

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

UNITED MAINTENANCE COMPANY, INC.,)
)
Employer,)
)
v.)
)
SERVICE EMPLOYEES INTERNATIONAL)
UNION, LOCAL 1,)
)
Petitioner.)
)
)
)

Case No. 13-RC-106926

**REQUEST FOR REVIEW BY UNITED MAINTENANCE COMPANY, INC. OF THE
DECISION AND DIRECTION OF ELECTION OF THE REGIONAL DIRECTOR,
REGION 13**

United Maintenance Company, Inc. ("United"), by its counsel, submits this Request for Review of the Decision and Direction of the Regional Director, Region 13, pursuant to Section 102.67 of the Rules and Regulations of the NLRB.

PROCEDURAL BACKGROUND

The Regional Director of Region 13 issued his Decision and Direction of Election ("Decision") on July 12, 2013. That Decision followed an evidentiary hearing before a hearing officer of the National Labor Relations Board ("NLRB") on June 25, 2013. Two issues were addressed at the hearing. The first concerned whether the Petition of Service Employees International Union, Local 1 ("SEIU") should be dismissed based on a recently executed collective bargaining agreement (the "Agreement") between United and the International Brotherhood of Teamsters, Local 727 ("Local 727"). The second issue concerned whether the window washers should be included within the bargaining unit proposed by SEIU; however,

after the hearing, SEIU conceded this point and agreed that the window washers should be included in the unit if an election was directed.

The Regional Director determined that the Agreement between Local 727 and United did not bar the SEIU's petition for election, and that Local 727 had disclaimed interest as the exclusive bargaining representative of United's janitors and window washers assigned to provide services at O'Hare International Airport ("O'Hare"). Pursuant to Section 102.67(c)(1) and (4), United now timely submits its Request for Review to the NLRB.

BRIEF SUMMARY OF FACTS

United has no material dispute with the Statement of Facts presented by the Regional Director in the Decision. The factual statements presented by the Regional Director are an accurate, albeit incomplete, depiction of the record developed at the hearing. Since United has no issue with the factual statements set forth in the Decision, it will not repeat those facts in this Request for Review. Of particular significance to this matter, however, are several key facts which are not mentioned by the Regional Director in his Decision.

Unrefuted are the facts that Local 727 presented evidence to United that Local 727 represented a majority of United's employees at O'Hare, and that evidence was confirmed by an independent arbitrator pursuant to a neutrality agreement in place between United and Local 727 (Record of proceedings; page 20, line 25; page 21, lines 1-24). There is no evidence in the record that at any time relevant to this proceeding, Local 727 lost majority status or that SEIU ever had majority support of the employees of United at O'Hare. These facts are important because the interests of the employees as a relevant factor are not mentioned in the Decision.

Also significant and unrefuted is the fact that Local 727 never participated in any mediation, arbitration or other form of dispute resolution with respect to any purported

jurisdictional dispute (Record of Proceedings; page 72, lines 13-25; page 73, lines 1-18). In addition, SEIU did not present the alleged complaint which supposedly triggered the instruction to disclaim from James Hoffa, the General President of the International Brotherhood of Teamsters; nor did SEIU put on any evidence concerning compliance with the Change to Win Constitution or any evidence concerning the dispute resolution process itself. The only reference in the entire United record to a jurisdictional dispute is found in the four sentence letter of Mr. Hoffa, which was admitted into evidence as Employer's Exhibit 10. Also, there is nothing in Local 727's charter which would prevent it from representing United's employees. It is against this factual backdrop that the Regional Director decided that the disclaimer of Local 727 operated to prevent application of the contract bar doctrine.

UNITED'S BASIS FOR THE REQUEST FOR REVIEW

United submits that the facts of this matter present important questions of law and policy due to a substantial departure from NLRB precedent. There also are compelling reasons for reconsideration of this Decision and the need for clarification of important NLRB policy concerning the contract bar doctrine. In fact, given the conflicting precedent involved on this topic, the reasons for granting the Request for Review are even more compelling. The Regional Director's reliance on *American Sunroof Corp.*, 243 NLRB 1128 (1979) is misplaced based on key distinguishing facts present in this case. The NLRB also should review the Decision as an opportunity to reconcile conflicting NLRB precedent on when the contract bar will apply despite a disclaimer of interest from the contracting union. The Decision also should be reviewed to clarify the evidentiary burdens of the parties and whether a party asserting the contract bar has any realistic opportunity to demonstrate collusion (a high burden indeed) in the context of a representation hearing occurring mere weeks after the filing of a petition by another union. Instead, at the very least, the burden should be on the petitioning union to demonstrate facts why

the contract bar should not apply and its compliance with jurisdictional dispute procedures, especially in situations where, as here, the employees already have expressed support for the contracting union and no evidence of majority support for the petitioning union is provided.

ARGUMENT

A. Employee choice is an important and distinguishing factor.

There are, essentially, four parties of interest in this matter. An important argument can be made that the interest of the bargaining unit employees should trump all other concerns. The evidence in the record is unrefuted on two key points. First, the employees who exercised their Section 7 rights to sign authorization cards in favor of Local 727 now are faced with their own union disclaiming any interest in representing them. Second, there is no evidence in the record that the union representing those employees (Local 727) or the petitioning local of SEIU had any involvement whatsoever in the jurisdictional dispute. At best, Tom Balanoff, the President of Local 1 of SEIU, testified that he had knowledge of a complaint being initiated at the international level.

Employee choice is a substantial concern left unaddressed by the Regional Director in his Decision, which effectively nullifies the express intent of a majority of the bargaining unit employees to have Local 727 represent them. The Decision also has the practical effect of eliminating the contract which the bargaining unit employees ratified and expected to be implemented. The NLRB's analysis should take into consideration these very important concepts, yet it is missing entirely from the Decision of the Regional Director.

Evidence of employee preference was present in *American Sunroof Corp.*, and that is a key distinguishing factor between the two cases and not addressed by the Regional Director. In *American Sunroof Corp.*, forty employees comprised the bargaining unit, and the contracting

union only disclaimed interest in the bargaining unit *after* a Section 9(e)(1) decertification petition was filed by 39 of the 40 employees. Therefore, there was clear evidence that the contracting union no longer enjoyed majority support, and the NLRB had to consider the application of the contract bar doctrine in light of this clear expression of employee intent. No such evidence exists in this case. In fact, the only evidence on employee preference is that Local 727 continued to enjoy the majority support of the bargaining unit at the time of the disclaimer.

Employee choice should be a key factor with respect to the application of the contract bar doctrine. After all, the contract bar doctrine does not just benefit the union and the employer, or exist as a theory in the push and pull between unions and employers, but it also benefits directly the employees on whose behalf the contract was negotiated and subsequently administered. The practical effect of the non-application of the contract bar doctrine is that the contract goes away, and the employees lose the benefit of the contract terms which had been negotiated. In this situation, the selection by the employees of the bargaining representative and their ratification of the contract itself has been nullified upon only the barest of evidence. Evidence of employee preference for a bargaining representative was present in *American Sunroof Corp.* and is absent here. That is a clear distinguishing factor which should have entered into the calculus of the Regional Director.

B. The Board has never reconciled conflicting precedent concerning the Contract Bar Doctrine.

One line of Board precedent, represented by *East Manufacturing*, 242 NLRB 5 (1979) and *Mack Trucks, Inc.* 209 NLRB 1003 (1974) elevates industrial peace, employee choice, and the enforcement of contracts above the competing interests of two unions in jurisdictional disputes, except when the contracting union is defunct. The second line of cases, evidenced by

American Sunroof Corp. and *VFL Technology Corp.*, 332 NLRB 1443 (2000), sacrifices the contract bar doctrine at the altar of a union disclaimer, except in situations where the unions are shown to be in collusion with each other. Lost in the second line of cases are considerations of bargaining unit employee preference for a bargaining representative, contract stability, industrial peace, the interests of the employer (which invested time and resources into the negotiation of a collective bargaining agreement), and finally, the interests of employees who seek to enjoy the contract terms they ratified.

C. The standard suggested by the Regional Director is unworkable on a practical level.

The practical import of the Decision is that the contract bar, absent evidence of collusion between a contracting union and a petitioning union, will fall to a union's disclaimer. It is undisputed that the contract bar doctrine most often is raised at representation hearings which occur within a matter of weeks after the filing of a petition by a labor organization. With the exception of the availability of a subpoena for the hearing, an employer has no discovery rights or practical ability to investigate, much less prove, the existence of collusion between unions. This practical reality means that the Board has set an insurmountable evidentiary burden on the employer, which rarely could be met, except in those rare occasions where an employer through happenstance becomes aware of collusive and often secret activities by third parties. Thus, the most likely result of following the *VFL Technology Corp.* line of cases is the elimination of the protection of a contract bar for employees and the employer, even when there is little if no record made of the underlying reasons for a contracting union's disclaimer. Indeed, the rhetorical question is begged. What is left of the contract bar doctrine if all a contracting union must do is disclaim and invoke the words "jurisdictional dispute"? In order to overcome long-standing and

important policy considerations such as employee choice and industrial peace, certainly more should be required.

D. Policy considerations warrant the review and reversal of the Decision.

Perhaps the best discussion of the competing policy interests at stake in this dispute is found in *Garden Manor Farms, Inc.* 341 NLRB 24 (2004), wherein former Member Schaumber identifies the various policy goals which should be accommodated in the analysis of this issue. Included among those policy goals are stability in collective bargaining, the ability of the employees to secure adequate and effective representation, employee free choice and the loss of terms which the employees had achieved in bargaining. *Id.* Former Member Schaumber said that in shaping the contract bar doctrine, "the Board must consider both the importance of preserving stability in collective bargaining agreements and the policy of the Act to ensure that employees secure fair, adequate and effective representation. *Id.* citing *NLRB v. Circle A & W Products Co.*, 647 F.2d 924 (9th Circ. 1981). He also pointed out accurately that unit employees are not parties to the unions' turf wars and their choice is set aside, thereby "undermining employee democracy, breeding cynicism and mistrust. *Id.* Former Member Schaumber also articulated the interests of the employers who now face additional costs and uncertainty after engaging in good faith in the collective bargaining process and establishing a bargaining relationship with the union holding the support of a verified majority of the bargaining unit employees. *Id.*

A proper test would take into consideration all of these issues. The line of cases exemplified by *American Sunroof Corp.* leaves out of the equation employee choice, stability in industrial relations between a majority union and the employer, and the preservation of the contract terms the employees previously ratified. For these reasons alone, the NLRB should

reject that standard and either adopt expressly the approach set forth in *East Manufacturing, Inc.* and *Mack Trucks, Inc.*, or modify the test outlined in that line of cases to take into consideration all relevant factors and policy considerations.

CONCLUSION

For the foregoing reasons, United requests that the NLRB accept for review the Decision of the Regional Director of Region 13 in this matter. Accepting the review will allow the NLRB to resolve the inconsistencies in existing NLRB precedent, and/or fashion a modified test which takes into consideration all relevant, long-standing policy goals of the NLRB.

Respectfully submitted,

UNITED MAINTENANCE COMPANY, INC.

By: /s/Tom H. Luetkemeyer

Tom H. Luetkemeyer
One of Its Attorneys

Tom H. Luetkemeyer
Hinshaw & Culbertson LLP
222 N. LaSalle Street, Suite 300
Chicago, IL 60601
Phone: 312-704-3000
Fax: 312-704-3001

CERTIFICATE OF SERVICE

I do hereby certify that the attached Request for Review was served on July 26, 2013, by electronic mail to:

Mr. Robert Bloch
Dowd, Bloch & Bennett
8 South Michigan Avenue, 19th Floor
Chicago, IL 60603
rebloch@dbb-law.com

Dated: July 26, 2013

/s/ Leigh C. Bonsall
Leigh C. Bonsall
HINSHAW & CULBERTSON LLP
222 North LaSalle St., Suite 300
Chicago, IL 60601
(312) 704-3000