

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 15

I.S.S. ACTION, INC.,

Employer,
and

Case No. 15-RC-120239

GULF COAST SECURITY PROFESSIONALS
ASSOCIATION,

Petitioner,
and

INTERNATIONAL UNION, SECURITY,
POLICE & FIRE PROFESSIONALS OF
AMERICA (SPFPA), LOCAL 711,

Union.

SPFPA'S REQUEST FOR REVIEW OF THE REGIONAL DIRECTOR'S DECISION

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I. Introduction

Region 15 held a hearing on Case No. 15-RC-120239 on Tuesday, January 21, 2013 in New Orleans, LA. Chief Executive Officer Pamela Newman appeared on behalf of I.S.S. Action, Inc. (I.S.S.), William Prince represented Gulf Coast Security Professionals Association (Gulf Coast or the Petitioner), in which he holds the title of President. Eric Berg of Gregory, Moore, Jeakle & Brooks, P.C. appeared on behalf of the International Union, Security, Police & Fire Professionals of America (SPFPA). At issue was whether there was a contract bar in place that would block Gulf Coast's RC Petition for the bargaining unit working at the Government Printing Office (GPO) located within the National Aeronautics & Space Administration's (NASA) Stennis Space Center Complex (hereafter Stennis or the Complex). The Regional Director issued a Decision and Direction of Election finding no contract bar to Gulf Coast's petition. The Union respectfully requests the Board reverse the Regional Director's Decision and Direction of Election and dismiss the RC petition. This case raises a substantial question of law or policy as to whether the Regional Director departed from the Board's reported precedent.

II. Statement of Facts

In 2010, the Federal Government mandated that an "8(a)" company receive the contract for security and protective services at the Stennis Space Center. (Tns. p. 28). Ms. Newman explained that to qualify as an 8(a) company, the business must be owned by a woman, minority, or member of another disadvantaged group. *Id.* I.S.S. took over as the prime contractor effective February 1, 2012. *Id.* I.S.S. had an agreement with Paragon Systems, Inc., the predecessor contractor, to subcontract the security services.¹ *Id.* Ms. Newman and Les Kaciban, President of Paragon Systems, Inc. executed three collective bargaining agreements (CBAs) covering all of the Security Officers working at Stennis. Ms. Newman characterized the CBAs as "bridge agreements". (Tns. p. 28).

There are three separate bargaining units of security officers within the Stennis, all of whom were previously employed by Paragon and became I.S.S. employees February 1, 2012. Because there are three different bargaining units there were and are three different CBAs. The CBA at issue here covers the bargaining unit working at the GPO within Stennis. Anywhere from 19-20 Security Officers work in this unit. (Tns. p. 97). Ms. Newman testified that the three CBAs were bargained for at the same time. (Tns. p. 38). Further, Ms. Newman testified that the parties intended all three contracts to become effective February 1, 2012

¹ During the Hearing it became clear that Paragon was no longer involved in performing security services at the Government Printing Office (Tns. pps. 28-32). As such, the testimony focused on I.S.S. only despite the fact that Paragon also signed the CBAs. At the hearing the Union had a sworn affidavit from Les Kaciban, President of Paragon Systems, Inc., indicating that the expiration date of the GPO CBA should have been September 15, 2014. That affidavit was submitted to the Region.

and end on September 15, 2014. The CBAs are consistent on this point, save a typographical error on the cover page of the GPO CBA. The bottom of the cover page of the GPO CBA bears the unadorned dates "March 22, 2011- March 21, 2014".

Additionally, the GPO CBA includes two Letters of Understanding (LOUs) that identify the bargaining unit and CBA to be amended as follows. The parties "agree to amend to current Collective Bargaining Agreement representing the Security Officer Employees at the Government Printing Office John C. Space Center in Hancock County, Mississippi as certified by the National Labor Relations Board in Case Number 15-RC-8799 that has a March 24, 2014 expiration date". The Petitioner did not cite the LOUs as the source of its confusion. The only error discussed at the hearing was the error on the cover page of the CBA.

Nevertheless, the Regional Director, *sua sponte*, identified the LOUs as the cause of ambiguity in the CBA. Both LOUs were drafted to amend the health and welfare (H&W) benefit contribution by the Employer -nothing further. The language identifying the bargaining unit and contract to be amended is descriptive only. The LOUs both explicitly limit their effect to Article 22, Section 22.4 (H&W contributions). By the plain terms of the LOUs nothing in the CBA was altered but the H&W contribution. The definition of the bargaining unit and the typographical errors they contain do not alter the CBA.

Ms. Newman testified that the parties built the new CBAs from the old documents (CBAs) between Paragon and SPFPA. (Tns. p. 40). When asked whether it was possible that when altering the CBA with Paragon that someone failed to

change the date on the cover page while creating the new CBA, Ms. Newman responded in the affirmative. *Id.* The date March 21, 2014 was the original expiration of the CBA between Paragon and SPFPA. (Tns. p. 67). That error, in turn, could have prompted the incorrect expiration date to be transposed into the LOUs.

Rick O'Quinn, Vice President Region 2 SPFPA, who signed the CBAs on behalf of the SPFPA, testified by telephone. Mr. O'Quinn explained that all three CBAs were negotiated at the same time. (Tns. p. 65). Further, Mr. O'Quinn explained that the same effective and ending dates (February 1, 2012 & September 15, 2014) were negotiated to apply to all three CBAs. (Tns. p. 66). Mr. O'Quinn explained that the March 21, 2014 date on the GPO CBS was simply transposed from the previous contract between SPFPA and Paragon. The CBA between Paragon and SPFPA was scheduled to end March 21, 2014. (Tns. p. 67). Consistent with Ms. Newman, Mr. O'Quinn testified that the cover page of the GPO CBA should have read February 1, 2012 - September 15, 2014.

Mr. O'Quinn explained that the September 15, 2014 date was selected for a deliberate reason. In order for the Company to get a "cost adjustment" from the government a signed CBA must be submitted prior to the end of the fiscal year, October 1, 2014. (Tns. p. 69). Simply put, September 15, 2014 was selected so the Security Officers could negotiate a raise in wages and benefits in time for the government to approve a "cost adjustment" of its compensation to the Contractor. (Tns. p. 72-3).

The Petitioner called several witnesses, all of whom were Security Officers currently working at the GPO.² Each witness testified that he was under the impression that the CBA expired March 21, 2014. David Van Someren testified that he noticed that the cover page and the listed effective and termination dates in the body of the contract differed. (Tns. p. 77). Mr. Van Someren testified that he asked Thomas Burleson, Operations Manager, Building 9101 about the discrepancy and Burleson's supervisor William Turner. (Tns. p. 78) Burleson indicated his belief was that the dates on the cover page were the effective and termination dates. Mr. Burleson apparently offered no explanation as to why he maintained this belief. (Tns. p. 80). Mr. Van Someren agreed that Mr. Burleson might have been offering his own interpretation. *Id.* In the next breath Mr. Van Someren said "[n]ow I did not personally ask Mr. Bill Turner, or William Turner, what the start or ending date was. But I figured it trickled down, since the information should have went up." (Tns. p. 79). Notably, Mr. Van Someren did not testify that he asked his Union steward, Local President, or any other individual from the Union. Further, Mr. Van Someren did not testify that he contacted the I.S.S. corporate office, it's labor relations department, or human resources department.

The Petitioner next called Mr. Phillip Borne who testified that he believed the CBA expired March 21, 2014. (Tns. p. 84). Mr. Borne also testified that he noticed the discrepancy between the cover page and the substantive provision of the CBA listing the effective and termination dates. (Tns. p. 86). Mr. Borne testified

² David Van Someren submitted his resignation to the Company. His last day of work was January 26, 2014.

that he asked Mr. Burleson to explain his perceived discrepancy on the CBA's dates but Mr. Burleson never got back to him. *Id.* It would appear that Mr. Borne did nothing further to investigate the perceived conflict.

The Petitioner's final witness, Mr. Michael Prince, testified that he also understood the termination date of the CBA to be March 21, 2014. (Tns. p. 89). However, Mr. M. Prince also testified "I've never looked at the back until recently. I had no reason to." (Tns. p. 90). When questioned by the Hearing Officer what events, if any, led him to believe the expiration date was March 21, 2014, Mr. M. Prince explained "there was nothing otherwise stated". (Tns. p. 94).

Despite the fact that the LOUs were never considered during the hearing or in the post-hearing briefs, the Regional Director based her decision on the typographical errors found therein. The Regional Director denied the Union the opportunity to submit evidence and argument as to the effect of the LOUs. The Board should exclude the introductory paragraphs of the LOUs because they are not part of the CBA. To do so renders the Regional Director's argument moot as the duration of the CBA is stated with particularity in a substantive and enforceable clause of the CBA. If the Board is not inclined to reverse the Decision and Direction of Election the case should be remanded for supplementary proceedings.

III. Question Presented

Whether the Regional Director erred by finding SPFPA's Collective Bargaining Agreement was not a bar to Gulf Coast's representative election (15-RC-120239).

IV. Discussion

A. The Four Corners of the Contract

The Petitioner argued that the cover sheet of the CBA that includes a line "February 1, 2012 - March 21, 2014" required the conclusion that the CBA expires on March 21, 2014 and therefore its representation petition is timely. The Regional Director ignored the Petitioner's argument and held the typographical errors in the LOUs rendered the expiration date of the CBA ambiguous and therefore the CBA could not constitute a contract bar. The LOUs were not addressed by the Parties during the hearing or in post-hearing briefs. Despite the conclusion of the Regional Director, the durational clause in the CBA gives third-parties sufficient notice of its expiration.

The beginning and ending dates for the GPO CBA may be found on page 32 of Joint Exhibit 1, Article 29 § 29.1. Article 29 bears the title "Duration"; it reads as follows.

Article 29 DURATION

Section 29.1 This Agreement becomes effective February 1, 2012 and will remain in full force and effective until midnight, September 15, 2014, and from year to year thereafter, unless either party gives written notice, not less than sixty (60) days, immediately prior to the expiration date of its intention to amend, modify, or terminate this Agreement.

It is a fundamental principle of the law of contracts that "specific terms and exact terms are given greater weight than general language" *Royal Ins. Co. of Am. v. Orient Overseas Container Line Ltd.*, 525 F.3d 409, 420 (6th Cir. 2008)

(quoting *Restatement (Second) of Contracts* § 203(c) (1981) (internal marks omitted). "It is settled law that where an agreement contains general and specific provisions that conflict, 'the provision directed to a particular matter controls over the provision which is general in its terms.'" *L.W. Matteson, Inc. v. United States*, 61 Fed. Cl. 296, 307 (Fed. Cl. 2004) (quoting *Hol-Gar Mfg. Corp. v. United States*, 351 F.2d 972, 980 (1965)).

The Regional Director argued that the GPO CBA contained conflicting dates in the LOUs. First, the introductory paragraph containing the incorrect date does not alter the CBA. The LOUs are extremely specific about what changes the LOUs will have to the CBA- a change to the expiration date is not included. Plainly, the information relied upon by the Regional Director was not part of the CBA and therefore should not have been considered.

Even if the typographical errors are considered, where there are conflicting terms in the CBA the conflict must be resolved under the law of contracts. The Duration Article of the CBA says "the agreement becomes effective...and will remain in full force until September 15, 2014. The cover page, meant to identify the parties and the jobsite, does not have similar language to the Duration Clause. There is simply a line on the cover page that says "February 1, 2012 - March 21, 2014". Again, the language describing the bargaining unit and CBA to be amended in the LOUs is descriptive only -it was not incorporated into the CBA; it is not a substantive provision of the CBA and does not alter the CBA in anyway.

The language of the Duration clause is unequivocally more specific than the unadorned date on the cover page and the unincorporated dates found in the LOUs. As such, the specific language in the Duration section controls. If there is a conflict between provisions the contract must be read in favor of the more specific language.

The Petitioner's witnesses testified that they believed the CBA expired March 21, 2014. "The proper interpretation of a contract is a question of law." *Royal Ins. Co. of Am. v. Orient Overseas Container Line Ltd.*, 525 F.3d 409, 421 (6th Cir. 2008) (quoting *JPMorgan Chase Bank, N.A. v. Winget*, 510 F.3d 577, 582 (6th Cir. 2007)). As such, the subjective beliefs of the witnesses who testified for the Petitioner are irrelevant. The Petitioner's confusion is regrettable. However, as a matter of law, the expiration date of the CBA is September 15, 2014. Such a conclusion is drawn from the four corners of the contract without the need for parol evidence. As a matter of law, the CBA expires September 15, 2014. As such, the Regional Director erred in her Decision and Direction of Election.

B. Mutual Mistake

The testimony at the hearing established that the parties made a mutual mistake by including (a) typographical error(s). The offending parts of the CBA are voidable and the Board must reform the CBA to reflect the intent of the parties. The Region heard testimony from the individuals who negotiated the CBA, Rick O'Quinn and Pamela Newman. Both testified that it was their intention for the duration of the CBA to be February 1, 2012 - September 15, 2014. Further, O'Quinn explained the significance of the expiration date of the CBA. (Tns. p. 73). September

15 tracked the government's fiscal year and the window for I.S.S.'s ability to request a cost adjustment to account for any wage or benefit increases for its employees. (Tns. pps. 69-73). The Petitioner did not offer any evidence to suggest that the parties intended the GPO CBA expire on March 21, 2014.

The Regional Director declined to consider the evidence introduced at the Hearing regarding the parties intentions. To do so was error. The Board's precedent follows the common law of contracts.

The parole evidence rule, in its simplest terms prohibits the introduction of any extrinsic evidence to vary or add to the terms of an integrated legal instrument. It does not exclude evidence that the instrument is invalid or ineffective or to prove facts rendering an agreement voidable for mistake, illegality, fraud, or duress. *Teamsters, Local 439*, 196 NLRB 971 (1972).

Parol evidence is admissible to show fraud, accident, and mistake; the Courts have so held for quite some time. *Babcock v. Wyman*, 60 U.S. 289, 290 (1856). The testimony presented by the Union demonstrated the intent of the parties. The Union presented unrebutted evidence of mutual mistake. "Where a mistake of both parties at the time a contract was made as to a basic assumption on which the contract was made has a material effect on the agreed exchange of performances, the contract is voidable." *Restatement (Second) of Contracts* § 152 (1981).

In this case, the CBA contains a Savings Clause such that only the incorrect date(s) is/are voidable. All of the parties to the Agreement intended the expiration date to be September 15, 2014. To the extent that the Board thinks the cover page or the LOUs have any influence on the expiration of the CBA, the cover page should be reformed to read "February 1, 2012 - September 15, 2014" and the LOUs to read

"has a September 15, 2014 expiration date". Petitioner offered no evidence that would call into doubt that a mutual mistake was made.

Explaining mutual mistake in the context of the National Labor Relations Act, the Board in *Americana Healthcare Ctr.*, 273 NLRB 1728, 1733 (1985) explained (addressing the accidental omission of a sick leave provision from a CBA):

the parties agreed to a provision on sick leave substantially in the language of the Company's September 29 proposal with some modification, and further agreed that this provision was to be incorporated into the written collective-bargaining agreement. By mutual mistake it was not included in the agreement. Respondent presents additional arguments. Thus, it contends that the "zipper clause"³ makes it unnecessary to determine whether, in fact, there was any agreement on sick leave. This argument, if accepted, would make it impossible to correct any mistake in a written agreement, and would bind the parties to a contract which did not reflect their complete agreement. Such a conclusion would also be contrary to the provision in Section 8(d) of the Act requiring a party to reduce to writing any agreement reached, and the Supreme Court's holding that a party may be required to do so. (citing *H. J. Heinz Co. v. NLRB*, 311 U.S. 514, 523-526 (1941)).

C. Cases Relied Upon by the Regional Director

1. *South Mountain Health Care*

The Regional Director held that *South Mountain Health Care*, 344 NLRB 375 (2005), controls the outcome of this case. In *South Mountain Health Care*, the incumbent Union executed a three-page memorandum of understanding (MOU) with the Employer. The cover of the MOU bore the unadorned date "March 5, 2004" and indicated the agreement was effective for four years. The Union signed the MOU on March 5, 2004, however, the Employer did not sign the MOU until March

³ The Respondent argued the "zipper clause" barred admission of any parol evidence.

9, 2004. The Board noted "there is no language in the agreement stating its effective date or its expiration date." The Board explained that an effective date and expiration date were material terms of the contract and unless those dates are apparent, the contract will not serve as a bar.

The Board in *South Mountain Health Care* objected to the ambiguity created by the lack of definite terms. The terms must be apparent so "outside unions may look to it to determine the appropriate time to file a representation petition." (*citing Cooper Tire and Rubber Co.*, 181 NLRB 509 (1970)). The Board explained that the MOU could have four possible effective dates (and therefore four possible termination dates). As such, a third-party could not discern the appropriate time to file a petition.

The GPO CBA does not suffer from the same defects as the three-page MOU in *South Mountain Health Care*. The only date on the MOU was an unadorned "March 5, 2004" in the upper left hand corner. The GPO CBA has an Article in the CBA titled "Duration". That Article unequivocally expresses the beginning and ending dates of the CBA. There was no such language present in the South Mountain Health Care MOU. The purpose of the contract bar is to promote stability in the bargaining relationship. Allowing a typographical error to render specific durational language in the CBA meaningless denies the parties the benefit of their bargain. Further, there was no issue of mutual mistake present in *South Mountain Health Care*; that distinction renders the cases fundamentally different.

South Mountain Health Care stands for the proposition that a third-party should be able to discern the effective dates of the CBA from its terms. *South Mountain Health Care* does not reject the long settled law of contract interpretation. The case is limited to its facts. From an objective reading of the MOA a third-party could have discerned four possible expiration dates.

Here, at least one of the Petitioner's witnesses admitted that he did not read the entire CBA until recently. (Tns. p. 90). One of the Petitioner's witnesses explained that Mr. Burleson, essentially a shift-supervisor (Tns. p. 81), told him that the beginning and end dates on the cover page were accurate. (Tns. p. 79). Another of the Petitioner's witnesses testified that he asked Burleson to explain the discrepancy; Burleson said he would get back to him with an answer but never did. (Tns. p. 86). It was never established that Burleson even read the CBA. The problem here is not ambiguity in the CBA but a failure of the Petitioner to make a reasonable inquiry.

Finally, *South Mountain Health Care* had facts such that the principles of contract interpretation discussed above did not apply. There was no specific language in the MOU that clarified the unadorned date on the cover. Further, there was no error made in the MOU besides poor drafting; the problem here is a typographical error(s). The testimony of the Union's witnesses established that the March 21, 2014 date was simply an error in transposition. (Tns. p. 67). All of the parties made a mutual mistake and therefore the offending clause is voidable. Such was not the case in *South Mountain Health Care*. Allowing a typographical error to

void a substantive provision of the CBA would upend the stability of the bargaining relationship - the opposite of the Board's stated purpose in *South Mountain Health Care*.

2. *Cooper Tire & Rubber Co.*

The Regional Director relied on *Cooper Tire & Rubber Co.*, 181 NLRB 509 (1970) to support her decision. In *Cooper Tire* the Board reversed the decision of a Regional Director finding no contract bar and ordering an election. The CBA in *Cooper Tire* contained a durational clause that did not specify the month and day of the effective and ending dates. Despite its defects, the Board found the effective and ending dates of the CBA could be reasonably construed from the CBA by looking to the language dealing with annual wage increases. *Cooper Tire* stands for the proposition that a defect in durational language does not defeat a contract bar. Rather, the Board must engage in contract interpretation to determine whether the CBA is sufficient on its face to create a contract bar. As such, the Regional Director's interpretation and reliance on *Cooper Tire* was incorrect.

D. Typographical Errors Cannot Frustrate the Intent of a CBA

1. *Cook County School Bus*

The Board's precedent that controls this case is *Cook County School Bus, Inc.*, 333 NLRB 647 (2001). In *Cook County*, the Board considered a situation with similar facts to this case. The CBA in *Cook County* contained a typographical error that potentially controlled whether there was a contract bar in place.

Bargaining for the new CBA, the parties agreed on a three-year term. The agreement should have read the "contract shall become effective the 1st day of December, 1998 and shall remain in full force and effect through November 30, 2001 and continue in full force and effect from year to year...unless either party shall notify the other, sixty (60) days prior to November 30, 2001...of its desire to terminate or amend this agreement." When the CBA was finalized it contained a typographical error. Rather than reading "sixty (60) days prior to November 30, 2001" it read "sixty (60) days prior to November 30, 1999." The reference to 1999 was simply a typographical error. The parties agreed on a three-year contract but the typographical error arguably rendered the duration one-year.

The Board found that the CBA should have read 2001 and accordingly there was a contract bar in place. The Board, adopting the decision of the ALJ, held "the parties conduct should be governed by what they agreed to and not by what was mistakenly put in the contract." The Board further explains "where a written agreement is not in conformity with the actual intent of the parties, a court of equity will reform the writing in accordance with that intention." (*citing* WILLISTON ON CONTRACTS § 1547 (3rd ed. 1970)).

The GPO CBA contains a typographical error(s). When confronted with a similar scenario in *Cook County* the Board did not hesitate to reform the CBA to reflect the intent of the parties and find a contract bar. The same result is appropriate in this case.

2. *Spectrum Health-Kent Community Campus*

The Board's decision in *Spectrum Health-Kent Community Campus*, 353 NLRB 996 (2009) is similarly instructive. This case arose in the context of an Employer withdrawing recognition from the Union during the term of the CBA. The dispute turned on when the CBA expired. The bargained for term of the CBA was from April 2005 through 12:01 a.m. April 1, 2008. However the front page of the CBA contained the words "Date of the Agreement: January 1, 2005- March 31, 2008." The Employer argued that the date on the front page was the effective date of the CBA and its withdrawal of recognition in January 2008 was permissible. The opening sentence of the agreement read this agreement is effective "April 13, 2005."

The Board explained "in contract interpretation matters like this, the parties' actual intent underlying the contractual language in question is always paramount, and is given controlling weight. To determine the parties intent, the Board normally looks to both the contract language itself and relevant extrinsic evidence". (citing *Mining Specialists*, 314 NLRB 268 (1994)). As such, the Board rejected the Employer's argument that the incorrect date on the cover page controlled the effective date of the agreement or created sufficient ambiguity to rebut the presumption of majority support during the term of the CBA.

The Board's reasoning in *Spectrum* applies equally to this case. The Board refused to allow a typographical error to frustrate the bargained for provisions of the CBA. So too, here, the Board should find that the typographical error(s) in the CBA do not destroy the specific durational language contained therein.

V. Conclusion

For the reasons stated above, the Intervenor Union respectfully requests that the Board find that the termination date of the CBA is September 15, 2014, either by the four corners of the contract or the testimony presented by the SPFPA and further, dismiss the RC petition as barred by contract.

Respectfully submitted,

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Dated: February 20, 2014

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Union.

Proof of Service

I hereby certify that on February 20, 2014, I filed the Brief above electronically with the NLRB's e filing system.

I.S.S. was served by electronic mail at the address: pnwman@issaction.com

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Respectfully submitted,

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