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Jackson Terrace Associates *and* Delano Thompson and National Organization of Industrial Trade Unions (NOITU) and Industrial Production Employees Union, Local 72, affiliated with NOITU. Case 29–RD–1037

December 30, 2005

DECISION ON REVIEW AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On March 24, 2005, the Regional Director for Region 29 issued a Decision and Direction of Election in the above-entitled proceeding in which he found that a collective-bargaining agreement between Jackson Terrace Associates (Employer) and National Organization of Industrial Trade Unions (NOITU) and Industrial Production Employees Union, Local 72, affiliated with NOITU (Intervenors), does not bar the instant decertification petition because it is not clear that the agreement was signed before the petition was filed. Thereafter, pursuant to Section 102.67 of the National Labor Relations Board's Rules and Regulations, the Employer and the Intervenors filed timely requests for review in which they contend that the agreement was signed on December 31, 2004, before the petition was filed on January 18, 2005. The Petitioner filed a brief in opposition.

On April 19, 2005, the Board granted the requests for review.

Having carefully considered the entire record in this proceeding, we find, contrary to the Regional Director, that the Employer and the Intervenors signed the agreement before the Petitioner filed his decertification petition, and that the agreement is a bar to the petition.

I.

The Employer operates a residential apartment complex in Hempstead, New York. The Intervenors, who jointly represent the Employer's building services employees, and the Employer are parties to a 3-year collective-bargaining agreement that expired on December 31, 2004.[1] Peter Pacheco, then Local 72's vice president, testified that, on December 30, the Employer and the Intervenors agreed to the terms of a successor contract, except for wage and pension issues which they agreed to send to interest arbitration. Pacheco further testified that he told the unit employees that an agreement had been reached, but that wage and pension issues would be sent to interest arbitration. Pacheco stated that, on December 30, he phoned his office and spoke with a secretary named Janet.[2] Pacheco told Janet the terms of the agreement and directed that she prepare a document incorporating those terms for signature by the parties and send it to the Employer by fax or overnight mail. Pacheco testified that Janet has been with the Intervenors for approximately 15 years and that she has experience in preparing documents in this fashion.

The agreement is a 2-page document containing an effective date and a termination date. The agreement specifically states that the terms of the agreement are those of the predecessor contract that expired December 31, with several modifications. The agreement further states that the parties agree to submit wage and pension issues to interest arbitration before a specifically-named arbitrator. The agreement contains the signatures of Local 72's president at the time, Helen Lasky; National NOITU President Gerard Jones; and Peter Florey, the Employer's representative. The date "12/31/04" is handwritten on the document.

Jones testified that the clerical employee assigned to prepare the agreement gave it to him to sign "towards the end of the year." Jones signed the agreement and testified that he witnessed Helen Lasky sign the agreement. Although neither Jones nor Lasky dated the agreement when they signed it, Jones testified that the Employer's signature and a date were not on the agreement when he and Lasky signed it. Jones asked the clerical employee to send the agreement to the Employer for signature.

Florey, the Employer's property manager, testified that after Richard Smith, the Employer's negotiator, gave him the agreement and told him that it was accurate, he signed the agreement on December 31, and wrote "12/31/04" on the agreement. Florey further testified that the signatures of Jones and Lasky were already on the agreement when he signed and dated it.

Pacheco testified that he next saw the agreement during the first week of January 2005, when he returned to his office from vacation, and that the agreement had been signed by Florey, Jones, and Lasky and dated "12/31/04." Pacheco also testified that he recognized the signatures of Jones and Lasky on the agreement because he has had a 20-year working relationship with them. Pacheco further stated that on January 5, 2005, he sent a letter to the arbitrator named in the agreement requesting that the arbitrator set a date for interest arbitration on the wage and pension issues, as the parties had specified in

[1] All subsequent dates are in 2004 unless otherwise indicated.

[2] Pacheco had returned from vacation for the December 30 bargaining session and did not return to the Intervenors' local office until early January 2005.

their agreement. On January 11, 2005, the designated arbitrator faxed letters to the parties setting an arbitration date. On January 18, 2005, the Petitioner filed the decertification petition.

The Regional Director found that "as a legal matter," the contract asserted as a bar to the decertification petition contained "substantial terms and conditions" and would bar an election if it were executed before the petition was filed.[3] The Regional Director viewed the "real question" in this case as a factual one—whether the agreement was signed before the decertification petition was filed. The Regional Director found that inconsistencies in the testimony and documentary evidence made it impossible to determine when the agreement was actually signed and that the evidence therefore was too uncertain to permit a finding that it was signed before the decertification petition was filed. The Regional Director accordingly concluded that the agreement did not bar the decertification petition.

II.

Contrary to the Regional Director, we find that the Employer and the Intervenors signed the agreement before the Petitioner filed his decertification petition on January 18, 2005, and that the agreement constitutes a bar to the petition.

The Board has long held that, for contract bar purposes, an agreement must meet certain formal and substantive requirements, including the requirement that the document proposed as a bar be signed by the parties to the agreement prior to the filing of a petition that it would bar. *Appalachian Shale Products Co*., 121 NLRB 1160, 1162 (1958). A contract signed after the filing of a petition does not serve as a bar to an election. Id. at 1161–1162. The party asserting that a contract operates as a bar bears the burden of proving that the agreement was signed by the parties prior to the filing of a petition. *Roosevelt Memorial Park, Inc*., 187 NLRB 517 (1970). See also *Appalachian Shale*, supra at 1160.

The agreement at issue in this case is signed by the Employer's representative, Peter Florey, and by the Intervenors' representatives, Helen Lasky and Gerard Jones. The sole issue in this case is the *date* on which the parties' representatives actually signed the agreement. While the agreement's stated execution date is "12/31/04," it is not readily apparent from the document which signatory actually signed the document on December 31, which signatory dated the document, or whether any or all of the signatories signed the document on December 31. Where, as here, the execution date is not clear from the face of the document, the Board may look to evidence outside the document to ascertain the execution date. *Road & Rail Services*, 344 NLRB No. 43 (2005), and cases cited therein.[4]

The extrinsic evidence shows that the parties to the agreement signed it on December 31. As an initial matter, it is undisputed that Lasky, Jones, and Florey possessed the authority to sign the agreement on behalf of the Intervenors and the Employer. Jones' undisputed testimony shows that he signed the agreement before the end of the year and that Lasky signed the agreement in his presence. Florey's undisputed testimony shows that he signed the agreement and dated it "12/31/04." Florey also testified that when he received the agreement, the signatures of Jones and Lasky were already on the agreement. Additionally, Pacheco testified that, pursuant to the terms of the agreement, he contacted an arbitrator on January 5, 2005.[5] The Petitioner presented no testimony to contradict or discredit the testimony of Jones, Florey, and Pacheco concerning the circumstances surrounding the execution of the agreement.[6]

The Petitioner requests that the Board consider evidence regarding whether the parties actually reached an

[3] *Appalachian Shale Products Co*., 121 NLRB 1160 (1958). Although the Petitioner did not file a request for review contesting this finding, in its statement in opposition to the requests for review, the Petitioner suggests that the parties had not reached any agreement by December 31. The Petitioner further suggests that the written agreement asserted as a bar to its petition does not contain, on its face, "substantial terms and conditions of employment deemed sufficient to stabilize the bargaining relationship," as *Appalachian Shale* requires, inasmuch as the agreement merely adopts the terms of the prior agreement and leaves certain issues open and subject to interest arbitration. In *Stur-Dee Health Products*, 248 NLRB 1100, 1101 (1980), cited by the Regional Director, the Board stated that the failure of an agreement to delineate every possible provision does not negate the bar quality of the agreement. The Board also stated that a provision to leave economic items, such as wages and pension issues, to interest arbitration, does not mean that the agreement may not operate as a bar. Id. As in *Stur-Dee*, the Employer and the Intervenors have a long history of collective bargaining and they have been parties to a series of collective-bargaining agreements containing provisions for, inter alia, recognition of the unit, mediation and arbitration, vacations, holidays, hours of work, union security, seniority, and dues checkoff. Here, the agreement provides the "requisite degree of labor relations stability to constitute a bar" to the petition where the agreement specifically retains the terms of the parties' prior collective-bargaining agreement. Moreover, the parties have included in their agreement a "definite and readily ascertainable method for determining economic terms." Id.

[4] Cf. *Cooper Tank & Welding Corp*., 328 NLRB 759 (1999) (absence of an execution date on a contract does not remove the contract as a bar to a petition if it can be established that the contract was, in fact, signed before a petition was filed).

[5] Pacheco's letter to the arbitrator and the arbitrator's response corroborate that the contract was in effect prior to the date on which the decertification petition was filed. *Cooper Tank & Welding*, supra at 759.

[6] Even the Regional Director points out that his doubts about a December 31 execution date do not necessarily mean that the agreement was signed after the petition was filed.

agreement at the bargaining table. That issue, however, is not before us. Further, the Petitioner did not produce evidence to establish that the signing of the agreement was contrived. The Petitioner does not attack the signatories' authority to sign the document. The Petitioner did not present testimony or evidence to contradict the Employer's and Intervenors' witnesses who testified that they signed the agreement on or before December 31. Additionally, it is undisputed that there are letters dated prior to the filing of the petition to and from the arbitrator named in the agreement regarding sending wage and pension issues to interest arbitration, as specified in the agreement.[7]

We find the cases on which the Regional Director relied in reaching his conclusions to be distinguishable. For example, in *Bo-Low Lamp Corp*., 111 NLRB 505 (1955), and *Roosevelt Memorial Park, Inc.*, 187 NLRB 517 (1970), the parties presented inconsistent testimony as to the date on which they signed a contract. The Board held in both cases that the "vague, ambiguous, and inconsistent" testimony introduced to establish the contract's execution dates was insufficient. In the present case, however, unlike both *Bo-Low Lamp* and *Roosevelt Memorial Park*, testimony about the execution date is neither vague nor inconsistent.

Road & Rail Services, Inc., 344 NLRB No. 43 (2005), which issued after the Regional Director's decision in this case, also involved inconsistent testimony. In that case, the issue was whether one of three contracts operated as a bar to a petition. Two signatories did not testify, and the intervenor presented inconsistent testimony as to whether it had a contract with the employer. Under these facts, the Board found "sufficient uncertainty" as to the date of a bar-worthy contract because "neither of the parties asserting contract bar has met its burden of presenting evidence sufficient to overcome and resolve the myriad uncertainties in [the] case." Id. at slip op. 3. By contrast to *Road & Rail Services*, there is no similar confusion or uncertainty in this case: there is but one document; the document is signed by the required signatories; and there is uncontradicted and corroborating testimony from two of the three signatories about the agreement's execution.

We find, therefore, based on the entire record, that the Employer and the Intervenors have met their burden of showing that they signed their agreement on or before December 31, prior to the January 18, 2005 date on which the Petitioner filed a decertification petition. We further find, contrary to the Regional Director, that the December 31, 2004 agreement constitutes a bar to the decertification petition. Accordingly, we reverse the Regional Director's Decision and Direction of Election and dismiss the petition.

ORDER

The petition is dismissed.

Dated, Washington, D.C. December 30, 2005

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Peter C. Schaumber, Member

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[7] The Regional Director, based on the Petitioner's contentions, expressed his concerns about the agreement and its execution, remarking that there are, in his view, many unanswered questions about the agreement. We find those concerns to be without merit. The Regional Director questioned why Helen Lasky's signature on the agreement looked different from her signature on a January 19, 2005 letter to employees. Although on the face of the two documents Lasky's signatures look different, no party alleged at the hearing, and there is nothing in the record to suggest, that her signature on the agreement is fraudulent. Jones testified that Lasky signed the agreement in his presence and that he recognized her signature. Pacheco testified that he recognized Lasky's signature based on a 20-year working relationship with her. Further, there is no evidence that the signature on the letter that the Regional Director used for comparison to the agreement is actually that of Lasky.

We find that the Regional Director's remaining concerns are speculative at best and essentially relate to the reaching of an agreement at the bargaining table and not to the question at hand of whether the Employer and Intervenors signed the agreement prior to the filing of the petition.