

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

In the matter of:

UNITED MAINTENANCE COMPANY, INC.,)	
)	
Employer,)	
)	
and)	Case 13-RC-106926
)	
SERVICE EMPLOYEES INTERNATIONAL)	
UNION, LOCAL 1,)	
)	
Petitioner.)	

**PETITIONER’S STATEMENT IN OPPOSITION TO
EMPLOYER’S REQUEST FOR REVIEW**

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Employer United Maintenance Company, Inc. seeks review of the Regional Director's Decision and Direction of Election based on the following grounds set forth in the Board's Rules and Regulations, Sections 102.67(c)(1) and (4):

1. That the Regional Director engaged in a "substantial" departure from officially reported Board precedent (Brief at 3); and
2. There are compelling reasons for reconsideration of an important Board rule or policy based on its claim that the Board must resolve "conflicting precedent" (Brief at 3).

There are no compelling reasons present to grant review. The Employer's request for review should be denied because the Regional Director's decision falls squarely within controlling precedent and the Employer makes no valid argument to impose an "employee preference" rule in contract bar analysis where the incumbent union has validly disclaimed interest in representing the employees in the petitioned-for unit.

STATEMENT OF FACTS

The Petitioner has represented private sector janitors since its founding 93 years ago. Janitors are its largest craft, and it currently represents 30,000 janitors (UM, 106-07; Gx, 168).¹ It has represented window washers since a window washer local union was merged into Petitioner in 1992 (UM, 106, 108). It has represented janitors and window washers working at O'Hare Airport continuously since the airport began subcontracting this work in 2004 (UM, 108; Gx, 168, 179). When United Maintenance took over the janitorial contract at O'Hare on

¹ At the pre-election hearing in this matter, the Regional Director took administrative notice of the hearing record in Geralex Janitorial, Case 13-RC-106888, a closely related matter whose hearing was conducted the day prior to the June 25, 2013 hearing in United Maintenance (UM, 123). Accordingly, references to the hearing record for the United Maintenance hearing are designated "UM" and references to the hearing record for the Geralex hearing are designated "Gx."

December 17, 2012, it hired some incumbent employees but not enough to confer bargaining rights on Petitioner (UM, 18; Gx, 170). In January 2013, Petitioner's President Thomas Balanoff directed his staff to seek representation rights for all janitors employed at O'Hare airport (UM, 44; Gx, 177-80).

Teamsters Local 727 represents airport hotel shuttle drivers at another Employer facility, and it previously procured a card check/access/neutrality agreement from the Employer under the labor contract negotiated at the other facility (UM, 11-16, 19021; UM Emp. Exh. 1). Local 727's jurisdiction, though eclectic and broad, does not include janitors or window washers (UM, 77-78; UM Emp. Exh. 9).²

As Petitioner engaged in representational activities at O'Hare Airport, the Employer gave Local 727 agents access to its employees at O'Hare but refused such access to Petitioner (UM, 19-20, 45-46). Local 727 commenced its organizing activity at O'Hare on or about March 30, 2013, when it presented authorization cards to the Employer (UM, 20-21).³ Within days of presenting its card majority, and after one bargaining session (UM, 23), Local 727 signed a labor contract on April 3, 2013 with the Employer covering janitors and window washers employed at O'Hare, which became effective on that date (UM, 25; UM Emp. Exh. 2). The record is clear that the nearly 5-year long Local 727 labor contract, effective from April 3, 2013 through December 15, 2017, secured literally *nothing* in the way of improvements to wages or benefits than the pre-existing terms before Local 727 first attempted to organize the Employer (UM, 47-

² Local 727's jurisdiction is described on its letterhead: Auto Livery Chauffeurs, Embalmers, Funeral Directors, Apprentices, Ambulance Drivers & Helpers, Taxicab Drivers, Miscellaneous Garage Employees, Car Washers, Greasers, Polishers & Wash Rack Attendants, Motion Picture, Theatrical, Exposition, Convention & Trade Show Employees, Pharmacists, Bus Drivers, Parking Lot Attendants & Hikers, and Hotel Industry & Racetrack Industry Employees (UM Emp. Exh. 9).

³ The Regional Director found that both the Petitioner and Teamsters Local 727 commenced organizational campaigns with the Employer in January 2013 (D&DE at 2). But the record is devoid of any organizational activity by Local 727 prior to March 30, 2013 (UM, 20-21, 26-29; Gx, 150-51).

48; UM Emp. Exh. 2).⁴ The record further contains no evidence that the Local 727 labor contract was ratified by the affected employees.⁵

Local 727 is an affiliate of the International Brotherhood of Teamsters (“IBT”), and Petitioner Local 1 is an affiliate of the Service Employees International Union (“SEIU”). Both international unions are affiliates of the labor federation Change to Win (UM, 75-76; Gx, 92-93, 171).

Petitioner’s President learned in early April that Local 727 had initiated organizational activities at United Maintenance (Gx, 171). Petitioner caused a jurisdictional complaint to be initiated by the SEIU with Change to Win pursuant to its constitutional jurisdictional dispute resolution procedure (UM, 76; Gx, 171-72, 93; UM Board Exh. 3). Such complaints must be brought by the International affiliates and not by local unions (Gx, 172). The complaint concerned all privatized janitors working at O’Hare Airport (Gx, 173).

As the Regional Director found, the Change to Win Constitution provides for voluntary adjustment of disputes concerning organizing rights (Article XIII) or established bargaining relationships (Article XIV) by the affiliated International Unions under Article XV Sections 1 and 4(a) (UM Board Exh. 3). Though no formal proceedings ensued on the Petitioner’s complaint (UM, 73), and the local unions weren’t directly involved in the proceedings (UM, 72; Gx, 174), the matter was resolved voluntarily by the international unions without a hearing (UM,

⁴ United Maintenance counsel Doerscheln testified that the parties “tabled” economics for the future (UM, 23-24). But he acknowledged that the 4.5-year contract contains no provisions for a reopener (UM, 48; UM Emp. Exh. 2).

⁵ Local 727’s General Counsel Stephanie Brinson testified at both the United Maintenance and Geralex hearings, and Local 727 Business Representative Nicholas Micaletti testified at the Geralex hearing. Neither person testified that the United Maintenance O’Hare Airport contract was ratified by the affected employees. Brinson testified only that she “assumed” it was ratified because there was no strike (UM, 71). United Maintenance counsel Doerscheln opined that it “had to be ratified in order for us to sign it” (UM, 26) but later admitted he didn’t know if it was ratified or not (UM, 48-49).

77), and on May 3, 2013 the IBT by letter directed Local 727 to disclaim representation of O'Hare airport workers. The letter stated in relevant part:

The Teamsters and SEIU, by virtue of our membership in Change to Win, are bound to the jurisdictional dispute mechanisms and procedures in the Change to Win Constitution.

In resolution of the dispute between SEIU and the Teamsters in the above-referenced matter, I am hereby instructing Local 727 to immediately disclaim interest in the unit of airport workers at Chicago-O'Hare Airport that was recently represented by SEIU Local 1.

(UM Ptr. Exh. 1; UM Emp. Exh. 10.) The letter was written by IBT General President Hoffa and was addressed to Local 727 principal officer John T. Coli (Gx, 93-94). As the Regional Director noted, this exhibit, which was separately introduced into the record *both* by the Employer and the Petitioner, was received as substantive evidence and without any objection as to the truth of the matters asserted therein.

On May 6, Local 727 sent a disclaimer letter by electronic mail to United Maintenance. The letter was signed by John Coli, the Local 727 principal officer who had executed the Employer's labor contract on behalf of Local 727 (UM, 33-35). It stated, in relevant part:

Please be advised that Teamsters Local Union No. 727 hereby disclaim any and all representational interest in the previously recognized unit of airport workers located at Chicago-O'Hare Airport.

(UM Emp. Exh. 9). Employer General Counsel Paul Doerscheln understood the disclaimer letter to mean that Local 727 "was disclaiming its interest, its representational interest in the United Maintenance employees at O'Hare" (UM, 32-33). As Local 727 General Counsel Brinson affirmed at the hearing, Local 727's disclaimer was unconditional, and Local 727 had no intention ever to represent Geralex employees in the future (UM, 79).

Local 727 disclaimed interest in representing the United Maintenance employees solely because it was directed to do so by the IBT in resolution of jurisdictional dispute claims brought

by the SEIU (UM, 77, 74; Gx, 98). There was never any agreement between Petitioner and Local 727 pertaining to the Employer, including any agreement that Local 727 would disclaim in order that Petitioner could renegotiate a different agreement with the Employer (UM, 78; Gx, 175). There was no sham or act of bad faith between Petitioner and Local 727 (Gx, 176). Petitioner sought Local 727's removal in order to protect and preserve Petitioner's bargaining rights in the privatized janitorial industry and the standards it had established through collective bargaining (Gx, 176).

Local 727 has taken no action inconsistent with its disclaimer (UM, 78, 50, 54). It is undisputed that Local 727 ceased all contact with United Maintenance and all representation functions at United Maintenance as of May 6, 2013. (UM, 58, 78-79). After May 6, Local 727 never engaged in any activities of any kind at O'Hare (UM, 49-50; Gx, 99-100). It filed no grievances (UM, 98). Local 727 has since engaged in no picketing, handbilling or other organizational activity at O'Hare (UM, 79). No union dues were deducted at any time prior to or after the Local 727 disclaimer (UM, 78). Local 727 was notified of the hearing in this matter and pointedly declined to intervene because it had disclaimed any representational interest in the petitioned-for unit (UM, 79-80; UM Board Exh. 4).

Local 727's representation of United Maintenance employees lasted just over 30 days. Its labor contract with United Maintenance provided the employees no wages or benefits they didn't already have, and thus they lost no economic benefits as a result of Local 727's disclaimer.

ARGUMENT

1. The Regional Director did not depart from officially reported Board precedent

The Employer does not dispute that resolution of this matter is governed under *American Sunroof Corp.*, 243 NLRB 1128 (1979) and *VFL Technology Corporation*, 332 NLRB 1443 (2000), which hold that “[i]t is well settled that a contract does not bar an election when the contracting union has validly disclaimed interest in representing the employees covered by the agreement.” The only permissible inquiry as to the validity of the disclaimer is whether the disclaimer is clear and unequivocal and made in good faith. *Id.*, citing *American Sunroof*, 243 NLRB 1128 (1979).

Rather, the Employer makes the frivolous argument that the Board should distinguish *American Sunroof* because of the “key distinguishing factor” in that proceeding that the union’s disclaimer there followed evidence that it was no longer the majority representative, and that employee preference must therefore overrule all of the other factors in ascertaining the validity of a union’s disclaimer here.

The Employer’s argument is misplaced both factually and legally.

First, it makes the dishonest claim that the employees there nearly unanimously supported the “decertification” of the incumbent union (Brief, 5). In fact, the employees had filed a union deauthorization petition, not a decertification petition, and no vote was ever conducted to ascertain employee preference on the matter. Moreover, the Board’s decision in *American Sunroof* was not based in any respect on the fact that a deauthorization petition was filed, nor does that factual context arise in the more recent *VFL Technology* decision.

Second, there is no basis to conclude, as the Employer claims, that the Board in *American Sunroof* and *VFL Technologies* failed to reconcile competing precedent regarding contract bar rules. In *American Sunroof*, as affirmed in *VFL Technologies*, the Board explained that *Mack Trucks* and *Gate City Optical* present “special circumstances” in the analysis of disclaimers, either due to collusion between the unions or the defunctness of a union. *American Sunroof*, 243 NLRB at 1129; *VFL Technologies*, 332 NLRB at 1144. The collusive agreement between unions rendered disclaimer ineffective in *Mack Trucks*, and no such collusion was present in the latter decisions, or here.

Accordingly, there is no reasonable basis to suggest that the Regional Director departed from precedent by failing to recognize an “employee preference” element into the disclaimer analysis.

2. There are no compelling reasons here to reconsider the Board’s disclaimer and contract bar rules

The Employer asks the Board to reconsider its rules concerning its hearing procedures, and its policies concerning incumbent union disclaimers and contract bars. It fails to provide any valid reasons to support its requests, and certainly not compelling ones.

First, the Employer argues that the Board’s pre-election processes create for it an “insurmountable evidentiary burden” to prove that collusion exists – which it infers it could have proven here if it were given the opportunity. (Brief at 6). The Employer complains that it has no discovery rights here other than subpoenas in which to prove collusion, and it has only the two-week period between petition filing and hearing date to assemble its evidentiary case.

Presumably, the Employer seeks to overturn or amend Sections 102.63-67 of the Board’s Rules

and Regulations, and would prefer to establish the full panoply of discovery rules available under the Federal Rules of Civil Procedure, including depositions, interrogatories, and other pre-hearing discovery production in which to establish its case.

The problem, of course, is the Employer's proposal would so unreasonably delay the pre-election hearing that employees could not reasonably express their preference, which the employer claims it seeks to protect. Would it allow 6 months for this pre-hearing discovery, 12 months, or perhaps more? It has not, in any event, demonstrated why the Board's existing tools to prepare evidentiary records as established under Rule 102.66 are insufficient.

The Employer is also wrong to assert that it has only two weeks in which to put its case for collusion together. Here, as in many cases, the incumbent union disclaimed interest in representing the employees over a month before the Petitioner filed for election. The Employer well knew that Local 727 claimed on May 6 to have been ordered by its international union to disclaim interest in the O'Hare employees due to the jurisdictional claims made by the SEIU. If it distrusted the reasons presented by Local 727, the Employer had significant time in which to investigate its concerns.

The record here does not, in any event, present even a hint of collusion between the two local unions, but rather an adversarial dispute over jurisdiction that was resolved between the international unions to which the local unions are affiliated. The Employer presents no valid reason why it should be allowed the panoply of time consuming and expensive pre-hearing discovery techniques to pursue a theory for which it lacks even a scintilla of evidence.

The Employer's second argument, equally unavailing, is that the Board should allow employee preference, and other factors advocated by former member Schaumber, to control the

contract bar doctrine, and which presumably would spell the demise of the Board's disclaimer policy.

It must first be observed, before examining the Employer's request for reconsideration, that the Employer does *not* seek review over the Board's policy to recognize the validity of disclaimers pursuant to resolution of jurisdictional disputes between unions and withdrawal of an incumbent union as bargaining representative. The Board has at least twice reviewed disclaimers pursuant to jurisdictional protections established by the AFL-CIO Constitution and found them to be in good faith and valid. Most recently, in *VFL Technology Corporation*, the disclaimer of a 9(a) labor agreement pursuant to an Article XX no-raid ruling was found to be valid and in good faith. "Those procedures are clearly adversarial in nature as between the unions claiming the right under the AFL-CIO constitution to represent the unit employees. Thus in no way can utilization of the procedures be considered collusion." 332 NLRB at 1444. But a formal ruling is not necessary to find that the disclaimer was made in good faith. In *Food & Commercial Workers Local 158 (Queen Fisheries)*, 208 NLRB 58 (1974), cited with approval in *VFL Technology*, a union disclaimed representation of multiple units based on its assertion that such representation was "barred by reason of Article XX." Though the record was devoid of any proceeding actually initiated under Article XX, the Board accepted the disclaimer on this basis, finding there "is no evidence to indicate that the disclaimer was a mere tactical maneuver to avoid the effects of the collective-bargaining agreement . . . or to avoid bargaining , . . . or otherwise not made in good faith." *Id.*, at 59; See *VFL Technology*, 332 NLRB at 1444 fn 3. The Employer further makes no claim, nor seek review, on the basis that jurisdictional disputes resolved by the Change to Win federation deserve different treatment than those resolved by the AFL-CIO, nor is there is there any reason for the Board to do so on its own.

The Employer's argument therefore ignores that basic fact that a union can't be compelled to represent employees if its parent organization forbids it or if it otherwise chooses for non-collusive reasons that it no longer wishes to perform that function. The Employer does not contend here that it should be illegal for a union to disclaim interest in representing employees. And if a union can legally disclaim, how is employee preference served if the bargaining representative has abandoned the bargaining unit? As the Board in *American Sunroof* observed, "the purposes of the Act are not served by a result which would, in fact, leave the employees with no representation at all for the remainder of the term of [the incumbent union's] contract." 243 NLRB at 1129, fn 3.

The Employer also seeks to resurrect former member Schaumber's dissent in *Garden Manor Farms*, 341 NLRB 192 (2004) to narrow or eliminate disclaimer as an exception to the contract bar rule. Member Schaumber therein stated 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.*, at 193 (citation omitted).

It is ironic that the Employer chooses on this record to posit such principles for evaluating contract bars and disclaimers. Its labor contract with Local 727 was written in a single bargaining session and provided *nothing* for the covered employees in improved wages and benefits. Local 727 then conclusively disclaimed and abandoned the relationship after only a month. There is little here for which the employer can find a stable collective bargaining environment, and nothing to suggest that the covered employees would secure fair, adequate and effective representation if the Local 727 labor contract barred a new election after Local 727 had lawfully withdrawn as bargaining representative.

CONCLUSION

Under Rule 102.67(c), the Board will grant a request for review only where compelling reasons exist for review. For the foregoing reasons, the Petitioner respectfully requests that the Employer's Request for Review be denied.

Respectfully submitted,

/s/ Robert E. Bloch
Attorney for Petitioner

CERTIFICATE OF SERVICE

The undersigned caused a copy of the Petitioner's Statement in Opposition to Employer's Request for Review to be served on July 30, 2013,

by United States mail, postage prepaid, on:

Mr. Peter Sung Ohr
Regional Director
National Labor Relations Board, Region 13
The Rookery Building
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/s/ Robert E. Bloch