UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

INWOOD MATERIAL TERMINAL, LLC,
Employer
and

CARLOS CASTELLON,
Petitioner **Case 29-RD-206581**
and

UNITED PLANT & PRODUCTION WORKERS LOCAL 175 P,
Intervenor.

EMPLOYER'S BRIEF IN OPPOSITION TO REQUEST FOR REVIEW BY INTERVENOR UNITED PLANT & PRODUCTION WORKERS LOCAL 175 P

I. Statement of the Case

The Regional Director for Region 29 of the National Labor Relations Board ("Board") issued a Decision and Direction of Election ("Decision") on February 20, 2018, in the above-captioned case. On February 27, 2018, United Plant & Production Workers Local 175 P (the "Union"), filed with the Board a Request for Review of the Decision ("Request for Review"). On March 8, 2018, an election was conducted among the employees of Inwood Material Terminal, LLC ("Employer"); twelve employees participated in the election with zero votes cast for the Union and eleven votes cast against the Union. There was one challenged ballot, which did not affect the results of the election.[1] The Board granted the Union's Request for Review on May 7, 2018, with

[1] The election objections are not the subject of the present Request for Review. On March 15, 2018, the Union filed timely objections to conduct affecting the results of the election. The Regional Director issued a Decision on Objections and Certification of Results ("Certification") on May 2, 2018, certifying the election results and dismissing the Union's objections.

respect to the specific issue of whether certain of the parties' emails were sufficient to constitute a signed agreement that would bar the decertification petition in this case.

The Decision held that the emails were not sufficient to establish a contract bar to the decertification petition because:

> where the question raised is whether an unsigned document could constitute a bar to an election, the Board has held that without the signature of both parties on the collective bargaining agreement, or some document referring thereto, the agreement is insufficient to act as a bar.

Decision at page 5. Further, the Decision stated,

> [i]n these circumstances and where the collective bargaining agreement was not signed by the Employer until December 15, 2017, such agreement is insufficient to act as a bar to the instant petition, filed on September 21, 2017. See e.g. *DePaul Adult Care Communities, Inc.*, 325 NLRB 681 (1998) (where the parties reached agreement but there was no document signed by both parties memorializing the parties' agreement, such unsigned agreement was insufficient to act as a bar to a decertification petition.)

Decision at page 7. Board precedent has been consistent for eighty years - unless an agreement is signed by both parties, it does not bar an election. The requested relief and the Union's Request for Review are meritless and the Board should summarily affirm the Decision and the Certification.

II. <u>Counterstatement of Relevant Facts</u>

1. The Employer and the Union participated in negotiations for an initial collective bargaining agreement. (Decision at page 2.)

2. Union President Fred Clemenza, Union attorney Eric Chaikin, Employer attorneys Aislinn McGuire and Peter Clark, and Employer-Owner William Haugland, Jr. participated in the bargaining sessions. (Decision at page 2, n.4; Hearing Tr. 22:25-23:5.)

3. There were at least ten bargaining sessions. (Decision at page 2; Hearing Tr. 23:22-25.)

4. On July 17, 2017, Employer attorney McGuire forwarded, by email, a "final" collective bargaining agreement, noting that the "working dues needed to be added." (Decision at page 2; Hearing Tr. 30:6-22, 31:13-25; Union Exs. 5, 6.)

5. The Union's attorney admitted that "for some reason the dues amount had been deleted from prior drafts" and the draft stated that the Employer would deduct "the sum $TBD per hour for all hours worked including overtime." (Decision at page 2, n.5; Hearing Tr. 95:11-14.)

6. When the Employer sent the collective bargaining agreement to the Union it was not signed. (Hearing Tr. 28:4-12, 31:3-19.)

7. Article 12 of the Agreement explicitly acknowledged the signature requirement: "The agreement shall be executed by both parties hereto." (Decision at page 2; Union Ex. 3.)

8. The Union inserted the dues amount into the agreement and sent the Employer an executed copy of the collective bargaining agreement expecting a signature from the Employer. (Hearing Tr. 52:4-22.)

9. The Union's chief negotiator, Clemenza, admitted that he "intended that the company sign that agreement and send it back to [him] or the Union." (Hearing Tr. 52:20-22, 53:1-4.)

10. The Union's chief negotiator, Clemenza, further admitted that there never came a time when the Union did not expect the Employer to sign the collective bargaining agreement and return same to the Union. (Hearing Tr. 53:1-4.)

11. Between July 17, 2017, and December 15, 2017, when the agreement was executed, the Union repeatedly emailed to the Employer demanding that the Employer provide the Union with a signed copy of the agreement. (Decision at page 2, n.6; Hearing Tr. 32:2-34:19; Union Exs. 5-14.)

a. On July 26, 2017, Union attorney Chaikin emailed to the Employer's attorney McGuire demanding a signature: "[You advised] that you would get the company's signature on the document. It would be a simple item to **scan or fax it to Billy for his signature**; yet over a week has gone by and nothing from Billy. Please take a moment to advise me what is the status of **our receiving back a fully executed contract**." (Union Ex. 8; emphasis supplied.)

b. On August 11, 2017, Union attorney Chaikin again emailed to the Employer's attorney McGuire again inquiring: "will I get **a fully executed contract** Monday?" (Union Ex. 9; emphasis supplied.)

c. On September 11, 2017, Union attorney Chaikin yet again emailed to the Employer's attorney McGuire again inquiring: "Why don't I have **a signed CBA from Billy**?" (Union Ex. 11; emphasis supplied.)

d. On September 15, 2017, Union attorney Chaikin again emailed Employer attorney McGuire, for the fourth time, demanding a signature: "Just **want to know if it is signed**." (Union Ex. 13.)

12. On September 18, 2017, the Employer indicated that it continued to have concerns about the dues. (Decision at page 2-3.)

13. On September 21, 2017, Carlos Castellon filed a petition under 9(c) of the National Labor Relations Act, seeking to decertify the Union as the representative of the bargaining unit. (Decision at page 1.)

14. Prior to September 21, 2017, the Union did not receive any dues payments. (Decision at page 4.)

15. Haugland signed the collective bargaining agreement on December 15, 2017. (Hearing Tr. 26:7-12, 27:8-10.)

16. No grievances were filed by the Union or any employee between July and the date the petition was filed. (Decision at page 4.)

III. Board Law Has Been Consistent Since Before *Appalachian Shale* and There is Nothing in the Instant Case to Warrant Changing That Result Now

The Union attempts to cloud the issue by asserting that changing technology requires the Board to revisit its long-held rule that both parties' signatures are required to show there is complete agreement regarding a new contract. The Union argues that "the Board should delineate, in today's world, whether emails between parties constitute such a signature." Request for Review, at page 3. The Union's argument is a red herring. Emails have been in place for over twenty years and in no way change the basis for requiring signatures in some form. Indeed, if anything, emails simply make it easier to obtain the necessary signatures: Technology now permits PDFs with signatures, digital signatures, and even electronic signatures.

The gravamen of this case is that no agreement had been signed in any format when a petition was timely filed, and accordingly there was no contract bar. *See Seton Medical Center*, 317 NLRB 87, 87 (1995) (stating that: "the agreement must be

signed by the parties prior to the filing of the petition that it would bar and it must contain substantial terms and conditions of employment sufficient to stabilize the parties' bargaining relationship.") Nothing about technology today requires a modification or review of this precedent; indeed, all that technology has done is make it easier to obtain both parties' signatures in various formats.

The National Labor Relations Act seeks to protect the rights of employees to choose whether or not to have representation and which representative, if any, they want. The law is clear that a collective bargaining agreement does not bar a timely-filed petition unless the contract is signed by both parties.

Here the Petitioner timely filed a petition for decertification and the Regional Director properly directed that an election must be held, explaining:

> as specifically held in *Appalachian Shale*, contracts not signed before a petition will not bar the processing of the petition even though the parties consider it properly concluded and put into effect some or all of its provisions. Thus, even assuming certain provisions of the contract were implemented, inasmuch as the collective bargaining agreement was not signed prior to the filing of the petition, it cannot serve as a bar.....

Decision at page 6. *Appalachian Shale* could not be clearer: The Board's inquiry is whether the Agreement contains a signature; if not, there is no contract bar. *Appalachian Shale Products Co.*, 121 NLRB 1160, 1162 (1958).

The Union asserts that "there is a substantial question of law or policy being raised due to the absence of officially reported Board precedent." Request for Review at page 1. This is inaccurate and the answer the Union seeks is evident in its Request for Review. Although the Union wants to the complicate the issue, the Union itself clearly articulated the applicable standard:

> There does not appear to be any board precedent that specifically delineates what facts constitute a clear and convincing showing that a Contract was entered into that would constitute a Bar short of a signature from both parties on the contract itself.

Request for Review page 3 (emphasis supplied). The policy behind this rule, stability in labor relations, reflects the very purpose of the Act: "[E]xperience has indicated that true stability of labor relations is not obtained until collective agreements have been reduced to writing and signed." *Branch Cheese*, 307 NLRB 239, 240 n.5 (1992) (internal citations omitted).

Board precedent requires a signature from both parties on the contract itself or some document referring thereto or else the unsigned agreement is insufficient to act as a bar. *See* Decision at page 5, citing *De Paul Adult Care Communities, Inc.,* 325 NLRB 681, 681 (1998) holding that "[i]n order for an agreement to serve as a bar to an election, it must satisfy certain substantive and formal requirements which have been well-established by Board case law." "[T]he Board [has] made clear the necessity for signing the contracts or documents constituting the agreement of the parties." Decision at page 5, citing *Appalachian Shale, supra* at 1162.

The requirement that the parties execute the contract is conclusive where the parties, through their agreement, contemplate a fully-executed document, which the parties in this case did. *See* Decision at page 2; Union Ex. 3.

> [A]lthough *Appalachian Shal*e indicates some willingness to honor the parties' decision to memorialize their contract through a more informal exchange of documents, 121 NLRB at 1162, the Union and the Employer here consciously did not opt for that approach. The evidence shows that they intended to prepare and execute a formal agreement, which was not accomplished before the filing of the representation petition.

Branch Cheese, 307 NLRB at 240 (emphasis supplied). The Board in *Branch Cheese* held that the parties' intention to have their contract formally signed by both parties

precluded a finding that any less formal version of their agreement could serve as a contract bar. 307 NLRB at 240. The same result is required here: there is no contract bar because the employees' decertification petition was filed before the contract was fully executed.

Diversified Services, Inc., d/b/a Holiday Inn of Ft. Pierce, 225 NLRB 1092 (1976), cited by the Union, is entirely beside the point here because, the Board there relied on its finding that there were relevant signatures from both parties. The employer's attorney sent the union *a signed* cover letter enclosing a collective-bargaining agreement for the union's signature. The Board found that the employer's signed cover letter accompanying its proposal, coupled with the union's signature on the contract satisfied the signing requirement. *Id.* at 1092.

The additional cases cited by the Union are also distinguishable and ignore the principle that, where a signature is required by the parties on their formal contract, that intention is conclusive as to whether or not there is a contract bar. *Branch Cheese, supra*, 307 NLRB at 240.

In *Gaylord Broadcasting Co.*, 250 NLRB 198 (1980), the Board found a contract bar after both the employer and the union initialed and dated 39 separate pages of contract provisions. *Id.* at 199. There are no comparable initials or signatures from both parties in the present case.

In *Liberty House (AMFAC Corp.)*, 225 NLRB 869, 869 (1976), the employer's offer was set forth in a letter to the union and that letter was later countersigned by the union indicating its acceptance, and there was no suggestion that the parties there expected any more formal execution of their new contract. In the present case, the parties expressly stated that a formally-signed contract was expected.

In *Georgia Purchasing Inc.*, 230 NLRB 1174 (1977), the parties had an expiring prior contract and the Board held that the terms of the prior contract and the offer and acceptance of terms for a renewal agreement "chart[ed] with adequate precision a continuing contractual relationship between the parties." *Id.* at 1175. The parties in the present case had no prior agreement, and only a formally-executed, signed contract would "chart with precision" their intended relationship. *Georgia Purchasing* is entirely beside the point of the present case.

Lastly, in *Valley Doctors Hospital, Inc.*, 222 NLRB 907 (1976) the employer signed a cover letter forwarding the proposed contract to the union. After the employees ratified the agreement, the union countersigned the employer's written offer. *Id.* at 907. In the present case, there is no personally-signed offer from the Employer, and like the rest of the cases cited by the Union, the Board's decision in *Valley Doctors Hospital* is entirely distinguishable from the present case where the parties intended there to be a formally-executed contract to memorialize their agreement, and there was none before the petition was filed in this case. There is no basis to find a contract bar here.

The propriety of requiring a signature is clearly as applicable today as it was when *Appalachian Shale* was decided. In the absence of the standard established in *Appalachian Shale*, attempts to cobble together piecemeal, unsigned provisions and various tentative agreements "could also result in substantial delays in resolving employees' representational interests, in contravention of one of the primary goals of *Appalachian Shale* – the more expeditious disposition of representation cases." *Seton Medical Center, supra* at 88.

While the Union attempts here to prevent the employees from exercising their right to decide for themselves whether or not to continue representation, the Board should exercise prudent restraint and not deviate from the existing legal standard set forth in *Branch Cheese,* 307 NLRB at 240: when the parties intend to have their agreement formally executed in a signed contract, that should be controlling on the issue of whether there is a contract bar. The Board should affirm the Decision and Direction of Election, and respect the employees' choice to have an election concerning continued representation.

The "Electronic Signatures in Global and National Commerce Act," 15 U.S.C. Sections 7001 *et seq.* (the "E-Sign Act"), cited by the Union, supports the conclusion that there was no signed contract before the petition was filed in the present case. The E-Sign Act " ... does not ... (2) require any person to agree to use or accept electronic records or electronic signatures, other than a governmental agency with respect to a record other than a contract to which it is a party." 15 U.S.C. s. 7001 (b) (2). The Employer most certainly did not consent to "use or accept ... electronic signatures..." and cannot be bound to an electronic signature on any agreement it had with the Union because it consented to no electronic signature. To the contrary, the Employer consented in Article 12 of the parties' agreement, Union Exhibit 3; Decision at p. 2, only to be bound by a signed contract, and that is what the Union, also, expected by way of a signature from Mr. Haugland, the Employer's principal. (Hearing Tr. 32:2 – 34:19, and 53:1-4, Union Exhibits 8, 9, 11 and 13).

It is "well established that contracts not signed before the filing of a petition cannot serve as a bar. These rules are simple, easily understood, and require no

change . . . It feels that after more than 20 years[2] of contract bar policy, the parties should be expected to adhere to this relatively simple requirement[.]" *Appalachian Shale, supra* at 1161--1162 (footnote added). Accordingly, there is no contract bar in the present case and the Union's request for review should be rejected and the Decision and Direction of Election should be sustained.

IV. The Current Rules Adequately Govern the Conduct of the Parties and There Is No Pending Unfair Labor Practice Charge in this Case

As stated by the Regional Director, a decertification petition "should not be dismissed where there has been no finding or admission that the employer actually engaged in the allegedly wrongful conduct. *TruServ Corporation*, 349 NLRB 227 (2007)." Decision at page 5. Furthermore, unfair labor practice charges "will not bar the processing of an otherwise timely filed petition where the charges are withdrawn." Decision at page 5, *citing City Markets*, 273 NLRB 469 (1984). The Union, as the Regional Director noted, "withdrew its unfair labor practice charge in Case No. 29-CA-206592, alleging that the Employer refused to sign the collective bargaining agreement in violation of Sections 8(a)(5) and (1) of the Act and there is no admission by the Employer that it engaged in such unlawful conduct." Decision at page 6.

The Union had the opportunity to file an unfair labor practice charge, which it did, but it also voluntarily withdrew the charge. It cannot now assert that the withdrawn unfair labor practice charge should block or bar the present decertification petition. There is no need to revisit the matter simply because the Union is dissatisfied

[2] At the time of *Appalachian Shale*, the signature requirement had been Board law for twenty years. As of now it has been Board law for eighty years.

that the employees have resoundingly rejected representation by the Union. This election clearly furthers the purposes of the Act and "protects the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid and protection." 29 U.S.C. § 151. Board law, as properly cited and followed by the Regional Director, is clear that an agreement can only serve as a contract bar when signed by both parties, and there was none here.

CONCLUSION

Based on the foregoing arguments, the record in the case, and the Regional Director's well-reasoned decision, the Board should reject the Union's request for review and should affirm the Regional Director's Decision and Direction of Election.

Dated: May 21, 2018, at New York, New York.

Respectfully submitted,
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CERTIFICATION OF SERVICE BY U. S. MAIL OR ELECTRONIC MAIL

The undersigned, an attorney admitted to practice before the Courts of the State of New York, affirms under penalty of perjury, that, on May 21, 2018, he caused a true and correct copy of the attached Employer's Brief in Opposition to Request for Review by Intervenor United Plant and Production Workers Local 175P to be served upon the parties or the attorney for the party, respectively, via first class mail deposited in an official depository under the exclusive care and custody of the United States Postal Service within the state of New York, enclosed and sealed in a properly-addressed, postpaid envelope, or by electronic mail, as the case may be, addressed to:

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A copy of the Employer's Brief in Opposition to Request for Review by Intervenor United Plant and Production Workers Local 175P is being submitted to the Regional Director via NLRB E-filing.

May 21, 2018.

G. Peter Clark

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