

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

CONTINUUS MATERIALS OF PA, LLC

Employer

and

Case 04-RC-269639

**INTERNATIONAL UNION OF OPERATING
ENGINEERS, LOCAL 542¹**

Petitioner

DECISION AND ORDER

This case presents the issue of whether to order an election, or dismiss the petition, where the Employer asserts that it will imminently cease operations at the facility where the petitioned-for unit employees are employed. Operating Engineers Local 542 (Petitioner) seeks to represent approximately 22 employees of Continuum Materials of PA (the Employer) at its Philadelphia, Pennsylvania facility.² The Employer seeks dismissal of the petition contending that it will soon cease operations at this facility, resulting in the permanent layoff of all unit employees. In contrast, Petitioner argues that the petition should not be dismissed because, in its view, the evidence fails to meet the Board's requisite showing that the Employer's cessation of operations is both "imminent" and "definite."

A hearing officer of the National Labor Relations Board (the Board) held a videoconference hearing in this matter on December 29, 2020. Both parties filed post-hearing briefs. Having reviewed the stipulations, evidence, and arguments presented by the parties, as well as the applicable legal precedent, I find that the Employer has met its burden of establishing that the cessation of operations is both imminent and definite, and thus it would not effectuate the purposes of the Act to order a representation petition. Accordingly, I will dismiss the petition.³

¹ The correct legal names of the Employer and Petitioner appear in this decision as stipulated by the parties.

² Petitioner seeks to represent, "all full-time and regular part-time operators, leads, electrical techs, mechanics, lab techs, maintenance employees, and laborers employed by the Employer at its 5137 Bleigh Ave., Philadelphia, PA facility; but excluding all other employees, managerial employees, office clerical employees, guards and supervisors as defined in the National Labor Relations Act." The parties stipulated that the petitioned-for unit is an appropriate unit within the meaning of Section 9(b) of the Act.

³ The parties also disagreed as to the mechanics of an election, should one be directed. Given my decision to dismiss the petition, this Decision and Order will not address the parties' contentions on this issue.

I. FACTUAL OVERVIEW

a. The Employer's Operations

The Employer produces roof cover board made from paper and plastic extracted from waste materials and pressed together and formed into four-foot by eight-foot sheets. The recycled paper and plastic used to manufacture this product are typically sourced from municipal waste streams.

The Employer's parent company, Continuous Materials, LLC (Continuous Materials), in addition to its operations at the Philadelphia facility, owns Continuous Materials of Iowa and has a facility in that state where it also produces roof cover board. The Philadelphia facility, also known as "the Forge," produced approximately 200,000 to 300,000 square feet of roof cover board in 2020. The Iowa facility produced approximately 4 million square feet of product and is the primary source of roof cover board for the Employer's customer base.

In addition to manufacturing the roof cover board, Forge employees are involved in conducting trials for the purposes of research and development of the Employer's products and equipment. Employees in the petitioned-for unit are paid hourly and work either first shift or second shift.

The Forge is comprised of three buildings: a small office building, a warehouse, and a process building, which houses most of the equipment used by the Employer in the production process. The Employer leases the facility from Waste Management, Inc. The Forge is on the site of a Waste Management transfer station, which receives waste collected by sanitation trucks from the surrounding areas. Additionally, the Employer has purchased mixed paper and plastic from recycling facilities.

The Employer began operations at the Forge in 2015 with the production of a different product, a fuel product called SpecFUEL. However, manufacture of SpecFUEL was not a profitable venture and the Employer decided to manufacture the roof cover board instead. After installing the necessary equipment in early 2020, the Employer began production of this product.

Throughout 2020,⁴ Forge employees primarily performed research and development work, rather than manufacturing the product, and this work was not profitable. Indeed, the Employer estimates that it lost between \$300,000 and \$500,000 per month operating the Forge. The Forge is a small facility and, according to the Employer, does not have the appropriate economies of scale to be profitable. Therefore, the Employer initially planned to continue to operate the Forge as a research and development operation through approximately the second or third quarter of 2022, and to open the Fairless Scale Plant, a much larger facility about 25 miles away in Morrisville, Pennsylvania (Fairless Plant) around the beginning of 2023. The Employer envisioned the Fairless Plant to be significantly larger, with the ability to produce approximately 150 million square feet of roof cover board per year.

⁴ Hereinafter, all dates occurred in 2020, until otherwise noted.

b. Funding of The Forge and the Fairless Plant

The two primary shareholders that fund the Employer's operations at the Forge are Emerging Infrastructure Capital Partners (EICP), the majority shareholder, and Waste Management, a minority shareholder. According to Continuous Materials Chief Financial Officer James Condela, significant investment was needed from EICP and Waste Management not only to fund operations beyond 2020, but also to fund the proposed Fairless Plant. Condela testified that the Fairless Plant would cost around \$150 to \$160 million to build. Additionally, the Employer needed a \$200 million investment to fund cash-loss operations at the Forge, cash-loss operations at the Iowa facility, and cash-loss operations for corporate overhead. In view of the substantial cash infusion needed by the Employer for continuing and future projects, the Employer, EICP, and Waste Management negotiated throughout the summer of 2020 in the hopes of reaching an agreement on how to further fund continued and future operations.

In order for its vision for the Fairless Plant to be realized, the Employer anticipated Waste Management providing the land, through a land lease, as well as the waste feed stock supply needed to produce its products. The proposed location of the Fairless Plant was adjacent to the Fairless landfill owned by Waste Management, and the Employer envisioned that a portion of the waste that was destined for the Fairless landfill would be diverted to the Fairless Plant for processing. According to Condela, without a feed stock supply agreement from Waste Management, the Employer would not have the material needed to manufacture its product, nor the ability to dispose of the reject material.

In anticipation of the Fairless Plant project moving forward, on November 16 the Employer presented to the Board of Supervisors of Falls Township, Pennsylvania where the plant would be located, an outline of the potential construction and the overall project. One reason for this presentation was the Employer's need for a variance setback on the proposed building site.

Negotiations between the Employer, EICP, and Waste Management continued into the fall. By November though, the parties had yet to reach an agreement, and the negotiations began to break down. On November 23, Steve Hamaker, Managing Director of Corporate Development & Innovation for Waste Management, notified Continuous Materials Executive Chairman Joaquin Fernandez Silva⁵ that future financing was at risk, but the parties agreed to keep speaking.

On December 11, Condela apprised the Continuous Materials Board of Directors of the precarious financial condition of the Employer. The Board of Directors was notified about the lack of an agreement with EICP and Waste Management on providing funding to the Employer and that many of Waste Management's commercial agreements for the Fairless Plant project remained incomplete. The Board of Directors was further notified that the Employer had sufficient cash to fund operations into early January 2021, but beyond that, it would need additional funding. Three scenarios were proposed to the Board of Directors, should the Employer fail to reach

⁵ Silva is also a principal with EICP.

agreement with Waste Management: (1) continuing to operate the business as usual; (2) pause all Fairless Plant project development and maintain full staffing at the Forge to perform research and development and production work; or (3) shut down the Forge operations. Ultimately, Continuous Materials management recommended to the Board of Directors that the Forge be shut down no later than February 2021 with retention of senior staff to facilitate future development should the Employer resolve funding issues for the Fairless Plant project. Management also informed the Board of Directors that it was in discussions with EICP for interim bridge financing sufficient to fund the operations through the end of February 2021.

On December 14, Hamaker notified Silva that Waste Management would discontinue negotiations with EICP for further funding of the Employer's operations at the Forge and the Fairless Project and that absent agreement Waste Management did not see a path to continued funding of the Forge operations, to market area pricing support, to providing access and space on its strategic landfill assets, or to providing its expertise or help on sourcing feedstock.

c. Continuous Materials decides to shut down the Forge operations

Thereafter, internal discussions at Continuous Materials were held to determine the path forward. Ultimately, the Employer determined that it was not possible to maintain operations at the Forge without an additional cash infusion and with the Fairless Plant project no longer viable. Accordingly, on December 23, Condela emailed Silva and notified him that the Employer did not have the necessary cash to maintain operations, and in order to save money the Forge would be shut down by January 29, 2021, with all employees let go by that time. Condela also notified Silva that the Employer would notify the site landlord, Waste Management, regarding the termination of the lease, and would start preparing a plan for dismantling and removing the Employer's assets.⁶

On December 23, the Employer officially notified Waste Management that it intended to terminate the lease at the Forge. In an email to Hamaker and others, Condela stated that operations at the Forge would cease no later than January 29. In a second email, Condela formally notified Waste Management that Continuous Materials was terminating the lease for the office building and warehouse building as of February 28, 2021. Condela further stated that Continuous Materials intended to terminate the processing plant building lease and that it anticipated vacating that building by June 30. The Employer needed the additional time to determine how best to move forward with its equipment in the processing building.

⁶ On December 19, the Employer installed a new twin auger screw system in its drying machine, which it had purchased for approximately \$10,000. The Employer paid another \$10,000 for installation. According to Condela, the Employer decided to buy this equipment prior to receiving Waste Management's December 14 notice, and because it had already incurred the purchase price, it decided to proceed with installing it. The Employer determined that installing the new auger screw would provide some operational value during the last few weeks of operation, and would increase the value of the drying machine if the Employer decides to sell the equipment.

On December 28, Continuous Materials' Senior Vice President of Operations, Allan Bradshaw, issued a notice to employees at the Forge that the operations would cease given the unsuccessful conclusion to funding negotiations. The notice, which was posted near the time clock, stated that the Forge operations would be shut down in two phases -- second shift would cease on January 15, 2021, and first shift would cease on January 29, 2021. As of the hearing date, the Employer had not yet determined whether salaried employees, who are not in the petitioned-for unit, would be laid off.

Although the Employer had made the decision to cease operations at the Forge as of the hearing date, it had not yet revoked its proposal to the Falls Township Board of Supervisors for the Fairless Plant project. While Continuous Materials had not abandoned its goal of developing a profitable roof cover board project that is cash-flow positive and further demonstrates its product, Condela testified that there were no definitive paths for funding the Forge and the Fairless Plant project. Moreover, though Continuous Materials hopes that negotiations with Waste Management can resume and ultimately result in an agreement, there was no indication that such an agreement can be reached.

II. POSITIONS OF THE PARTIES

a. The Employer

The Employer contends that the petition must be dismissed due to the certain and imminent closure of the Forge operations. The Employer argues that the Forge is its only site of operations in the area, and it has given unequivocal notice to Waste Management of its intention to terminate the leases for the facility. Furthermore, employees in the petitioned-for unit were notified that they would be permanently laid off by either January 15 or January 29, 2021, depending on their shift assignment. The Employer asserts that the sole reason for the Forge closure is the lack of funding to continue operations there or to build the Fairless Plant, and there was no evidence that additional funding necessary to remain operational is forthcoming.

b. Petitioner

Petitioner contends that the Employer failed to present concrete evidence that the cessation of operations at the Forge is imminent and definite. Petitioner relies on a number of factors, including that the Employer has not: (1) filed for bankruptcy; (2) dissolved its corporate entity; (3) announced the Forge's closure to the public; nor (4) terminated employees. Petitioner points out that the Employer only announced the future layoffs one day before the representation hearing. Additionally, Petitioner argues that the purported plans regarding the closure of the Forge are not a sale, cessation, or fundamental change in the nature of its operations. At most, according to Petitioner, the Employer has established that it plans to lay off unit employees and close the current facility in six months. Further the Employer did not deny that it continues to pursue other financing paths for funding of the larger plant or that the Fairless Plant can be revived if the Employer can resolve its differences with Waste Management.

III. ANALYSIS

a. Board Law

Upon the filing of a petition for representation, the Board is statutorily required to investigate whether a question of representation exists, and if such question exists, to direct an election. 29 U.S.C. § 159(c)(1). However:

[t]he Board has recognized a narrow exception to this statutory mandate, limited to circumstances in which it is reasonably certain that conducting an election will serve no purpose: it will dismiss an election petition when cessation of the employer's operations is imminent, such as when an employer completely ceases to operate, sells its operations, or fundamentally changes the nature of its business.

Retro Environmental, Inc./Green JobWorks, LLC, 364 NLRB No. 70, slip op. at 6 (2016), . The burden of proving that cessation is imminent and definite is on the party asserting an imminent cessation of operations and requires concrete evidence, such as an announcement of business closure and/or termination of employees. The Board will not dismiss an election petition based on conjecture or uncertainty concerning an employer's future operations, an employer's mere contention that it intends to cease operations or reduce its workload sometime in the future, or evidence of cessation that is conditional or tentative. *Ibid*; see also *Canterbury of Puerto Rico, Inc.*, 225 NLRB 309 (1976). Factors considered include the period of time between the representation hearing and the expected date of cessation, steps taken by the employer to effectuate the change, and whether the employees have been notified. *Hughes Aircraft Co.*, 308 NLRB 82, 83 (1992); *Davey McKee Corp.*, 308 NLRB 839, 840 (1992); *Larson Plywood Co.*, 223 NLRB 1161 (1976).

The Board has held that where an employer's operations are scheduled to terminate within three to four months, no useful purpose is served by directing an election. *Davey McKee Corp.*, *supra* at 840; see also *Martin Marietta Aluminum*, 214 NLRB 646 (1974) (approximately four-and-a-half months after representation petition filed); *M.B. Kahn Construction Co.*, 210 NLRB 1050 (1974) (three months until significant reduction in force and six months until complete cessation); *General Motors Corp. (GMC Truck & Coach Division)*, 88 NLRB 119 (1950) (two to four months until cessation). In *Hughes Aircraft Co.*, *supra*, the subcontracting and elimination of unit work within 90 days was found to be definite and imminent based upon evidence of the employer's solicitation of bids, meetings with and execution of agreements with subcontractors, and notification to employees of the timeframe of their anticipated layoff. In *Larson Plywood Co.*, *supra*, the record established that the employer intended to liquidate its entire business within 90 days, and thus the cessation was found to be both imminent and definite. In contrast, in *Norfolk Maintenance Corp.*, 310 NLRB 527 (1993), the Board ordered an election where the employer was not expected to cease operations in the petitioned-for unit for at least seven months after the Decision and Direction of Election issued.

b. Application of the Law to the Facts

The Employer has met its burden to show that its cessation of operations at the Forge is both imminent and definite. The future of operations at the Forge was dependent on a large infusion of cash from investors, as well as the continued pursuit of the Fairless Plant. Neither of these possibilities materialized. Rather, one of the anticipated investors in both the Forge and the planned Fairless Plant - Waste Management - notified EICP and the Employer that it would no longer invest in the Forge operations, nor provide funding, land, or material for the Fairless Plant project without acceptance of its final proposed terms.

Waste Management's December 14 notification led Continuous Materials to decide to shut down the Forge operations. Upon doing so, Condela notified Silva that the Employer decided to cease operations there and subsequently notified Waste Management that the Employer intended to terminate its leases of all three buildings on the property. Thereafter, on December 28, the Employer notified employees that the Forge operations were being shut down, and that the employment of all employees in the petitioned-for unit would be terminated by January 29, 2021 at the latest.

In sum, the Employer: notified its principal investors that the operations were being shut down; advised its landlord that it intended to terminate the leases of all three buildings; and unequivocally informed unit employees that their employment at the Forge would end no later than January 29, 2021.

Petitioner contends that Condela did not deny the possibility of construction of the Fairless Plant moving forward if funding is secured, and he repeatedly acknowledged that the Employer is exploring funding opportunities at other locations. Additionally, Petitioner points out that the Employer has yet to revoke its proposal to the Falls Township Board of Supervisors. Petitioner also emphasizes that the Employer has not filed for bankruptcy or notified the public of its closure at the Forge. While that all may be true, it does not change the fact that the Employer has explicitly announced that operations at the Forge would cease, and that it has taken tangible and affirmative steps to terminate its leases with Waste Management. The speculative possibility that future funding may be secured to re-start operations at the Forge and build the Fairless Plant is not sufficient to conduct an election when cessation of the operations and termination of the petitioned-for employees is imminent and definite.

Petitioner cites *Martin Marietta Aluminum, Inc., supra*, and *CUNA Mutual Group*, 1999 WL 33914461 (July 30, 1999) for the proposition that wind-down efforts such as layoffs, seeking a buyer, and announcements should only be considered when they occur before the filing of a petition. According to Petitioner, because any wind-down efforts in the instant matter occurred after the petition was filed - on December 1 - this timing undermines the Employer's arguments for dismissal of the petition. I do not agree. The record is clear that at the time the petition was filed, the Employer was in negotiations with EICP and Waste Management for continued and future funding of the Forge operations and the Fairless Plant. It was not until December 14, when Waste Management notified EICP and the Employer that it would no longer engage in

negotiations, that the Employer made the decision to shut down and cease operations at the Forge. Thus, the fact that the eventual decision to cease operations and begin winding down occurred after the filing of the petition in this matter is not dispositive.⁷

Lastly, Petitioner raises the possibility of the Employer remaining at the Forge until June 2021 as evidence that the Employer is not imminently and definitely ceasing operations. In doing so, it argues that Board cases where petitions were dismissed often relied on the cessation of operations occurring much sooner than the six months the Employer may remain at the Forge. Notwithstanding the above, it is clear that the Employer is terminating its leases of the office building and warehouse as of February 2021 and will spend the time after the cessation of operations on January 29 evaluating the equipment in the processing building and storing it or selling it. There is no evidence that production or research and development operations at the Forge will continue beyond January 29. Nor is there any evidence that employees in the petitioned-for unit will be employed beyond that date. Thus, the fact that the Employer may remain in the processing building until June 2021 does not detract from the evidence showing that cessation of operations is both imminent and definite.

To ensure the employees' statutory right to an election, however, if there is new evidence indicating that the Employer has not ceased operations consistent with evidence it submitted at the hearing, I will entertain a motion by the Petitioner to reinstate the petition. See *Davey McKee Corp.*, 308 NLRB 839, 840 (1992); *Cal-Neva Lodge*, 235 NLRB 1167 (1978).

IV. CONCLUSION AND ORDER

Based on the record evidence, as discussed in detail above, and in view of well-established legal precedent, I find that the Employer has met its burden to establish that the cessation of its operations at the Forge is both imminent and definite. In that regard, the record clearly shows that the Employer's operations will cease by January 29, 2021 at the latest, and there was no evidence presented to find that operations will continue beyond that date. Consequently, I find that directing an election in this case would serve no purpose. Thus, it is hereby ordered that the petition in this matter is dismissed.

RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67(c) of the Board's Rules and Regulations you may obtain a request for review of this Decision by filing a request with Executive Secretary of the National Labor Relations Board. The request for review must conform to the requirements of Section

⁷ Petitioner also argues that the timing of the decision to cease operations after the instant petition was filed, and the notification to employees of the same only one day prior to the hearing in this matter, shows that the Employer was motivated to take these actions, at least in part, by Petitioner's organizing efforts. This Decision need not determine the Employer's motivations; such questions are appropriately investigated in unfair labor practice proceedings.

102.67 (d) and (e) of the Board's Rules and Regulations and must be filed by **Wednesday, March 17, 2021**.

Pursuant to Section 102.5(c) of the Board's Rules and Regulations, a request for review must be filed by electronically submitting (E-Filing) it through the Agency's web site (www.nlr.gov), unless the party filing the request for review does not have access to the means for filing electronically or filing electronically would impose an undue burden. A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to www.nlr.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Signed at Philadelphia, Pennsylvania this 3rd day of March, 2021.



THOMAS GOONAN
Regional Director, Region Four
National Labor Relations Board