

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

MASTEC NORTH AMERICA, Inc.

Employer

and

TONY E. VELAZQUEZ, JR.

Case 03-RD-105232

Petitioner

and

**INTERNATIONAL ASSOCIATION OF MACHINISTS &
AEROSPACE WORKERS, AFL-CIO, DL 15**

Union

DECISION AND DIRECTION OF ELECTION

The Employer is engaged in the business of installing satellite television services with an office located south of Buffalo, in Hamburg, New York. The sole issue raised in this matter is whether a collective-bargaining agreement between the Employer and Union bars the processing of the decertification petition. The Union contends that a complete collective-bargaining agreement that was ratified by its members existed before the petition was filed. The Employer asserts that a collective-bargaining agreement did not exist before the petition was filed, because there was no signed document evidencing that the parties had reached a collective-bargaining agreement as of the date the petition was filed. Based on the record and application of Board law, I find that there is no contract bar to the processing of the petition.

Board Law

The Board has long held that in order for an agreement to serve as a bar to an election, it must satisfy certain substantive and formal requirements that have been well established by Board case law. In *Appalachian Shale Products Co.*,¹²¹ NLRB 1160 (1958), the Board held that to constitute a bar to an election, an agreement containing substantial terms and conditions of employment sufficient to stabilize the parties' bargaining relationship must be signed by the parties prior to the filing of the petition. See also *Seton Medical Center*, 317 NLRB 87 (1995). The expiration date is one of those "substantial terms" and a contract having no fixed duration is not considered a bar for any period. *Cind-R-Lite Co.*, 239 NLRB 1255 (1979) (citing *Pacific Coast Association of Pulp and Paper Manufacturers*, 21 NLRB 990 (1958)). The expiration terms must be apparent from the face of the contract without resort to parol evidence, before the contract can serve as a bar. *Cind-R-Lite Co.*, *supra* (citations omitted).

The agreement need not be embodied in a formal document. An informal document or series of documents, such as a written proposal and written acceptance, which nonetheless contain substantial terms and conditions of employment, are sufficient if signed. *Seton Medical Center*, *supra*, citing *Appalachian Shale*, *supra*; *Georgia Purchasing, Inc.*, 230 NLRB 1174 (1977). The documentary evidence on its face must be sufficient to establish the terms of the agreement and must leave no doubt that it represents an offer and acceptance of those terms. See e.g. *Riverside Hospital*, 222 NLRB 907 (1976) (exchange of letters showing an offer and acceptance of a proposal constitutes a contract that will bar a subsequent petition); *Georgia Purchasing, Inc.*, *supra* (bar found after parties reached an agreement following the exchange of

telegrams incorporating by reference the terms of the previous contract, even though the full agreement was not in writing and signed by the parties until after a decertification petition was filed). However, if there is uncertainty or ambiguity from the exchange of documents as to the terms of the alleged contract, the parties' exchange of letters cannot serve as a bar. *Waste Management of Maryland, Inc.*, 338 NLRB 1002 (2003), *citing Branch Cheese*, 307 NLRB 239 (1992).

Application of Board Law to this Case

In reaching the conclusion that the contract is not a bar in this case, I rely on the following analysis and record evidence.

The Union was certified on May 16, 2012, as the bargaining representative for field technicians and field warehouse technicians at the Employer's Hamburg, New York facility. The parties commenced negotiations and initialed the agreements they reached, and made additions and deletions by crossing out certain lines or adding handwritten paragraphs. Two primary issues that remained as of April 25, 2013,¹ were both resolved when the Union agreed that day to the Employer's wage offer and its offer of a one-year contract. Norman Shreve, the Union's business representative and negotiator, asked Eric Simon, Esq., the Employer's counsel and negotiator, for a clean copy of the agreement to present for ratification.

On May 1, Simon emailed a copy of the agreement to Shreve, which he stated was a "draft of the proposals as tentatively agreed to at the bargaining table." The document was marked as a "draft" and Simon specified that it was "subject to modification and revision by MasTec as necessary." The Agreement reflected the

¹ All dates are 2013 unless otherwise specified.

tentative agreements reached at the table. The Agreement's duration clause stated that it was "effective as of the ___ day of ___, 2013 between the Employer and Union and shall continue in full force and effect up to and including the ___ day of ___, 2014." In the email, Simon also noted that he had added the hourly rate for "Tech Trainees" to Appendix 1 of the Agreement, which had not been discussed in negotiations. Simon also provided information on job rates for the installation of a new product called "GenieGo" and asked that the new rates be implemented. The Union's membership ratified the Agreement the following day, May 2.

On May 3, the parties exchanged the following series of emails. Shreve emailed Simon and informed him that the Agreement had been ratified and that he agreed to the implementation of the "GenieGo" job rates. Shreve also asked about the Employer's timeframe for moving to the new "scorecard/metrics" (a method for technicians to track their job performance). Simon replied offering his congratulations on the ratification and stated that he would draft a "GenieGo" side agreement. He informed Shreve that the Employer had no immediate plans to change the scorecard/metrics for Buffalo technicians and noted that the agreed-upon language in the Agreement gave the Employer the right to change the scorecard at the end of each quarter. Simon stated that he would get back to Shreve on the signing process. Shreve replied that he understood the "GenieGo" matter, but stated that they had agreed to change the scorecard/metrics, because Buffalo was the only location not using it. In reply, Simon stated that he had confirmed with his client that there was no commitment by the Employer to change the scorecard/metrics used in other locations for use in Buffalo and noted that he "didn't think we would have a disagreement quite so soon." Shreve replied that "he did not think

so either” but that he knew they were very clear and had agreed to switch. Simon replied that the language of the Agreement clearly states that it is the Employer’s discretion whether to change the scorecard/metrics and that if the Union’s position was otherwise they clearly did not have a meeting of the minds on a major substantive issue and there was no agreement on a comprehensive contract whatsoever. Shreve replied that he clearly understood what the contract stated, and explained that he was referring to a meeting in his office with Simon and his client, but he noted “I guess I see how you operate.” Simon replied that “we have very different understandings of what was said regarding changing the scorecard/metrics, and I think this difference directly relates to an important term and condition of employment that is apparently unresolved.” He stated that if Shreve wanted to discuss it he would ascertain how his client would like to proceed. To this Shreve replied, “First the contract has been ratified. That is done. Anything else will be handled appropriately.”

After the above-described May 3 email exchange, the parties had no contact until May 16, the day the instant petition was filed. That same day, Shreve emailed Simon seeking, inter alia, dates to sign the Agreement. Simon replied that he was waiting to hear from Shreve on whether or not it was still the Union’s position that as part of the overall agreement, there was an obligation to change the scorecard/metrics and that, if so, it had to be resolved before moving forward. Shreve replied, “...the contract is complete and has been ratified. There is NO obligation to change the scorecard. It is crystal clear in the agreement on how and when the scorecard can change. I am ready to move forward, just waiting for you. I look forward to your phone call.”

The parties spoke by telephone later that day and resolved their understanding on

the scorecard/metrics. They discussed Simon emailing Shreve copies of the Agreement for signatures.

There is testimony in the record that indicates that at the time of this telephone conversation the parties had some knowledge that a decertification petition had been circulated and either had been or was pending filing. It is unclear from the record as to what was specifically discussed by the parties in this regard. Shreve testified that he had no knowledge about the petition until after he sent the scorecard/metrics email, but he made a comment to Simon during their telephone conversation "about the Board." According to Shreve, Simon replied that he had "heard rumblings of it, but he did not know that it had happened." Again, according to Shreve, the telephone call ended but Simon later called Shreve back to ask who the Board contact person was and Shreve replied that he did not know as the Board agent had contacted the Union's general counsel, not Shreve. Simon did not testify at the hearing about the telephone conversations.

On May 20, the parties agreed to clarify two issues in the Agreement—the definition of overtime and the manner of calculation of bereavement pay. On May 21, Simon emailed the Agreement containing the clarified overtime and bereavement clauses to Shreve for signature. This copy of the Agreement states "May 3, 2013--May 2, 2014" on the cover page and contains a duration clause that states "This Agreement shall be effective May 3, 2013 and shall continue in full force and effect up to and including May 2, 2014." The Union and Employer signed the Agreement on May 22 and May 29, respectively.

I find that the parties reached agreement on all outstanding issues as of May 3. The agreement is reflected in the May 3 email exchange between the parties when Shreve responded to Simon's inquiry about the scorecard/metrics, that "the contract has been ratified. That is done." The ratified contract was a written document containing major terms of employment agreed-to by the parties after negotiations. The Union's email indicated that there was no issue remaining between the parties concerning the scorecard/metrics issue. Even if there was a question remaining on that issue as of May 3, by May 16 Shreve unequivocally communicated to Simon by email that the Agreement was crystal clear, "[t]here is NO obligation to change the scorecard."

If the Agreement contained a duration clause, it could constitute a bar to the petition even though it was based on a series of emails containing the draft contract language. This is true even though the full, formal agreement was not in writing and signed by the parties at that time. *Georgia Purchasing, Inc.*, 230 NLRB 1174 (1977) (contracts need not be formal documents and can consist of an exchange of a written proposal and a written acceptance). In addition, a tentative draft agreement can serve as a bar. *Television Station WVTM*, 250 NLRB 198 (1980). The minor clarifications that occurred, after May 16, concerning overtime and bereavement, would not disqualify the Agreement as a bar as it was clear as to substantial terms and conditions of employment agreed to by the parties, with the exception of the Agreement's term, which is discussed below. *St. Mary's Hospital and Medical Center*, 317 NLRB 89 (1995); *Cooper Tire and Rubber Company*, 181 NLRB 509 (1970).

Even if the parties did not reach a complete agreement until May 16, the same date the petition was filed, the petition would still be barred. A petition is barred if filed on

the same date that an immediately or retroactively effective contract is signed, and the employer has not been informed at the time of execution that a petition has been filed. *Deluxe Metal Furniture Company*, 121 NLRB 995 (1958). Here, the record does not clearly establish that the Employer knew that the petition had been filed on May 16. However, although I find that an agreement existed no later than May 16, which would bar the petition filed on the same day, it cannot serve as a bar to the petition under these circumstances, because it lacked a definite term until after the decertification petition was filed.

The Board is governed by the contents of the contract on its face in determining whether the contract constitutes a bar to a representation proceeding. *Benjamin Franklin Paint and Varnish Company*, 124 NLRB 54 (1959). The Board has held:

To serve as a bar to a petition, a contract must contain substantial terms and conditions of employment deemed sufficient to stabilize the bargaining relationship. *Cind-R-Lite Co.*, 239 NLRB 1255, 1256 (1979) (citing *Appalachian Shale Products Co.*, 121 NLRB 1160, 1163 (1958)). Both an effective date and an expiration date are material terms of a contract. *Id.* Unless these dates are apparent from the face of the contract, without resort to parol evidence, the contract will not serve as a bar. *Id.* The terms of the agreement must be clear from its face so that employees and outside unions may look to it to determine the appropriate time to file a representation petition. *Cooper Tire and Rubber Company*, 181 NLRB 509 (1970).

South Mountain Healthcare and Rehabilitation Center, 344 NLRB 375 (2005).

While the parties agreed to a one-year contract on April 25, neither an effective date nor an expiration date appear in any writing or tentative agreement until after the petition was filed. Specifically, the Agreement in existence on May 16 provides that "This agreement shall be effective as of the ___ day of ___, 2013 between the Employer and the Union and shall continue in full force and effect up to and including

the ___ day of ___, 2014.” No other dates exist in the body of the Agreement or on the face of the Agreement, until it was finalized and emailed to the Union on May 21. Further there is no duration clause referred to in writing or added as a tentative agreement via email that indicates the effective date of the Agreement.

The Employer presented no witnesses at the hearing but states in its post-hearing brief that the May 3 effective date was agreed to by the parties during a telephone call between Shreve and Simon the afternoon of May 16. Thus, it is not possible to ascertain the effective date of the Agreement on May 16 without resort to parol evidence, which is I am not permitted to do.² The effective date of the Agreement cannot be determined from the four corners of the document. While the Agreement’s stated duration is from 2013 to 2014, it is silent as to the date in 2013 the Agreement’s term begins to run and as to the Agreement’s expiration date in 2014. *Jet-Pak Corp.*, 231 NLRB 552, 552-553 (1977) (in determining whether a contract serves as a bar to an election, we are permitted only to examine the terms of the contract as they appear within the four corners of the instrument itself).

The Board has held that a contract term can be definite without the effective date and the termination date being set out in the duration clause by the exact month and day. *Cooper Tire and Rubber Company, supra*. In *Cooper Tire*, however, unlike in this case, the agreement showed a duration period of 3 years—from “....., 1968...until, 1971,” and also contained a wage section that provided for three annual

² It is noted that the parol evidence in the record, which cannot be considered, does not definitively establish when the parties agreed to the effective date of May 3. Shreve testified that he could not recall the exact date the parties agreed to the May 3 effective date and that he would be guessing that it was during the May 16 telephone call. No other witness testified concerning the effective date of the Agreement.

progressive wage increases, effective as of September 1 of each of the 3 years. *Id.* at 509. The Board held that considering the duration period—from 1968 until 1971—“in conjunction with” the wage section, it was satisfied that the contract reasonably construed on its face provided for a 3-year term beginning on September 1, 1968, and terminating at midnight, August 31, 1971. *Id.* Here, unlike *Cooper Tire*, Appendix 1 of the Agreement, which lists wage rates, contains no dates. There are no other provisions in the Agreement that could determine the effective dates of the Agreement.

While the Agreement contained definite effective and termination dates by May 21, the Agreement lacked both dates at the time the decertification petition was filed on May 16 and therefore cannot serve as a bar to the petition. See *Cind-R-Lite, Co., supra* (Board found that the contract could not serve as a bar even though it had been ratified by employees and provided for 3 annual wage increases beginning on April 1, 1978, 1979, and 1980, because it lacked a termination date *at the time the petition was filed*). 239 NLRB at 1256.

Given the lack of an effective date or expiration date, as of May 16 when the petition was filed, I find that the Agreement cannot serve as a bar to the petition. *South Mountain Healthcare and Rehabilitation Center, supra; Cind-R-Lite Co., supra; Cooper Tire and Rubber Company, supra.*

Conclusion Regarding Contract Bar Issue

In determining that the Agreement is not a bar to the petition, I have carefully considered the evidence, and concluded that although the parties came to an agreement on substantial terms and conditions of employment by no later than May 16,

the lack of an effective date or termination date or any other dates in the contract from which to reasonably construe its term, precludes it from serving as a bar to the petition.

CONCLUSIONS AND FINDINGS

Based upon the entire record in this matter and in accordance with the discussion above, I find and conclude as follows:

1. The hearing officer's rulings 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 herein.

3. The Union is a labor organization within the meaning of Section 2(5) of the Act and claims to represent certain employees of the Employer.

4. A 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.

5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time field technicians and field warehouse technicians employed by the Employer at its Hamburg, New York facility; excluding all other employees, office clerical employees, guards, and all professional employees and supervisors as defined in the Act.

There are approximately 50 employees in the unit.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by **International Association of Machinists & Aerospace Workers, AFL-CIO, DL 15**. The date, time and place of the election, will be specified in the Notice of Election which will issue shortly.

A. Voting Eligibility

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began

more than 12 months before the election date and who have been permanently replaced.

B. Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). The list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). This list may initially be used by me to assist in determining an adequate showing of interest. I shall, in turn, make the list available to all parties to the election.

To be timely filed, the list must be received in the Regional Office on or before **June 25, 2013**. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted to the Regional Office by electronic filing through the Agency's website www.nlrb.gov, by mail, by hand or courier delivery, or by facsimile transmission at 716-

551-4972. To file the eligibility list electronically, go to the Agency's website at www.nlr.gov, select **File Case Documents**, enter the NLRB Case Number, and follow the detailed instructions. The burden of establishing the timely filing and receipt of the list will continue to be placed on the sending party.

C. Notice of Posting Obligations

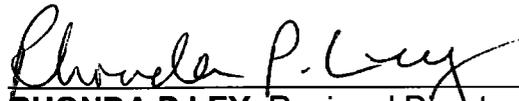
According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for at least 3 working days prior to 12:01 a.m. of the day of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so stops an employer from filing objections based on nonposting of the election notice.

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, DC by 5 p.m. EDT **July 2, 2013**.

The request may be filed electronically through the Agency's web site, www.nlr.gov,³ but may not be filed by facsimile.

DATED: June 18, 2013



RHONDA P. LEY, Regional Director
National Labor Relations Board, Region 3
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³ Filing a request for review electronically may be accomplished by using the E-filing system on the Agency's website at www.nlr.gov. Once the website is accessed, select **File Case Documents**, enter the NLRB Case Number, and follow the detailed instructions. The responsibility for the receipt of the request for review rests exclusively with the sender. A failure to timely file the request for review will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off line or unavailable for some other reason, absent a determination of technical failure of the site, with notice of such posted on the website.

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

WAIVER

IN THE MATTER OF _____
(Name of case) *(Number of case)*

PURSUANT TO SECTION 102.67 AND 102.69 OF THE RULES AND REGULATIONS OF THE NATIONAL LABOR RELATIONS BOARD, THE UNDERSIGNED PARTY WAIVES ITS RIGHT TO REQUEST REVIEW OF OR FILE EXCEPTIONS TO THE REGIONAL DIRECTOR'S AND/OR HEARING OFFICER'S

_____ IN THE ABOVE
(Name of document or applicable documents)

CAPTIONED MATTER. _____
(Date of document)

OR CHECK IF DOCUMENT NOT YET ISSUED.

(Name of party)

BY _____
(Name of Representative)

(Title)

DATE _____