concerning terms and conditions of employment. Alto Plastics Mfg. Corp., 136 NLRB 850, 851-852 (1962). Local 25 does not meet these requirements.

The record evidence shows that Local 25 is a creation of Alcaron himself, not a creation of Quality King employees coming together to engage in Section 7 concerted activity. At the time Local 223 withdrew its petitions on January 13, Alcaron was the Local 223 organizer assigned to the Quality King units. He was present throughout the first day of hearing, January

4, and was present in the hearing room on January 13 as a Local 223 representative. Alarcon testified that, between the time Local 223 announced its intention to withdraw its petitions and the reopened hearing in Pro's Choice closed, he resigned his job at Local 223 and travelled from Brooklyn to Bellport for the purpose of holding an election designating himself Local 25 president.

Throughout his testimony on intervention, Alarcon repeatedly referred to himself, not the employees of the Quality King companies, as constituting Local 25. ("...as a 1 percent Intervenor, I would [] have the ability to be on the ballot". QK Tr. at 9; "I meet the criteria of a labor organization". QK Tr. at 18; "That has nothing to do with me being a labor organization". QK Tr. at 19; "I'm a labor organization". QK Tr. at 25).

Second, there is no record evidence that Local 25 is an organization in which employees participate, as required by the Act's definition. The only evidence of employee involvement was Alarcon's testimony that he held an election among a group of workers near the Bellport facility for the purpose of electing himself president of Local 25. QK Tr. at 28. Alarcon's claim that employees from the Quality King repak unit and the Quality King warehouse unit voted in that election is not credible. Those employees work in Ronkonkoma. It would not be humanly possible, in the two hours before the Quality King hearing, for Alarcon to travel from Brooklyn to Ronkonoma, to persuade the employer to release Quality King warehouse and re-pak employees from work, for those employees to travel to from Ronkonoma to Bellport, for an election to be held, and for Alarcon to travel back to Brooklyn. Simply put, Alarcon could not have sought participation in the election from the two units in Ronkonkoma. This is supported by the fact that Alarcon failed to produce at the hearing in the Quality King repak unit a showing sufficient to permit even limited intervenor status, i.e., a single signature. Moreover, the record

reflects that Alarcon's showing in the January 13 hearing consisted of signatures on a piece of paper, not authorization cards.

There is no credible evidence that employees had authorized Alarcon as Local 25 to represent them. On the contrary, since Alarcon had been the organizer of Local 223 up until two hours earlier, it is likely that employees still viewed him in that capacity. The record demonstrates that Local 25 is a creation of Alarcon and not of the workers. Alarcon was unable to testify as to any aspect of the organization. He could not identify even one specific instance of his "labor organization" performing any task on behalf of or in the interest of the workers; the only activity was an election to elect himself as president of his Local 25. QK Tr. at 19-20, 28. Moreover, all of Alarcon's testimony regarding the purpose of the organization reflected his - not the workers' - goals for the future. Further, there is no evidence that employees shared Alarcon's goals.

We have located no cases that find labor organization status under such circumstances. While there is no requirement that an organization exist for a specific period of time before it can qualify as a labor organization, in all cases - unlike here- there is an indication that a period of time passed during which employees participated and planned their activities. See e.g., Armco, Inc., 271 NLRB 350, 350 (1984) (employees met, resolved to form organization to act as representative regarding terms and conditions of employment, selected a name, continued to organize, employees aware that head of organizing drive planned to seek recognition); Edward A. Utlaut Memorial Hospital, 249 NLRB 1153, 1159-1160 (1980) (25 employees participated in election of representatives, elected three representatives to present grievances); M. K. Morse Co., 302 NLRB 924, 927 (1991) (organization formed to represent employees in bargaining, published numerous pamphlets regarding terms and conditions of employment, regularly

distributed pamphlets to employees, held well-attended employee meetings, sent out notices regarding selection of officers, elected officers); Betances Health Unit, 283 NLRB 369, 374 (1987) (evidence that employees participated in the organization, issued two sets of demands to employer); St. Anthony's Hosp., 292 NLRB 1304, 1305 (1989) (employee committee that discussed various subjects with management regarding working conditions found to be a labor organization); Sahara Datsun, Inc. v. NLRB, 811 F.2d 1317, 1320 (9th Cir. 1987) (Regional Director found that entity was labor organization, where it had been in existence for approximately 2 years, was established by several individuals, held three or four meetings between 1982 and 1984, existed in part to deal with grievances and working conditions); Bridgeport Fittings, Inc. v. NLRB, 877 F.2d 180, 189 (2d Cir. 1989) (employees participated in organization, held meetings for employees and collected voluntary contributions, made requests to employer to bargain, consistently appeared in its own name during representation proceeding).

Here, in contrast, there is no evidence that Local 25 is an organization in which employees knowingly participated in during the 2 hours of its existence. For all these reasons, Local 25 is not a labor organization under the Act.

B. Alarcon is not Entitled to Intervenor Status in the Pro's Choice Warehouse Unit, Pro's Choice Repak Unit, or the Quality King Repak Unit.

The showing of interest must date before the close of hearing; the showing of interest may not postdate the close of the hearing. Dart Container Corp., 294 NLRB 798, 799 at n. 4 (1989); Gary Steel Products Corp., 127 NLRB 1170, 1173 at n. 3 (1960) (organization must "show a representative interest in the employees involved as of the time of the hearing") (*citing* Transcontinental Bus System, Inc., 119 NLRB 1840 at n. 3); Virginia-Carolina Chemical Corp.,

101 NLRB 1336, 1341 at n. 1 (1952). Compare with Sunnyvale Medical Clinic, Inc., 241 NLRB 1156, 1158 at n. 4 (1979) (showing of interest must predate approval of the election agreement). An organization may only intervene in a representation proceeding after the close of the hearing if that organization can show that it had a representative interest at the time of the hearing. United Boat Service Corp., 55 NLRB 671, 675-676 (1944).

Alarcon's organization must not be allowed to be an Intervenor in the Pro's Choice Warehouse Unit, Pro's Choice Repak Unit, or the Quality King Repak Unit because his showing of interest post dates the close of those hearings. The failure of Alarcon's alleged labor organization to remit the showing of interest prior to the close of hearing denies it the opportunity to intervene or to be placed on the ballot. Union College, 247 NLRB 531, 531 at n. 1 (1980).

CONCLUSION

For the foregoing reasons, principles of contract bar preclude elections in the matters involved herein. Therefore, the petitions should be dismissed. Should the Regional Director direct elections in any unit, Local 25 should be denied intervenor status both on the grounds that it is not a labor organization and that it did not present timely showings of interest.

Dated: New York, New York
January 27, 2012

Respectfully submitted,

By: s/ Jessica D. Ochs

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CERTIFICATE OF SERVICE

I hereby certify that I caused the foregoing Post-Hearing Brief of Local 348-S UFCW, CTW to be filed electronically via the NLRB's e-filing system. I further certify that I caused copies of the Post Hearing Brief to be served by e-mail upon:

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and a copy to be served via UPS Next Day Air upon:

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January 27, 2012

s/ Jessica D. Ochs _____
Jessica Drangel Ochs