

**Suffolk Banana Co., Inc. and Local 890, League of
International Federated Employees, Petitioner.**
Case 29-RC-9174

July 29, 1999

DECISION ON REVIEW AND ORDER
DISMISSING PETITION

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

On December 24, 1998, the Regional Director for Region 29 of the National Labor Relations Board issued a Decision and Direction of Election in the above-referenced proceeding in which he found that the collective-bargaining agreement between the Employer and the Intervenor¹ did not constitute a bar to the instant petition on the grounds that it required employees to pay moneys other than dues and initiation fees as a condition of employment and that it lacked a clear expiration date, thereby depriving employees of the means to determine the proper time for filing a representation petition.

Thereafter, in accordance with Section 102.67 of the Board's Rules and Regulations, the Intervenor filed a timely request for review of the Regional Director's Decision. By order dated January 27, 1999, the Board granted the Intervenor's request for review. The election was held as scheduled on January 19, 1999, and the ballots were impounded pending the Board's Decision on Review.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Having carefully considered the issues on review in light of the uncontested facts, as well as the Intervenor's brief, we find, contrary to the Regional Director, that the instant petition is barred by the collective-bargaining agreement between the Employer and the Intervenor.

The facts of the case are not in dispute. The Employer is engaged in the nonretail sale and distribution of fruits, such as bananas and vegetables. On October 1, 1994, the Employer and the Intervenor entered into a collective-bargaining agreement, which was effective until September 30, 1997 at 12:01 a.m., and which covered a unit of all drivers, drivers' helpers, warehousemen, maintenance employees, and mechanics.

The contract sets forth the following union-security provision:

All present employees and those hired in the future for all work covered by the terms and conditions of this agreement shall on the 31st day following the beginning of their employment, or the signing of this agreement, whichever is later be and remain members of the Union in good standing as a condition of employment.

The contract also contains a checkoff provision:

The Employer agrees that he will deduct from the wages of employees, once a month, out of the first salary payable in each month, the amount of dues, initiation fees, and regularly authorized assessments the employees are required to pay the Union for the month.

Once a month, within one week from the date of such deduction, the Employer will deliver the money billed and deducted to a duly authorized representative designated by the Union for the purpose. The Union agrees that it will file with the Employer written authorization executed by each employee authorizing such deductions. In the event the Employer is delinquent in making such payments he shall suffer the same penalties for non-payment as are provided in Article XII.

On September 26, 1997, the Employer and the Intervenor executed an agreement modifying the contract's wage provisions and extending its remaining terms. Although the agreement's preamble states that the parties "wish to modify the term" of the October 1994 contract and extend its expiration date from September 30, 1997, to July 5, 1999, and the agreement then provides that the contract "shall be modified to the extent that the expiration date . . . shall be on the 5th day of July 1999 at 12:01 a.m.," the agreement nevertheless concludes by providing that the terms and conditions of the contract, except as modified, "shall continue to be applicable . . . through the expiration date of this agreement on July 6, 1999." The petition herein was filed on December 3, 1998.

1. Union assessments issue

At the hearing, the Petitioner took the position that the contract does not operate as a bar because the dues-checkoff provision requires all employees to pay, in addition to initiation fees and dues, assessments. The Regional Director, agreeing with this contention, examined the union-security and dues-checkoff provisions and determined that a reasonable employee reading those two provisions in conjunction would be led to believe that membership in the Union includes the obligation to pay "regularly authorized assessments." Thus, the Regional Director, relying on *Santa Fe Trail Transportation Co.*, 139 NLRB 1513 (1962), concluded that the contract could not serve as a bar to the representation petition herein.

Contrary to the Regional Director, we find that the contract does operate to bar the instant petition as it contains no express requirement that an employee pay assessments as a condition of employment. In *Paragon Products Corp.*, 134 NLRB 662 (1961), the Board set out the three instances where a contract will not bar the processing of a petition:

[W]e now hold that only those contracts containing a union-security provision which is clearly *unlawful on its face*, or which has been found to be unlawful in an

¹ Local 348-S, United Food and Commercial Workers Union, AFL-CIO.

unfair labor practice proceeding, may not bar a representation petition. A clearly unlawful union-security provision for this purpose is one which by its express terms clearly and unequivocally goes beyond the limited form of union-security permitted by Section 8(a)(3) of the Act, and is therefore incapable of a lawful interpretation.

Such unlawful provisions include (1) those which expressly and unambiguously require the employer to give preference to union members (a) in hiring, (b) in laying off, or (c) for the purposes of seniority; (2) those which specifically withhold from incumbent nonmembers and/or new employees the statutory 30-day grace period; and (3) those which expressly require as a condition of continued employment the payment of sums of money other than “periodic dues and initiation fees uniformly required.”

Id. at 666 (emphasis added). See also *Gary Steel Supply Co.*, 144 NLRB 470 (1963) (applying *Paragon Products* rule to dues-checkoff provisions).

In *Santa Fe*, supra, 139 NLRB at 1514–1515, the Board found that the union-security provision involved was unlawful on its face and fell within the ban set forth in *Paragon Products* on clauses which expressly require as a condition of continued employment the payment of sums of money other than “periodic dues and initiation fees uniformly required.” The Board therefore invalidated that contract as a bar. In the instant case, the dues-checkoff provision contains no statement that payment of “uniform assessments” is a condition of employment or is even required. The union-security provision that does contain “condition of employment” language requires only that employees “be and remain members of the Union in good standing.”² Under these circumstances, we conclude that the contract does not expressly require the payment of assessments as a condition of employment and does not fall within the ban set forth in *Paragon Products*. Accordingly, *Santa Fe* is inapplicable to the instant case.³

2. Expiration date issue

The Regional Director also determined that the contract forfeited its bar quality because an employee would be unable to determine the appropriate window period for filing a representation petition in light of the fact that it is not clear whether the contract expires on July 5 or July 6, 1999.

² Although the union-security provision requires membership in the Union without defining one’s membership obligations, it is not unlawful on its face. See *Marquez v. Screen Actors Guild*, 119 S.Ct. 292 (1998).

³ As we have concluded that no provisions fall within the ban set forth in *Paragon Products*, we need not address the effect that the contract’s separability and savings clause would have had on a facially invalid contract provision.

In reaching his conclusion, the Regional Director relied on *Bob’s Big Boy Family Restaurants*, 259 NLRB 153, 154 (1981), enf. denied 693 F.2d 904 (9th Cir. 1982), in which the Board stated that “where parties to a contract create a situation in which a petitioner cannot clearly determine the proper time for filing a petition, the ambiguity does not inure to the benefit of the parties but instead means that the petition will not be barred.”⁴ In *Bob’s Big Boy*, the agreement between the incumbent union and the employer was “apparently effective” from December 11, 1974, to December 31, 1977. However, the contract distributed to the employees contained on its cover the dates “January 1, 1975 to December 31, 1977.” Id. at 153. Thus, the representation petition, which was filed on October 13, 1977, was filed within the appropriate “window period” according to the dates on the cover of the contract, but was 2 days late according to the dates in the text of the contract.

That is not the situation here, where the petition, filed on December 3, 1998, was untimely as to either date in the agreement extending the contract—either the July 5, 1999 date recited in its preamble and in another provision or the July 6, 1999 date stated in the agreement’s conclusion. The discrepancy, which appears to be the result of inattentive drafting, was not relied on by the Petitioner to its detriment, and thus the discrepancy did not “inure to the benefit of the parties.” Thus, the policies underlying the unclear expiration date holding of *Bob’s Big Boy* are inapplicable here.

The Board’s contract-bar rules are discretionary.⁵ As in all contract-bar cases, we must weigh and resolve the conflicting interests of, on the one hand, protecting the stability of collective-bargaining relationships, as represented by an existing contract, and, on the other, according to employees the freedom of choice guaranteed by Section 7 of the Act. We conclude that, under the circumstances here, the slight disparity in expiration dates had no effect at all on employee free choice and should not be deemed grounds for finding that the contract is not a bar to the petition.

⁴ Under our contract-bar rules, during the term of a 3-year contract, a representation petition is timely filed only if it is submitted during the 30-day “open period” running from the 90th day to the 60th day prior to the existing contract’s termination date, absent unusual circumstances. See *Leonard Wholesale Meats, Inc.*, 136 NLRB 1000, 1001 (1962), modifying *Deluxe Metal Furniture Co.*, 121 NLRB 995 (1958).

⁵ See *Hershey Chocolate Corp.*, 121 NLRB 901, 905 (1958).

Thus, pursuant to the rule of *Deluxe Metal*, the petition may properly be dismissed as prematurely filed.⁶

⁶ We note that, had it been determined that the contract's bar quality was forfeited on the ground of the "assessments" language, and had the decision on that ground issued on or before the 90th day preceding the expiration of the contract, then the petition would *not* be subject to dismissal because it was prematurely filed. *Deluxe Metal*, supra, 121 NLRB at 999 (premature petition not dismissed if petitioner submits information giving reason to believe that the contract is not a bar for

Accordingly, as we find the contract serves as a bar to the instant representation petition, and we further find that the petition was untimely filed, we shall reverse the Regional Director and dismiss the petition.

some reason other than expiration date considerations and if the Board's decision after the hearing on that other ground is issued on or before the 90th day preceding the expiration date). Those conditions are obviously not met here since we have found no merit to the Petitioner's "assessments" argument.