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

SUGAR HOUSE HSP GAMING LP[1] Employer and MICHAEL FOSBENNER Petitioner and MRC OF CARPENTERS SOUTHEASTERN PENNSYLVANIA, STATE OF DELAWARE AND EASTERN SHORE OF MARYLAND[2] Union Involved	Case 04-RD-082208

REGIONAL DIRECTOR'S DECISION AND ORDER

The Employer operates the Sugar House casino in Philadelphia, Pennsylvania. The Union Involved was certified in December 2010 to represent a unit of the Employer's warehouse employees, and the Petitioner seeks to decertify the Union Involved[3] as this unit's representative. The Union and the Employer both contend that the petition should be dismissed because prior to the filing of the petition: (1) they entered into a contract which serves as a bar to an election; and (2) the warehouse unit was merged into a larger unit which also includes the Employer's maintenance employees.

A Hearing Officer of the Board held a hearing, and the Union filed a brief. I have considered the evidence and the arguments presented by the parties, and, as discussed below, I have concluded that a contract bars the petition. I have further concluded that the warehouse unit was merged into a larger unit prior to the filing of the petition and that the petition therefore seeks an election in a unit that is not coextensive with the currently recognized unit. Accordingly, I shall dismiss the petition.

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[1] The Employer's name appears as amended at the hearing.
[2] The Union Involved's name appears as amended at the hearing.
[3] For convenience, this Decision will hereinafter refer to the Union Involved as "the Union."

This Decision shall first set forth the factors relevant to determining whether there is a contract bar and/or a merger. Then it will present the relevant facts and analysis supporting the conclusion that the petition should be dismissed.

I. RELEVANT FACTORS

A. Contract Bar

The purpose of the Board's contract bar doctrine is to achieve, "a finer balance between the statutory policies of stability in labor relations and the exercise of free choice in the selection or change of bargaining representatives." *Appalachian Shale Products Co.*, 121 NLRB 1160, 1161 (1958); see also *Deluxe Metal Furniture Co.*, 121 NLRB 995, 997 (1958). Pursuant to this policy, a contract for a reasonable term not in excess of three years will bar a representation petition for the duration of the agreement except for an "open period" from 60 days through 90 days before the termination date of the agreement, during which a petition may be filed. *Shen-Valley Meat Packers, Inc.*, 261 NLRB 958, 959–960 (1982); *General Cable Corp.*, 139 NLRB 1123, 1125 (1962). To constitute a bar, a contract must be in writing, must be signed by all parties prior to the filing of a petition, and must contain substantial terms and conditions of employment. *Appalachian Shale Products*, above at 1162-1163; see also *Television Station WVTV*, 250 NLRB 198, 199 (1980). The document signed need not, however, be a formal collective-bargaining agreement, and the parties' signatures do not have to appear on the same document. Recognizing that parties do not always sign formal contracts upon successful completion of negotiations, the Board has permitted informal documents to serve as a bar so long as they set out substantial terms of employment and are signed. *Georgia Purchasing, Inc.*, 230 NLRB 1174 (1977). But, parties must at a minimum signify their agreement by attaching their signatures to documents which tie together their negotiations by either spelling out the contract's specific terms or referencing documents which do so. *Waste Management of Maryland, Inc.*, 338 NLRB 1002, 1003 (2003). Further, the Board limits its inquiry to the four corners of the documents alleged to bar an election and will not permit extrinsic evidence to supply terms which the parties have neglected to reduce to writing. Ibid. The burden of proving that a contract is a bar falls on the party asserting that it has that effect. See *Road & Rail Services, Inc.*, 344 NLRB 388, 389 (2005); *Roosevelt Memorial Park, Inc.*, 187 NLRB 517 (1970).

B. Merger

An employer and a union can agree to merge separately certified or recognized bargaining units into a single overall unit. *Wisconsin Bell, Inc.*, 283 NLRB 1165, 1166 (1987); *Gibbs & Cox, Inc.*, 280 NLRB 953, 954 (1986), petition for review dismissed as moot, 904 F.2d 214 (4th Cir. 1990). In determining whether a merger has occurred, the Board considers the language of the parties' agreement, their course of conduct, and any history of bargaining. *Raley's*, 348 NLRB 382, 554-555 (2006); *Albertson's, Inc.*, 307 NLRB 338 (1992); *Wisconsin Bell*, above. The appropriate unit in a decertification election must be coextensive with the certified or recognized unit, and the Board will dismiss a petition seeking to decertify a unit

where it finds the unit has been merged into a larger group. *Albertson's, Inc.*, above at 339; *General Electric Co.*, 180 NLRB 1094, 1095 (1970).

II. FACTS

On December 3, 2010, the Union was certified as the representative for a three-person unit of warehouse employees working in the casino. Bargaining for a contract covering employees in this unit began in January 2011 and continued through 10 sessions until September 2011. The parties did not reach agreement. During the period of bargaining, representatives of the Union told warehouse employees that it would be difficult to secure a contract unless maintenance employees were added to the unit.

The Union was certified as the representative for a 15-person unit of maintenance employees on November 9, 2011. During a bargaining session on December 17, the parties discussed a single agreement which would cover both the warehouse and maintenance workers. At a negotiation session held on February 15, 2012, they formally agreed to combine the two units.

On March 20, 2012, the Union submitted an Employer contract proposal to employees for a ratification vote. The proposal, a copy of which was given to employees prior to the vote, expressly states that the "warehouse classification ... [will be] rolled into maintenance bargaining unit." Both warehouse and maintenance employees participated in the vote, which resulted in a rejection of the proposal. Notably, the Petitioner was present, and he conceded at the hearing that he was aware of the effort to combine the units.

Bargaining continued after March 20 and ultimately produced another Employer offer, which the Union agreed to take to a second ratification vote. The vote was scheduled for May 31. At 1:26 p.m. on May 30, Union Director of Organizing Robert Naughton sent an e-mail to Employer General Manager Wendy Hamilton. Attached to Naughton's e-mail was the Employer's final offer, a three-page document setting out in some detail the terms on which the Employer was prepared to agree. This document included provisions concerning wages, benefits, and layoffs, among others. Naughton's e-mail stated:

> "Wendy,
>
> Here are the documents we are going to show the men tomorrow.
> Please let me know if there are any discrepancies.
>
> Thank you,
> Rob."

Hamilton responded with the following e-mail sent at 3:08 p.m. that day:

> "Ed[4] & Rob:

[4] "Ed" is Union official Ed Coryell.

- You've stated the contract dates as retro to Sept 1. I disagree but I'll let it go.
- I'm fine on the wording of the two hours meeting pay.
- I'm fine on the wage exhibit, but want to point out that we will never refer to it as a 'bonus', nor will that exhibit ever appear in the contract, but fine to use for your meeting tomorrow. You might want to add "$1700" in the E4 row which is now blank.
- I cannot agree to the last bullet you added re: bonuses, stipends and awards – too generic. I cannot know what the future holds. We will always do the right thing – they are our employees and interact with our customers.

If we are finished, I will agree to Art Ferber as E4. Let me know."

Naughton replied at 3:52 p.m. as follows:

"Wendy,

I have removed the last bullet. Ed said that if we have your word that is good enough for him. I have also changed the word bonus to one-time payment and added the $1700 to the E4 row.

Thank you,
Rob"

Hamilton responded with this 4:42 p.m. e-mail:

"Excellent. You are set for the 8th floor conference room at 1080 N Delaware Avenue. Remember, use south elevator, this requires no access code. Coffee, OJ, doughnuts will be waiting for you. I am confident we are there! Only question is whether it takes a full hour, or you sell it in 15 minutes! Let me know how it goes. W."

Unit employees voted to accept the Employer's offer on May 31. Both warehouse and maintenance employees participated in the vote, at which the Petitioner was present.

The petition in this case was filed on June 1. On June 8, the parties executed a formal collective-bargaining agreement.

III. ANALYSIS

A. Contract Bar

Although the parties did not execute the formal collective-bargaining agreement prior to the filing of the petition, they had exchanged emails which reflected an agreement on the contract's terms. The facts here closely resemble the situation which confronted the Board in

Georgia Purchasing, Inc., 230 NLRB 1174 (1977). In that case, the union sent a telegram on January 14, 1977, detailing the terms of an agreement reached by the parties on the preceding day. The Employer responded with a telegram on January 17 confirming that the parties had reached agreement on the terms set forth in the union's telegram. The Board held that this exchange of telegrams substantially described the terms of the parties' agreement and was a sufficient written contract to serve as a bar to the processing of a subsequently filed decertification petition.

The May 30 exchange of e-mails in this case is similar to that exchange of telegrams. Union representative Naughton began the exchange by forwarding to the Employer a document detailing the terms on which he believed the parties had reached agreement. Naughton asked the Employer to confirm that the document accurately reflected the terms of the parties' contract and indicated that he intended to use the document on the following day to describe the contract to employees for purposes of conducting a ratification vote. Employer General Manager Hamilton responded by expressing minor disagreements about a few of the terms. Naughton agreed to make the changes suggested by Hamilton, and the exchange ended with Hamilton acknowledging that Naughton's documents accurately reflected the parties' agreement; as Hamilton put it, the parties were "there." The employees ratified the agreement on the following day. Based on *Georgia Purchasing*, I find that the e-mails exchanged by Naughton and Hamilton sufficiently describe the terms of the parties' contract to constitute the sort of written agreement which can serve as a contract bar.

The only remaining question is whether the e-mails are "signed" as required by the Board's contract-bar rules. In this connection, none of the e-mails contain a facsimile of a handwritten signature. Naughton typed his name at the bottom of both of the e-mails that he sent Hamilton in the course of confirming the parties' agreement. Hamilton typed her name at the bottom of her first email and placed her first initial, "W," at the end of the final e-mail. The fact that Hamilton used her first initial, rather than her full name, to signify assent is not a problem since the Board has accepted handwritten initials as the equivalent of a signature for contract-bar purposes. As the Board has explained, initials identify the parties and signify in writing an intent to be bound and therefore constitute a sufficient signature for contract-bar purposes. *Television Station WVTV,* 250 NLRB 198, 199 (1980). The question is whether the typewritten insertion of a party's name or initial at the conclusion of an e-mail, in lieu of a signature, should be deemed to serve the same purpose.

Although the Board does not appear to have expressly considered this issue, the insertion of a party's name at the end of an e-mail seems to serve the same purpose as a handwritten signature on a written document. The use of the name both identifies the party and indicates that the party is accepting responsibility for the content of the e-mail; the use of typed block lettering rather than a cursive signature facsimile has little significance as it is essentially dictated by the medium.

A number of Federal Courts have considered the issue and have agreed with this assessment. State Statutes of Frauds typically require that certain types of contracts will be enforceable only if they are reflected in signed writings, and several Federal Courts have been obliged to decide whether a typed name at the conclusion of an e-mail can serve as a signature

for Statute of Frauds purposes. They have found that the typed name was sufficient for this purpose. *Copeland Corp. v. Choice Fabricators, Inc.*, 345 Fed.Appx. 74, 77 (6th Cir. 2009); *Lamle v. Mattel, Inc.*, 394 F.3d 1355, 1362 (Fed.Cir. 2005); *Cloud Corp. v. Hasbro, Inc.*, 314 F.3d 289, 296 (7th Cir. 2002);[5] *International Casings Group, Inc. v. Premium Standard Farms, Inc.*, 358 F.Supp. 2d 863, 873 (W.D. Mo. 2005); *Roger Edwards LLC v. Fiddes & Son Ltd.*, 245 F.Supp. 2d 251, 261 (D.Me. 2003). I believe the same result is warranted under Board law and that the typed names on the e-mails in this case are sufficient to satisfy the signature requirement imposed by the Board's contract-bar rule. Therefore, I conclude that the exchange of e-mails here constituted a written agreement sufficient to bar processing of the subsequently filed petition.

B. Merger

Even if there were no contract bar, I would dismiss the petition because it does not seek an election in the currently-recognized unit. In February 2012, the Employer and the Union agreed to merge the warehouse unit, in which the Petitioner seeks an election, with the maintenance employees unit. Once a merger has occurred, any election normally must take place in the merged unit rather than either of the original units. *Albertson's, Inc.*, 307 NLRB 338 (1992); *Wisconsin Bell, Inc.*, 283 NLRB 1165 (1987).

The Board made an exception to this general rule where the petition was filed shortly after a merger and the unit in which decertification was sought had an independent existence for an extended period. *West Lawrence Care Center, Inc.*, 305 NLRB 212 (1991). But, this exception is clearly inapplicable here. The warehouse unit in which decertification is sought was certified in December 2010, existed independently for only 14 months before being merged, and has never even been covered by a separate contract. In these circumstances, I find that it would be inappropriate to order an election in a unit other than the unit currently recognized by the parties and would dismiss the petition on this basis.[6]

IV. CONCLUSIONS AND FINDINGS

Based upon the entire record in this matter and for the reasons set forth above, I conclude and find as follows:

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[5] In that case, the Court noted, inter alia, "It is not customary, though it is possible, to include an electronic copy of a handwritten signature in an e-mail."

[6] The Union also contends that even if no merger took place before the petition was filed, the Petitioner should be precluded from seeking decertification, based on the laches doctrine, since he knew a merger was imminent and should have filed the petition before the merger occurred, rather than waiting until after the contract was ratified. If required to consider the matter, I would reject the Union's argument. In *West Lawrence Care Center,* supra, the Board ordered a decertification election in the originally recognized unit even though that unit had merged into a larger unit and employees were aware of the merger for a number of months before filing their petition. Applying the same logic here, I would find that the Petitioner is not precluded from seeking decertification because he waited to file the petition until after the merger.

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

2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.

3. The Union Involved is a labor organization that claims to represent certain employees of the Employer.

4. No question affecting 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.

V. ORDER

IT IS HEREBY ORDERED that the petition be, and it hereby is, dismissed.

VI. 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, NW, Washington, D.C. 20570-0001. Upon the filing of such request for review, the filing party shall serve a copy of the request on the other parties and shall file a copy with the Regional Director either by mail or by electronic filing to Region4@nlrb.gov.[7] A request for review may also be submitted by e-mail. For details on how to file a request for review by e-mail, see http://gpea.NLRB.gov/. The request for review must be received by the Board in Washington by 5:00 p.m., EST on **July 10, 2012.**

Signed: June 25, 2012

at Philadelphia, Pennsylvania

Dorothy L. Moore-Duncan

DOROTHY L. MOORE-DUNCAN
Regional Director, Region Four
National Labor Relations Board

[7] See OM 05-30, dated January 12, 2005, for a detailed explanation of requirements which must be met when electronically submitting representation case documents to the Board or to a Regional Office's electronic mailbox. OM 05-30 is available on the Agency's website at www.nlrb.gov.