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**Garden Manor Farms, Inc. and United Food And Commercial Workers Union, Local 342, AFL-CIO, Petitioner.** Case 2-RC-2269

January 30, 2004

ORDER

BY MEMBERS LIEBMAN, SCHAUMBER, AND WALSH

The Petitioner's request to withdraw the petition is granted.<sup>1</sup>

Dated, Washington, D.C. January 30, 2004

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Wilma B. Liebman, Member

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Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER SCHAUMBER, dissenting.

Introduction

The Regional Director found in this case that the collective-bargaining agreement between the Employer and Local 210, Warehouse and Production Employees Union, does not bar the petition filed by UFCW Local 342 because Local 210 disclaimed interest in representing the unit. The Employer filed a request for review with the Board on August 19, 2003. By letter dated December 24 to the Regional Office, the Union, through its attorney, purported to withdraw its first petition and, by separate letter, sought to file a new second petition. The Regional Office was notified that the Board would consider the Union's December 24 letter as a request to withdraw its first petition. By their Order today, my colleagues grant that request. I must respectfully dissent.

The Employer's request for review has been pending over 6 months and it has been duly considered by the Board. Since it raises a significant legal issue disclosing, in my view, a disarray in Board law compounded by the Board's decision in *VFL Technology Corporation*, 332 NLRB 1443 (2000), and the action of the Regional Director in reliance thereon will aid in our administration of the Act, I believe we should consider the issue the filing of Local 342's petition presents on the merits. In light of the majority's order, I write separately to address the disclaimer issue, and more particularly to focus attention

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<sup>1</sup> We need not address the issues raised by our dissenting colleague in light of the Petitioner's withdrawal of the petition.

on the Board's caselaw in this area, which, as mentioned, appears in disorder and requires our attention.

The Disclaimer Issue Presented for Review

Local 210 made its disclaimer following settlement of "article XX" proceedings between itself and Local 342. Sometimes referred to as the "no-raiding" provision, article XX of the AFL-CIO constitution provides a mechanism for AFL-CIO affiliates to resolve their representational disputes. In *VFL Technology Corp.*, 332 NLRB 1443 (2000), the Board gave effect to a union disclaimer resulting from an article XX proceeding. In so holding, however, the *VFL Technology* Board directly contradicted *Mack Trucks, Inc.*, 209 NLRB 1003 (1974). In the appropriate case, I would overrule *VFL Technology* and return to *Mack Trucks*.

In *Mack Trucks*, the contracting incumbent union, IAM Local 35, disclaimed interest in favor of the UAW. Demanding recognition, the UAW informed the employer that "it was agreed under our joint UAW-IAM jurisdictional pact" that the UAW was the appropriate bargaining agent. 209 NLRB at 1004. The employer declined to recognize the UAW, which then filed a petition with the Board. The Board found IAM's disclaimer ineffective, stating:

The fact that IAM Local 35 has not been representing the employees involved, and does not appear to be willing at present to represent them, is evidently a consequence of an agreement reached between the Petitioner and the IAM after the execution of the contract. Although the Board has a policy of seeking, in its representation proceedings, to accommodate efforts being made to resolve disputes between unions under "no-raiding" agreements,<sup>[4]</sup> it does not permit such agreements to be used to supersede a binding collective-bargaining agreement interposed as a bar to an immediate election.

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[4] See N.L.R.B. Field Manual, sec. 11050.

Id. The cited Section 11050 of the Board's then-current Field Manual dealt with "programs established within the AFL-CIO for handling of representation disputes between affiliates." Section 11050's modern counterpart is Section 11017 of the Casehandling Manual (Part Two), Representation Proceedings, which similarly addresses union programs "for handling representation disputes (raiding)." A comparison of Section 11050 and Section 11017 reveals that some revisions have been made over the years, but it also demonstrates that the Board's fundamental policy with respect to these union "no-raiding" programs has remain unchanged. Section 11050 states that "[w]ithin certain limita-

tions, the Board's procedures make allowances for and give weight to these programs . . . .” Similarly, Section 11017 provides that “[w]ithin certain limitations, the Board's procedures accommodate these programs.”

As the above-quoted language from *Mack Trucks* and the citation to Section 11050 of the then-current Field Manual both make clear, the *Mack Trucks* Board viewed the IAM-UAW jurisdictional pact as a “no-raiding” agreement of the type it seeks to accommodate as a matter of policy. Nevertheless, *Mack Trucks* held that “such agreements” may not be used to supersede a contract interposed as a bar to an election. Thus, under *Mack Trucks*, union disclaimers stemming from “such agreements” are ineffective.

By contrast, the Board gave effect to a union disclaimer in *American Sunroof*, 243 NLRB 1128 (1979). However, no “no-raiding” agreement was involved in this case. Rather, the contracting union disclaimed interest after an employee filed a UD petition signed by 39 of the 40 unit employees. (UD petitions, authorized by Section 9(e) of the Act, enable employees to rescind the authority of their union to enter into a collective-bargaining agreement that contains a union-security provision.) Distinguishing *Mack Trucks*, the *American Sunroof* Board stated that “the essential fact” in that case “was that the disclaimer by the contracting union resulted from a *collusive* agreement” between the contracting and petitioning unions. 243 NLRB at 1129 (emphasis added). As I have just shown, however, *Mack Trucks* furnishes no basis whatsoever for this characterization. “Collusion” is defined as “secret cooperation for a fraudulent or deceitful purpose.” *Webster's Third New International Dictionary, Unabridged* 446 (1981). Again, the *Mack Trucks* Board treated the IAM-UAW jurisdictional pact as the kind of agreement the Board typically accommodates as a matter of policy. To characterize that agreement as “collusive” is tantamount to suggesting that the Board has a policy of accommodating fraud or deceit.

It is unclear why the Board in *American Sunroof* adopted such a distorted reading of *Mack Trucks*, given that another basis for distinguishing *Mack Trucks* was readily available. In *Mack Trucks*, the disclaimer was the result of a union-union “no raiding” agreement. In *American Sunroof*, the disclaimer followed the filing of a nearly unanimous UD petition, from which it was evident that the employees opposed their union on a fundamental matter of policy. See *NLRB v. Circle A & W Products Co.*, 647 F.2d 924, 927 (9th Cir. 1981). In *Mack Trucks*, by contrast, there was no evidence of any such opposition. On the contrary, the unit employees had just selected IAM Local 35 as their representative. Accordingly, giving effect to the disclaimer in that case

would have disrupted contractual stability without serving any countervailing interest in ensuring employee freedom of choice.

In any event, given the rather stunning implications of *American Sunroof's* misreading of *Mack Trucks*, one would think that the Board would have taken advantage of the first opportunity to correct that misreading. It had the opportunity to do just that in *VFL Technology*, which, like *Mack Trucks*, presented the issue of whether to give effect to a disclaimer made pursuant to a “no-raiding” agreement. Without overruling *Mack Trucks*, however, *VFL Technology* held the disclaimer effective. To reach that surprising result, the *VFL Technology* Board distinguished *Mack Trucks* by adopting *American Sunroof's* mischaracterization of that decision as involving a “collusive” agreement. By contrast, the Board found no collusion in *VFL Technology* because “[t]he disclaimer here stemmed from the independent article XX ‘no-raid’ procedures, a process long recognized and accorded deference by the Board. Cf. Casehandling Manual (Part Two), Representation Proceedings, Section 11017 et seq.” 332 NLRB at 1444. In other words, the disclaimer at issue in *VFL Technology* was given effect *because* it stemmed from a “no-raiding” procedure accorded deference under Section 11017—even though, in *Mack Trucks*, a disclaimer stemming from a like procedure accorded deference under Section 11017's precursor was *denied* effect, and even though *Mack Trucks* squarely held that *all* disclaimers pursuant to *all* “no-raiding” agreements are to be denied effect because, notwithstanding the Board's deference to them in other contexts, “it does not permit *such agreements* to be used to supersede a binding collective-bargaining agreement interposed as a bar to an immediate election.” 209 NLRB at 1004 (emphasis added). In short, the Board's own rationale in *VFL Technology* demonstrates that *Mack Trucks* is indistinguishable. Thus, by reaching the very result *Mack Trucks* precluded, *VFL Technology* rendered Board precedent on the issue of union disclaimers incoherent.<sup>2</sup>

That brings us to the instant case. Like both *Mack Trucks* and *VFL Technology*, it involves a disclaimer made pursuant to a union-union agreement. Under *Mack*

<sup>2</sup> Compounding matters, *VFL Technology* also claimed, incorrectly, that the Ninth Circuit had “approved *American Sunroof's* interpretation of *Mack Trucks*” in *Circle A & W*, supra. 332 NLRB at 1444. *Circle A & W* says nothing of the kind. This is what it says: “While somewhat opaque, the decision in *American Sunroof* may be justified on the ground that the Board explicitly found no collusion or attempt to avoid the terms of the collective bargaining agreement by the employees or the disclaiming union.” 647 F.2d at 926 fn. 1. Nothing in this language states or implies approval of *American Sunroof's* interpretation of *Mack Trucks*.

*Trucks*, Local 210's disclaimer would be denied effect; under *VFL Technology*, it would be given effect. I would adhere to *Mack Trucks*. In shaping 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." *Circle A & W*, supra at 926. Where a disclaimer results from a union-union agreement, permitting that disclaimer to supersede a bar-quality contract disrupts contractual stability without any countervailing benefit to employee free choice.

To put some flesh on these abstractions, let us view the consequences of *VFL Technology* from two perspectives. First, consider the employees' viewpoint. Exercising their Section 7 right to be represented by a labor organization of their own choosing, they vote for Union 1. Then, as a result of an AFL-CIO proceeding between Union 1 and Union 2—a proceeding, it should be noted, to which the affected unit employees are not parties—their choice is set aside. In my opinion, this arrangement undermines the principle of employee democracy, breeding cynicism and distrust. Some might counter that the employees will be able to vote for or against Union 2 in another election; but they chose Union 1, and Union 1 will not be on the ballot. Moreover, in addition to losing their chosen representative, the employees also stand to lose the terms and conditions won for them by Union 1 through collective bargaining. Even if they choose Union 2, there is no guarantee that their employer will reach agreement with that union on another contract. In sum, under *VFL Technology*, employees lose their elected representative and their contract, repeat the electoral process, and endure the uncertain prospect of further collective bargaining. Clearly, that decision subordinates employee interests to union jurisdictional interests.

Next, consider the perspective of the employer. It has accommodated a union organizing campaign, cooperated with the Board's electoral processes, and engaged in collective bargaining. All of this has entailed an investment of time and money—and in many instances, a substantial amount of both. Such costs are justified as the necessary concomitant of the rights the Act creates and the Board protects; but still, they are costs, and the employer must bear them. In return, the employer justifiably believes that it has obtained industrial peace in the form of a contract to which it is legally bound, and to which it rea-

sonably thinks the union is similarly bound. Then, as a result of an internal AFL-CIO proceeding to which the employer was not even a party, its contractual partner disclaims interest. By giving effect to that disclaimer, *VFL Technology* abruptly relieves the union of its contractual obligations, contrary to every settled assumption about the nature of a contract as a legally binding commitment:

The inviolability of contracts, and the duty of performing them, as made, are foundations of all well-ordered society, and to prevent the removal or disturbance of these foundations was one of the great objects for which the Constitution was framed.

*Murray v. Charleston*, 96 U.S. 432, 449 (1877). Meanwhile, the union that prevailed in the AFL-CIO proceeding, having obtained a showing of interest, files a petition, and the whole process starts all over again—another organizing campaign, another election, another round of collective bargaining. Only this time, the employer's costs cannot be justified as necessary to furthering employee rights under the Act. This time, the employer is simply paying for the results of a proceeding of which it had no notice, and in which it had no say. But those costs cannot be imposed without the Board's permission. In reality, *VFL Technology* taxes those costs to the employer by giving effect to the contracting union's disclaimer.

In sum, the relevant policy considerations argue powerfully against *VFL Technology* and in support of *Mack Trucks*. Had time not overtaken the disclaimer issue in this case, I would have voted to overrule *VFL Technology*. I am aware that the Board generally defers to article XX procedures. However, Section 11017 of the current Casehandling Manual, and Section 11050 of the Field Manual in effect when *Mack Trucks* issued, make clear that the Board's policy of accommodating "no-raiding" programs has always had "certain limitations." Those limitations include the disclaimer at issue in this case, as the *Mack Trucks* Board made abundantly clear.

Dated, Washington, D.C. January 30, 2004

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Peter C. Schaumber,

Member

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