

**UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD**

**SHEET METAL WORKERS INTERNATIONAL
ASSOCIATION LOCAL No. 18 – WISCONSIN, AFL-CIO**

Respondent,

and

Case No: 30-CB-075815

EVERBRITE, LLC

Charging Party.

**SHEET METAL WORKERS INTERNATIONAL ASSOCIATION LOCAL No. 18's
REPLY BRIEF IN SUPPORT OF ITS EXCEPTIONS TO THE DECISION OF THE
ADMINISTRATIVE LAW JUDGE**

**MATTHEW ROBBINS
mrr@previant.com
ANDREW SMITH
as@previant.com
The Previant Law Firm, s.c.
1555 N. RiverCenter Drive, #202
Milwaukee, WI 53212
PH: 414/271-4500 FAX: 414/271-6308**

ATTORNEYS FOR RESPONDENT UNION

INTRODUCTION

The Union did not violate the Act. The case should be deferred to resolution in the parties' grievance and arbitration provision. Moreover, proposals for midterm concessions do not reopen a labor agreement. Finally, the General Counsel failed to file exceptions and has thereby waived its objections to the Administrative Law Judge's decision.

ARGUMENT

I. THE CHARGE SHOULD HAVE BEEN DEFERRED.

A. The Board in *Tri-Pak* Did Not Limit its Ruling Only to Disputes Over Contract Provisions Which Require a Notice Letter to Specify Changes Desired in the Next Contract.

General Counsel's narrow interpretation of *Tri-Park Machinery, Inc.* 325 NLRB 671 (1998) incorrectly attempts to portray the current dispute as one over the existence of a contract, instead of a dispute over the interpretation or compliance with a termination clause under an existing contract. The issue in the present dispute is not whether the parties ever entered into an agreement or if one existed. Both parties concede that they entered into a collective bargaining agreement, with a grievance and arbitration provision, which was in effect until at least February 29, 2012. The parties also concede that the agreement contained a clause in Article XXXII Section 2 that provided that the agreement would rollover for an additional year absent proper written notice under the existing contract at least 60 days prior to the contract's expiration. Both parties also concede that the issue is whether the Company satisfied its contractual obligations under that provision.¹ Both parties even concede that the dispute arose over the clause 60 days

¹ In his answering brief General Counsel frames his own argument as one of contractual obligation. "Under Article XXXII, Section 2, the Company was obligated to provide the Union with (1) something in writing (2) prior to December 30 (3) that put the Union on notice of the Company's intent to modify or terminate the parties' agreement. For the reasons state below, the Company satisfied its contractual notice obligations." (GC Brf. 10).

before the expiration of the initial term of the agreement.² The current dispute is therefore undisputedly one which arose during a valid collective bargaining agreement and involves the interpretation of a specific clause.

In *Tri-Pak* the Board explicitly held that in such circumstances the dispute is arbitrable and subject to deferral.

We find no merit in the General Counsel's broad assertion that deferral to arbitration is inappropriate for questions regarding extensions or renewals of collective-bargaining agreements as to which the parties are in dispute. If there is no dispute about the existence of the contract containing the arbitration clause, and the clause, as here, broadly covers all disputes about contractual terms, then disputes concerning the renewal or termination of that contract are appropriate for arbitration.

Id. at 673 citing *Teamsters Local 70 v. Interstate Distributor Co.*, 832 F.2d 507, 510-511 (9th Cir. 1987) and *Roadmaster Corp.*, 98 LA 847 (Christenson, 1992).

Despite the broad language of the Board's holding, General Counsel argues that *Tri-Pak* applied only to the interpretation of termination or modification clauses which required that the changes sought by a party be explicitly listed in the written notice.

This contention is not supported by case law. Neither authority cited by the Board in *Tri-Pak* in support of its holding was limited to such clauses. *Tri-Pak* cited two authorities in support: *Teamsters Local 70 v. Interstate Distributor Co.*, 832 F.2d 507, 510-511 (9th Cir. 1987) and *Roadmaster Corp.*, 98 LA 847 (Christenson, 1992). *Id.* at 673. In *Teamsters Local 70* the parties had a collective bargaining agreement with a renewal clause nearly identical to that of Everbrite and Local 18. *Id.* at 508. The clause did not require that the parties send notice explicitly listing the changes sought as in *Tri-Pak*. The dispute was whether an exchange of

² General Counsel implicitly admits that the dispute arose under the contract before February 29, 2012 when he argues that any grievance in June of 2012 was untimely by six months. "The first time the Union proposed the grievance/arbitration procedure to resolve this dispute was June 13, 2012, which is almost six months after the fact." (GC Brf. 22-23).

letters was effective notice to reopen the agreement under the clause. The Court held that it was subject to arbitration.

From a practical standpoint, our rule leads to the following result: When the collective bargaining agreement contains a broad arbitration clause, the question whether a particular act or failure to act effectively serves to terminate the agreement is to be resolved by an arbitrator.

Brotherhood of Teamsters & Auto Truck Drivers Local # 70 v. Interstate Distributor Co., 832 F.2d 507, 511 (9th Cir. Cal. 1987)

In *Roadmaster* the parties submitted to binding arbitration a dispute over a termination and modification clause. The clause did not require that the notice list certain changes. The dispute centered around whether a letter constituted notice under the provision. The arbitrator resolved the dispute holding,

The words of the agreement are that the party desiring to terminate the agreement is to give “the other party written notice, by certified mail, at least sixty (60) days prior to the date it desires to ... terminate the Agreement.” The Company did what the words require, understanding those words in the context in which they were used and in the light of applicable law and public policy. Accordingly the grievance must be denied.

Id. at 853.

Tri-Pak has also not been subsequently cited by the Board for the limited holding the General Counsel suggests. In *Laborer’s Union Local 67*, 2002 NLRB LEXIS 82, the parties had a collective bargaining agreement with a reopener which did not require specified changes to be listed.

This Agreement shall be binding upon the respective parties from March 1, 1998 to and including November 30, 2000, and shall be considered as renewed from year to year thereafter unless either party hereto shall give written notice to the other of its desire to modify, amend or terminate the Agreement not more than ninety (90) days and not less than sixty (60) days prior to the last date mentioned or any subsequent anniversary date of the Agreement.

Id. at 5.

The Union contended that notice letters sent by the Employer were both untimely and defective to reopen the contract. *Id.* at 9. The Administrative Law Judge citing *Tri-Pak* as authority held that the issue of timeliness and defective notice was an issue of contractual interpretation subject to arbitration stating,

The issue decided under the 1999 agreements' grievance and arbitration procedures was not whether or not the contracts were valid, but rather whether or not they automatically renewed. Thus counsel for the Respondents argues the General Counsel's arguments are misplaced and the cases dealing with a refusal to defer when the issue is the existence of a contract are inapplicable. This is a case involving a contract renewal issue.

Id. at 18.

Finally, even in the *Allied-Industrial, Chemical and Energy Workers Local 6-0682 (Checkers Motors Corp.)* 339 NLRB 291 (2003) the Board considered whether a dispute over a clause that did not require changes sought to be listed was subject to deferral. Article VIII of the parties' agreement read in part,

[This agreement] shall become effective June 14, 1999, and shall extend until June 13, 2002, and from year to year thereafter unless changed by consent of both parties. Should either party desire to amend or change this Agreement, such party shall give the other sixty (60) days written notice before the expiration of the contract.

Id. at 297.

The Board held that the clause would have been subject to deferral had the employer been able to file a grievance. In doing so it explicitly rejected an ALJ holding that the issue was not deferrable because there was a question of the contract's existence. The Board held, "In distinguishing *Tri-Pak*, we do not rely on the judge's conclusion that *Tri-Pak* is inapposite because the parties here disputed the existence of the contract at the time the Respondent filed its July 2002 grievance."

In short, *Tri-Pak* does not stand for the limited point of law the General Counsel suggests, but stands for the proposition that where the parties have a dispute which arose over a

termination or modification clause in a contract, at the time the contract was in effect, the dispute is subject to deferral.

B. There is No Issue of Timeliness Preventing Deferral to Arbitration.

General Counsel argues that a grievance over the dispute cannot be timely filed and is therefore improper for deferral. (GC Brf. 22-24). In support of his contention he argues that grievances can only be filed under Article X Section 2 which gives explicit time limits which apply only to employees who file grievances. Article X Section 2 is not relevant to this dispute. The last sentence of Article X Section 3 allows Everbrite to file a grievance over a disputed interpretation of the agreement and Section 3 contains no such time limitations. Section 3 reads in its entirety,

Any grievance involving lost wages or earning in which the Company may be called upon to make restitution to the aggrieved employee may, by mutual consent of both parties thereto, be submitted directly to the Joint Board at a meeting called for the purposed after the preliminary steps in the grievance procedure have been waived by both parties. Further, it is agreed that in the event that any grievance or interpretation of this Agreement arises which effects more than one (1) employee in the bargaining unit, either party may request a meeting of the “Joint Board”.

Under the language of the contract, there are no contractual time limits that would render Everbrite’s grievance untimely.

Secondly, the Union stated in its pre-trial letter to Everbrite, at trial, and in its subsequent briefs that it was willing to allow Everbrite to submit the merits of the case to an arbitrator; waiving all timeliness or procedural defenses.

Where a party waives its timeliness and procedural defenses deferral is appropriate. In *United Technologies Corp.*, 268 N.L.R.B. 557, 560 n.22 (1984) the Board held that a Respondent could waive its timeliness defense to make deferral proper noting, “The Respondent must, of course, waive any timeliness provisions of the grievance-arbitration clauses of the collective-

bargaining agreement so that the Union's grievance may be processed in accordance with the following Order.”

In *Caritas Good Samaritan Medical Center* 340 N.L.R.B. 61, 62-63 (2003) the Board likewise found deferral appropriate where a party waived its timeliness defense noting, “The Respondent has expressed its willingness to arbitrate the dispute, offering to waive any timeliness issue.” The Board also recognized the ability of the Respondent to waive such defenses in *Hallmor, Inc.*, 327 N.L.R.B. 292 (1998), “A key element of the deferral policy is the parties' expressed willingness to waive contractual time limitations in order to ensure that the arbitrator addresses the merits of the dispute.” *Id.* at 292-293.

As the Union has waived timeliness or procedural defenses deferral is appropriate.

II. THE WRITTEN PROPOSALS COMMUNICATED ONLY A DESIRE FOR MIDTERM MODIFICATIONS.

The fact that Everbrite’s proposals were for midterm modifications and not proposals for a successor agreement is not a mere technicality. Rather, it goes to the essential message conveyed by the proposals. Proposals for midterm modifications and long term extensions convey to the Union only that the Company would like to change the existing contract and keep the Union under contract. They do not communicate to the Union whether the employer would choose to terminate the existing agreement if the proposals are rejected.

The General Counsel’s reliance on *Oakland Press*, 229 NLRB 476 (1977) and *Checker Motors Corp.* is misplaced. In *Oakland Press* the Board relied on the fact that the proposal was to take effect the day after the contract expired not three months before it.

I find that the essential message was in fact conveyed, even if not in the precise, technical terms of the contract. It is clear from the letter that the Union considered the contract would expire on May 31 and it wished to negotiate changes to take effect during the contract period commencing June 1, 1976.

Id. at 479.

This distinction supports the Union's position. For *Oakland Press* to provide precedent Everbrite's proposals would need effective dates of March 1, 2012 not December 1, 2012.

In *Checker Motors Corp.* the Union had no question that the proposals it received were for early successor agreements and not midterm modifications. Before handing the proposals to the Union the Company gathered the entire Union bargaining committee and explained that it would seek to reopen the contract if they could not reach an early agreement, but hoped to reach an early agreement so it could avoid banking parts to prepare for a potential strike upon the contract's expiration. *Id.* at 292. This distinction is critical. Unlike *Checker Motors*, Local 18 was forced to guess whether Everbrite would risk a strike by reopening the contract if it rejected the proposals. Everbrite's actions at La Crosse, in which it used a midterm modification and extension with a no-strike clause to close down the plant, suggested that Everbrite's primary goal was to keep the Union under a no-strike provision.

General Counsel argues that the fact the proposals extended beyond the length of the current contract, or that they stated that they were "new agreements" somehow escapes the more glaring fact that the proposals state repeatedly that they are to be effective December 1, 2011. Any reasonable person examining the plain language of the proposal would conclude it to be a proposal for midterm modification. The fact that it was extended beyond the length of the original contract is insignificant. A party still has a right to refuse to bargain over a proposal which would alter its existing contract. Further, Everbrite concedes that the proposal it made in December of 2010 was for midterm modifications and that proposal offered an identical five year extension. The phrase "new agreement" is hardly a legal term of art. Any different contract, even if midterm, would be "new."

The General Counsel also points to the timing of the proposal before the expiration of the contract as clear evidence of the Company's intent. However, the timing demonstrates that Everbrite was seeking a contract before the deadline to reopen, not before the contract expired two months later. This suggests that Everbrite either wanted the Union to agree to stay under a long term contract, or it wanted to get a feel for the Union's willingness to reach concessions before it was required to make a choice to reopen the agreement or let it renew.

The purpose of Article XXXII Section 2 is for the party seeking to terminate or modify the agreement to affirmatively provide notice of its intent to the other party. The effect of the ALJ's ruling here is to shift the burden on the party which is supposed to receive notice to accurately predict the other party's next move. Consequently, the two proposals for midterm modifications were not adequate written notice of Everbrite's intent to reopen.

III. AS GENERAL COUNSEL FAILED TO FILE EXCEPTIONS TO ITS OWN FINDINGS AND CONCLUSIONS WHICH THE ALJ REJECTED AT TRIAL IT HAS WAIVED THE RIGHT TO APPEAL THEM IN THE ANSWERING BRIEF TO THE UNION'S EXCEPTIONS.

Under 102.46 and 102.48 of the NLRB's Rules and Regulations each party must file exceptions and supporting grounds for any findings, conclusions, and recommendations that it objects to or they will be deemed waived. The General Counsel failed to file any exceptions or cross-exceptions to the ALJ's decision. As a result, its arguments that the Union waived its right to notice by conduct, that the letter from the FMCS (a third party) fulfilled contractual obligations of notice from Everbrite, or that Everbrite was not able to file a grievance under the contract should be waived.

Despite having all three issues put before him, the ALJ failed to find in favor of the General Counsel on any of these contentions.³ Yet, each one of these arguments constitutes a substantial portion of the General Counsel's answering brief leaving the Union with an insurmountable task of addressing their merits in a ten page reply brief.

These arguments go outside the scope of the Union's exceptions. Section 102.46(d)(2) of the Board's Rules and Regulations states that, "[t]he answering brief to the exceptions shall be limited to the questions raised in the exceptions and in the brief in support thereof." The Union specifically filed exceptions with detailed grounds. Other issues are waived.

Section 102.48(a) of the Board's Rules and Regulations states,

In the event no timely or proper exceptions are filed as herein provided, the findings, conclusions, and recommendations contained in the administrative law judge's decision shall, pursuant to section 10(c) of the Act, automatically become the decision and order of the Board and become its findings, conclusions, and order, and all objections and exceptions thereto shall be deemed waived for all purposes.

See Also El Paso Elec. Co., 357 NLRB No. 186, fn.4 (2012)("The Respondent did not file an exception to this aspect of the judge's finding and declined to re-open the record to adduce such evidence. Therefore, we adopt the judge's finding"); *Jet Electric Company, Inc.* 338 N.L.R.B. 650 (2002)("In the posture of this case, particularly the Respondent's failure to file exceptions, we simply would not revisit this matter.").

As the General Counsel has failed to file any exceptions to the ALJ's ruling its objections to the ALJ's decision should be deemed waived.

³ In particular, the ALJ failed to find merit in General Counsel's waiver argument. The Union instructed Everbrite it would not bargain or open the contract at every meeting and by email on September 26, 2011; a month before the first written proposal was made. The Union bargaining committee never attended a meeting and the Union made no tentative agreements, proposals, or counterproposals. The cursory exchange of information on pensions and the Union's offhand comments that the proposal was insulting for failing to consider grandfathering current employees are insufficient to constitute outright waiver. The Board has been clear that such sparring, objections, and other preliminary discussions do not constitute waiver. *Empire Screen*, 249 NLRB 718, 718-719 (1980); *Champaign County Contractors Association*, 210 N.L.R.B. 467, 470 (1974); *Sawyer Stores, Inc.*, 190 N.L.R.B. 651, 655 (1971); *Moore Drop Forging Company*, 168 NLRB 984 (1967). Finally, there is no precedent for the contention that a party waives its right to enforce a contractual notice provision for successor contract bargaining by listening to proposals for midterm modifications.

CONCLUSION

For the reasons stated above, the Board should dismiss the charge.

s/Matthew R. Robbins

MATTHEW R. ROBBINS

mrr@previant.com

ANDREW J. SMITH

as@previant.com

The Previant Law Firm, s.c.

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STATEMENT OF SERVICE

On this 20th day of September, 2012, Sheet Metal Workers Local No. 18 electronically filed its Reply Brief In Support Of Its Exceptions To The Decision Of The Administrative Law Judge with the National Labor Relations Board via the NLRB Electronic Filing System. Said document was also served upon the following via email:

Attorney Robert W. Mulcahy
rwmulcahy@michaelbest.com

Attorney Andrew S. Gollin
Andrew.Gollin@nlrb.gov

s/Matthew R. Robbins
MATTHEW R. ROBBINS
mrr@previant.com
ANDREW J. SMITH
as@previant.com
PREVIANT, GOLDBERG, UELMEN, GRATZ,
MILLER & BRUEGGEMAN, S.C.
1555 North RiverCenter Drive, Suite 202
P.O. Box 12933
Milwaukee, WI 53212
(414) 271-4500 (Voice)
(414) 271-6308 (Fax)

Attorney for Sheet Metal Workers Local No. 18