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

MICHIGAN EDUCATIONAL TRANSPORTATION SERVICES, INC.

Employer

and **Case 07-RC-086673**

MICHIGAN EDUCATION ASSOCIATION/NATIONAL EDUCATION ASSOCIATION (MEA/NEA)

Petitioner

and

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 324 (IUOE), AFL-CIO

Incumbent Union

APPEARANCES:
William M. Thacker, Attorney, of Ann Arbor, MI, for the Employer
Amy Bachelder, Attorney, of Detroit, MI, for the Incumbent Union
James J. Chiodini, Attorney, of Okemos, MI, for the Petitioner

DECISION AND ORDER

The Employer provides private transportation services to approximately 60 school districts in the State of Michigan. In about September 2011, Plymouth-Canton Community schools ("PCCS") subcontracted its transportation services to the Employer. Petitioner seeks to represent approximately 140-150 employees in the following bargaining unit ("Unit"), which the parties stipulate is appropriate:

> All full-time and regular part-time bus drivers, substitute bus driver, and monitors employed by the Employer at or out of a facility located at 1024 South Mill Street, Plymouth, Michigan, but excluding mechanics, security officers, secretarial staff, garage personnel, office clerical employees, and guards and supervisors as defined in the Act.

The Incumbent Union represented a unit of employees at PCCS since at least the 1990s, which included the same classifications as in the Unit sought by Petitioner but was broader, as it included classifications not subcontracted out to the Employer. The last collective bargaining

agreement between the Incumbent Union and PCCS was in effect from July 1, 2007, through August 13, 2010, and was extended one year. When the Employer took over as the provider of PCCS's transportation services, it hired the majority of its employees from among the PCCS employees represented by the Incumbent Union.

On September 28, 2011, the Incumbent Union filed an unfair labor practice charge in Case 07-CA-065711, alleging that the Employer was a successor within the meaning of ***NLRB v. Burns International Security Services, Inc.***, 406 U.S. 272 (1972). Subsequently, the Employer and Incumbent Union entered into a pre-Complaint informal Board settlement agreement which the then-Regional Director approved on December 12, 2011. The Employer agreed, inter alia, to recognize and bargain with the Incumbent Union as the exclusive collective bargaining representative of the Unit at issue herein, and post notices to employees.

On February 2, 2012,[1] the Employer and the Incumbent Union held their first bargaining session. On February 6, Petitioner filed a petition in Case 07-RC-073910 seeking to represent the Unit. On February 14, the Acting Regional Director dismissed the petition because the period for posting notices to employees pursuant to the settlement in Case 07-CA-065711 had not expired, and because, pursuant to longstanding Board law, a reasonable period must be afforded to parties to allow for negotiating a collective bargaining agreement following a settlement agreement that requires bargaining.

On June 19, Petitioner filed a second petition seeking to represent the Unit in Case 07-RC-083386. After issuing an Order to Show Cause as to why the petition should not be dismissed, the undersigned dismissed the petition on July 18, as a reasonable period of time had not passed since the Employer and Incumbent Union began bargaining on February 2.

The instant petition was filed on August 6.

The Incumbent Union and the Employer contend that processing of the petition is barred under the contract bar doctrine set forth in ***Appalachian Shale Products Co.***, 121 NLRB 1160 (1958), as well as barred by the recognition bar articulated in ***Lamons Gasket Co.***, 357 NLRB No. 72 (2011), and the successorship bar set forth in UGL-***UNNICO Service Co.***, 357 NLRB No. 76 (2011). The Incumbent Union and the Employer also raise the additional contention that processing of the petition is barred by the settlement bar set forth in ***Poole Foundry & Machine Co.***, 95 NLRB 34 (1951), enfd. 192 F.2d 740 (4th Cir. 1951), cert. denied 342 U.S. 954 (1952).

Petitioner contends that its petition was timely filed, and that there are no bars to an election.

As discussed below, based on the record and relevant Board law, I reject the Incumbent Union and Employer's contentions that the petition is barred from processing under the contract bar doctrine. In addition, based on the record herein, I find that the recognition bar is inapplicable. However, I find that a reasonable time for bargaining has not passed under the successorship bar and settlement bar.

[1] All dates refer to 2012 unless otherwise stated.

Board Law

Contract Bar

When a petition is filed for a representation election among a group of employees who are covered by a collective-bargaining agreement, the Board must decide whether the asserted contract exists in fact and whether it conforms to certain requirements. If the Board finds that the contract does exist and that the requirements are met, the contract is held a bar to an election. ***Hexton Furniture Co.***, 111 NLRB 342, 344 (1955). The required elements are set forth in ***Appalachian Shale Products***, supra. In order to meet the threshold inquiry of the contract bar doctrine, the agreement must be written, signed before a petition is filed, contain substantial terms and conditions of employment, encompass the employees involved in the petition, and cover an appropriate unit. Id. at 1161-1162; ***Seton Medical Center***, 317 NLRB 87, 87 (1995). The burden of proving that a contract is a bar is on the party asserting the doctrine. ***Roosevelt Memorial Park***, 187 NLRB 517, 517 (1970).

For a contract to be a bar to processing a petition, there is no requirement that the contract be a formal final document. A group of informal documents can constitute a contract provided that they lay out substantial terms and conditions of employment and that they are signed. ***Waste Management of Maryland***, 338 NLRB 1002, 1002-03 (2003), and cases cited therein.

The Board consistently has limited its inquiry into whether a putative contract bars a question concerning representation to the four corners of the document or documents alleged to bar an election and has excluded the consideration of extrinsic evidence. See ***Waste Management of Maryland***, supra at 1003 (limiting inquiry into whether contract required ratification for contract-bar purposes to the face of the documents and excluding parole evidence); ***Union Fish Co.***, 156 NLRB 187, 191-192 (1965). ("[T]he Board requires that the term, as well as the adequacy of a contract, must be sufficient on its face, with no resort to parol[e] evidence necessary, before the contract can serve as a bar.")

When ratification is a condition precedent to contractual validity by *express* contractual provision, the contract is ineffectual as a bar unless it is ratified prior to the filing of a petition. ***Appalachian Shale Products***, supra at 1162. See also ***American Broadcasting Co.,*** 114 NLRB 7, 8 (1956); and ***Kennebec Mills Corp.,*** 115 NLRB 1483, 1184 (1956).

Recognition, Successorship, and Settlement Bars

The Board has recognized circumstances in which a petition is barred for a reasonable period of time in order to allow the parties to have the opportunity to negotiate a collective bargaining agreement. In ***Lamons Gasket Co.***, supra, the Board held that an employer's recognition of a union bars the processing of an election petition for a reasonable period of time. Similarly, when a successor employer recognizes an incumbent union as the collective bargaining representative of its employees pursuant to its legal obligation, the union is entitled to represent the employees for a reasonable period of time without challenge to its representative status. ***UGL-UNNICO Service Co.***, supra.

In addition, following a settlement agreement containing a provision requiring bargaining, the Board has long held that a reasonable period of time must be afforded the parties in which to reach a contract. ***Poole Foundry & Machine Co.***, supra. The Board has required that no question concerning representation may be raised while the effects of the employer's unfair labor practices are being remedied by the employer's compliance with the terms of a settlement agreement. ***Lee Lumber & Building Material Corp.***, 334 NLRB 399, 402 (2001), enfd. 310 F.3d 209 (D.C.Cir. 2002). In the recognition, successorship, and settlement contexts, the Board has defined a reasonable period of time for bargaining during which no question concerning representation may be raised as a minimum of six months and a maximum of one year. Id.

In the case of successorship, the six month period of time applies as a fixed bright-line rule in situations where the successor employer expressly adopted existing terms and conditions of employment as the starting point for bargaining, without making any unilateral changes. In a situation where the successor unilaterally announces and establishes initial terms and conditions of employment before proceeding to bargain, the "reasonable period of bargaining" will be a minimum of 6 months and a maximum of 1 year, measured from the date of the first bargaining meeting between the union and the employer. In the latter successorship situation, the Board has found that because the destabilizing factors associated with successorship are at their height, a longer insulated period is appropriate. The burden of proof is on the party who invokes the "successor bar" to establish that a reasonable period of bargaining has *not* elapsed. ***UGL-UNNICO*** supra at 9.

The determination of whether a reasonable period of bargaining has elapsed after six months depends on a "multifactor analysis," which considers: (1) whether the parties are bargaining for an initial contract; (2) the complexity of the issues being negotiated and of the parties' bargaining processes; (3) the amount of time elapsed since bargaining commenced and the number of bargaining sessions; (4) the amount of progress made in negotiations and how near the parties are to concluding an agreement; and (5) whether the parties are at impasse. ***Lee Lumber***, supra at 402.

Application of Board Law to this Case

In reaching the conclusions that the processing of the petition is not barred by a contract between the Employer and the Incumbent Union or by the recognition bar, but is barred by the successorship and settlement bars as a reasonable time to allow bargaining has not passed, I rely on the following analysis and record evidence.

(1) A contract did not exist as of the date the Petitioner filed its petition

As set forth above, in determining whether a putative contract bars a question concerning representation, the Board has held that the document or documents comprising the agreement are to be considered, without inquiry into extrinsic evidence. ***Waste Management of Maryland***, supra at 1003. Petitioner contends, and I agree, that the appropriate document to be considered is the tentative agreement dated July 13, which was initialed by both William Miller for the Incumbent Union and William M. Thacker for the Employer. It is the only version of proposals and agreements which indicates the assent of the parties.

The July 13 tentative agreement contains recognition, union security, and management rights provisions; provisions regarding seniority, including bidding, layoff, recall, and breaks in seniority; provisions regarding probation, discipline, and discharge; a grievance and arbitration procedure; provisions governing work time, including work hours, overtime, and breaks; wage rates and leave policies.[2] The contract is thus in writing and signed by all parties at the time the petition was filed. Moreover, the contract is comprehensive and contains substantial terms and conditions of employment sufficient to stabilize the bargaining relationship. ***Appalachian Shale Products***, supra at 1161-1162. The contract clearly identifies the employees covered, which are the same employees in the Unit sought by this petition, and the parties have stipulated that the Unit is appropriate. Id.

However, Article 17 Term of Agreement states: "This Agreement shall become effective on **ratification** (the "Effective Date") and shall remain in full force and effect through and including **4 yr. agreement**..." (bolded words were handwritten on blank lines).[3] The agreement does not define what is meant by "ratification."

On July 16, Thacker emailed a revised copy of the tentative agreement to Miller, stating "Effective date and termination date included as you requested." Article 17 in the copy of the tentative agreement attached to Thacker's email states: "This Agreement shall become effective on **August 1, 2012** (the "Effective Date") and shall remain in full force and effect through and including **July 31, 2016**" (bolded words were typed onto blank lines). There are no emails or other writings showing the Incumbent Union's assent to this change to the effective dates of the contract.

Although Miller testified that he discussed with Thacker the need to insert specific dates into Article 17 which led to Thacker emailing him the revised version of the tentative agreement on July 16, the Board has consistently excluded parole and other extrinsic evidence from consideration in its inquiry into whether a putative contract serves as a bar to processing a petition. ***Waste Management of Maryland***, supra at 1003. Notably, the Board has expressly held that the term of a contract cannot be established by parole evidence. ***Union Fish Co.***, supra at 191-192. Thus, I find that, contrary to the contentions of the Employer and the Incumbent Union, Article 17 of the July 13 tentative agreement was not nullified by the July 16 version of Article 17 contained in the document attached to Thacker's email. Moreover, I find that Article 17 of the initialed, July 13 tentative agreement contains an express condition requiring ratification in order for the contract to go into effect.[4]

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[2] On August 14, the Incumbent Union and Employer corrected an inadvertent error to Article 10.8 of the tentative agreement regarding paid holidays.

[3] There are two copies of the tentative agreement in the record. The unsigned second copy, exhibit IU-12, is a "clean" version of the agreement, with the handwritten notations typed. Testimony regarding this exhibit indicates it was provided to the Incumbent Union before the July 16 document was provided.

[4] I find the Employer and the Incumbent Union's argument that Article 17 as set forth in the July 13 tentative agreement does not create an express condition of ratification, but rather identifies the date the agreement becomes effective, to be a distinction without a difference.

On July 31, the tentative agreement was submitted to the membership for ratification.[5] The contract was rejected by the membership and, therefore, not ratified. On August 6, Petitioner filed the instant petition. When ratification is a condition precedent to contractual validity by *express* contractual provision, the contract is ineffectual as a bar unless it is ratified prior to the filing of a petition. ***Appalachian Shale Products***, supra at 1162; ***American Broadcasting Co.,*** supra at 8; ***Kennebec Mills Corp.,*** supra at 1484. Accordingly, because the contract was not ratified at the time the petition was filed, the petition is not barred from processing by an existing contract. [6]

(2) The petition is barred by the successorship and settlement bars, rather than the recognition bar

The Incumbent Union and the Employer also argue that the petition is barred by the recognition, successorship, and settlement bars as the parties have not been afforded a reasonable period of time to negotiate a contract. I find that the successorship and settlement bars apply, rather than the recognition bar.

In ***Lamons Gasket***, supra, the Board held that an employer's voluntary recognition of a union, based on a showing of uncoerced majority support for representation, bars the processing of an election petition for a reasonable period of time, in order to permit the employees' chosen representative to serve in that capacity and seek to negotiate a collective-bargaining agreement with the employer. Here, the Employer's bargaining relationship with the Incumbent Union is not a result of voluntary recognition, but, rather, arises because the Employer is a successor to PCCS. Accordingly, I find that the recognition bar does not apply.

I do agree with the Incumbent Union and the Employer, however, that the successorship and settlement bars apply.

To begin, I find, consistent with the settlement agreement in Case 07-CA-065711, that the Employer is a successor to PCCS. Where an employer is continuing the operations of its predecessor substantially unchanged, the employer is a successor and is obligated to comply with the incumbent union's recognition and bargaining request if the employer has hired a "substantial and representative complement" of its bargaining unit employees, and if the predecessor's employees constitute a majority in the unit. ***Fall River Dyeing & Finishing Corp. v. NLRB***, 482 U.S. 27, 46-52 (1987); ***NLRB v. Burns International Security Services***, 406 U.S. 272, 278-281 (1972). See also ***Dean Transportation, Inc.***, 350 NLRB 48 (2007), enfd. 551 F.3d 1055 (D.C.

[5] The Incumbent Union's constitution at Article XXIV, Subdiv. 11 Section (a) provides that before execution a contract be provided to the affected membership for approval, however, the Local Union may delegate to its Local Executive Board or to its bargaining committee authority to approve a contract without submitting it to its affected membership for a vote.

[6] After the close of the hearing, the parties sought to reopen the record for the limited purpose of receiving stipulation as to events occurring after the close of the record. The stipulation states that a [second] ratification vote occurred on August 24, and that the August 14 version of the tentative agreement was ratified by a vote of 25 for ratification, and 20 against ratification. By Order dated August 30, 2012, I received the stipulation in the record as Joint Exhibit 1. However, because the ratification effectuating the contract occurred after the instant petition was filed, it does not alter my finding that at the time the petition was filed no contract existed to serve as a bar to the processing of the petition.

Cir. 2009). The record establishes that unit employees generally work at the same location they did when working for PCCS, park their cars on the same school grounds, punch-in on the same time clock as when they worked for PCCS, take direction from the same dispatchers, and drive the same school busses as when employed by PCCS.

The parties held their first bargaining session on February 2, pursuant to the settlement agreement in Case 07-CA-065711. At that session, the Employer presented its initial proposal to the Incumbent Union. The proposal contained different terms from the last collective bargaining agreement in effect between the PCCS and the Incumbent Union, and I find that the Employer did not expressly adopt existing terms and conditions of employment as the starting point for bargaining. Accordingly, the bright-line six-month rule does not apply to the determination of what constitutes a reasonable period of time for the parties to negotiate a contract. ***UGL-UNNICO***, supra at 9. Rather, a longer insulated period is appropriate. Id.

As explained above, in evaluating whether a reasonable time has elapsed to allow bargaining in both the successorship and settlement contexts, the Board has held that the multi-factor test articulated in ***Lee Lumber*** applies. Applying these principles, I find that all of the factors set forth in ***Lee Lumber*** weigh against a finding that a reasonable time had elapsed when the petition was filed.[7]

(a) The parties were bargaining for an initial contract

The parties were negotiating their first contract. Although the Incumbent Union negotiated on behalf of the Unit employees in the past, the Incumbent Union was negotiating with a new entity with whom it had no former relationship. In addition, the predecessor employer was a public entity while the successor employer with whom the Incumbent Union was now bargaining is a private entity. This factor weighs against a finding that a reasonable amount of time has elapsed.

(b) The complexity of the issues being negotiated and of the parties' bargaining processes

The issues negotiated at the table were complex. In the past, the Incumbent Union negotiated directly with the PCCS. Now, the Incumbent Union was negotiating with the Employer, which also maintained a contractual relationship with PCCS. The contract between the Employer and PCCS was comprehensive and determined the Employer's budget, and provided PCCS with control over many matters which would ordinarily be negotiated between a union and employer in a collective bargaining relationship, such as bus routes and removal of employees. The agreement between the Employer and PCCS also gave PCCS input into hiring, and set forth matters such as wage rates, safety policies, and drug and alcohol policies applicable to Unit employees. In addition, the Employer sought approval from PCCS in order to agree to

[7] Even if the recognition bar applied in this situation, the application and my analysis of the ***Lee Lumber*** factors, as well as my conclusion that all factors weigh against a finding that a reasonable time for bargaining has passed, would be the same.

financial terms in negotiations with the Incumbent Union, and, as a result, negotiations on economic terms were delayed.

The Petitioner's arguments to the contrary, I find that the contractual obligations between the Employer and PCCS added an additional layer to the complexity of bargaining between the Employer and the Incumbent Union. The Board has found that "complex issues and bargaining structures weigh against a finding that a reasonable time has elapsed." ***Lee Lumber***, supra at 403. See also ***MGM Grand Hotel***, 329 NLRB 464, 467 (1999).

(c) The amount of time elapsed since bargaining commenced and the number of bargaining sessions

The Incumbent Union and the Employer held ten bargaining sessions, the first of which occurred on February 2, six months and four days prior to the filing of the instant petition. In total, the parties spent approximately 10 hours negotiating. "The more time that has elapsed since the parties began to bargain and the more negotiating sessions they have engaged in, the more opportunity they have had to reach a contract, and vice versa." ***Lee Lumber***, supra at 404. Notably, during at least the first six negotiation sessions, the parties did not discuss economic terms as the Employer was waiting for approval on financial issues from PCCS. I find that this factor weighs against a finding that a reasonable time has elapsed.

(d) The amount of progress made in negotiations and how near the parties are to concluding an agreement

At the time the petition was filed, the Employer and the Incumbent Union had reached a complete tentative agreement. The Board held in ***Lee Lumber*** that when the parties have almost reached agreement and there is a strong probability that they will do so in the near future, this progress serves as evidence that a reasonable time for bargaining has not elapsed. "When negotiations have nearly produced a contract, it is reasonable that the parties should have some extra time in which to conclude an agreement." Id. at 404. This is especially true here where, after the petition was filed, the Incumbent Union's membership ratified the parties' tentative agreement. I find that this factor weighs heavily against a finding that a reasonable time has elapsed. See ***Ford Center for the Performing Arts***, 328 NLRB 1, 1 (1999) (rival union's petition dismissed where recognized union and employer worked diligently for nine months, engaged in fruitful and constructive negotiations, and were on the verge of a complete agreement). See also ***MGM Grand Hotel***, supra at 467 ("[t]he fact that the process took over 11 months to complete, or that there remained a few issues when Petition III was filed, does not, and should not, form the basis for thwarting the extensive good-faith efforts of these parties.").

Whether The Parties Are At Impasse

The parties are not at impasse. I find this factor also weighs against a finding that a reasonable time has elapsed.

In sum, I conclude that a reasonable time had not elapsed to afford the Incumbent Union and the Employer time to negotiate a contract.

For the foregoing reasons, I find that the Employer's successorship to PCCS, and the settlement requiring the Employer to bargain with the Incumbent Union in Case 07-CA-065711, constitute bars to processing the Petitioner's petition, and that a reasonable period of time had not elapsed in which to conduct collective bargaining when Petitioner filed its petition.

CONCLUSIONS AND FINDINGS

Based on the foregoing discussion and on the entire record,[8] I find and conclude as follows:

1. The hearing officer's rulings are free from prejudicial error and are 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.

3. The labor organization involved claims to represent certain employees of the Employer.

4. The Employer's successorship to PCCS and the settlement requiring the Employer to bargain with the Incumbent Union in Case 07-CA-065711 constitute bars to processing the Petitioner's petition, as a reasonable period of time had not elapsed in which to conduct collective bargaining when Petitioner filed its petition.

ORDER

IT IS ORDERED that the petition is dismissed.

Dated at Detroit, Michigan, this 14th day of September 2012.

(SEAL) */s/ Terry Morgan*

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[8] All parties timely filed briefs, which were carefully considered.

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, DC 20570-0001**. This request must be received by the Board in Washington by **September 28, 2012**. The request may be filed electronically through the Agency's website, **www.nlrb.gov**,[9] but may **not** be filed by facsimile.

[9] To file a Request for Review electronically, go to the Agency's website at **www.nlrb.gov**, select **File Case Documents**, enter the NLRB Case Number, select the option to file documents with the **Board/Office of the Executive Secretary** and follow the detailed instructions.