

**UNITED STATES GOVERNMENT  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 29**

FLAGG COURT OWNERS CORP.  
and WPG RESIDENTIAL INCORPORATED

Employers<sup>1</sup>

and

Case No. 29-RC-9262

LOCAL 32B-32J, SERVICE EMPLOYEES  
INTERNATIONAL UNION, AFL-CIO

Petitioner

and

LOCAL 2, NEW YORK STATE INDEPENDENT  
UNION

Intervenor

**DECISION AND DIRECTION OF ELECTION**

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, herein called the Act, as amended, a hearing was held before Scott Feldman, a Hearing Officer of the National Labor Relations Board, herein called the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned:

Upon the entire record in this proceeding, the undersigned finds:

1. The Hearing Officer's rulings made at the hearing are free from prejudicial error and hereby are affirmed.

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<sup>1</sup> The name of the managing agent, WPG Residential Incorporated, herein called WPG, appears as amended at the hearing.

2. The parties stipulated that Flagg Court Owners Corp., herein called Flagg, a New York corporation with its principal office and place of business located at 7200 Ridge Boulevard, Brooklyn, New York, has been engaged in the ownership of a 450 unit residential apartment complex, herein called the Ridge Boulevard complex. During the past year, which period is representative of its annual operations generally, Flagg, in the course and conduct of its business operations, derived gross annual revenues in excess of \$500,000, and purchased and received at its New York facility, goods and supplies valued in excess of \$5,000 from suppliers located within the State of New York who, in turn, purchased these goods and supplies directly from entities located outside the State of New York.

Based upon the forgoing, I find that the Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The labor organizations involved herein claim to represent certain employees of the Employer.

4. The Intervenor and Flagg contend that their current contract is a bar to an election in the instant matter.

The record shows that the Intervenor has represented the superintendent and other building service workers at the Ridge Boulevard complex for several years. The most recent fully integrated collective bargaining agreements covering these employees were effective from January 1, 1995, through December 31, 1997, and contained automatic renewal provisions. One of these contracts

covered a unit of approximately nine building service employees while the other covered the superintendent. The agreements name both Flagg and WPG as parties.<sup>2</sup>

Lee Wallach, the vice president of Flagg, testified that in 1998, following the expiration of these contracts, Flagg and the Intervenor met on from one to three occasions. They met again in March, 1999, and agreed to a three year contract providing for across the board wage increases of \$12.00 or \$12.50 per week during each year.<sup>3</sup> However, no written agreement was executed at that time. Thereafter, the Intervenor's shop steward approached Flagg and requested a meeting between bargaining unit employees and Flagg's Board to discuss a contract. On April 14 this meeting was held. At this meeting, which was not attended by any representatives of the Intervenor, the participants agreed to weekly wage increases of \$15.00 effective January 1, 1998, and wage increases of 12.50 per week during each of the following two years. This was memorialized in a handwritten agreement executed by Flagg and the eight employees who attended.<sup>4</sup> The employees also requested more comprehensive medical coverage, and Flagg promised to attempt to obtain it for them.

According to the witnesses who testified, on April 29, Wallach met with Intervenor President Carlos Stuart, Secretary Treasurer Guerrero and Roy Barnes, the Intervenor's attorney. At that meeting, the parties reviewed the

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<sup>2</sup> WPG was responsible for administering the wage and benefit provisions of these agreements. The record does not show whether it played any role in the supervision of employees.

<sup>3</sup> Aldo Guerrero, the Intervenor's Secretary-Treasurer, testified that the parties agreed to weekly wage increases of \$12.00. However, Wallach's testimony appeared to indicate that they agreed to wage increases of \$12.50 per week.

<sup>4</sup> The superintendent and one or two of the other building service employees were not present at this meeting.

handwritten agreement and bargained concerning welfare fund contributions. After reviewing the signatures on the April 14 agreement, the Intervenor and Flagg agreed to the wage increases contained therein and an increase in contributions to the Intervenor's welfare fund. However, no agreement was prepared or executed at the meeting.

Guerrero testified that following the meeting, he returned to his office and had his office prepare two Memoranda of Agreement (MOAs), one for the superintendent and the other for the remaining employees, setting forth the aforementioned increases. Neither MOA is dated, a departure from the Intervenor's usual practice of dating such documents. Guerrero testified that "if I remember" he brought the MOAs to Wallach's office a day later and that the two of them executed the agreements. Wallach testified that the MOAs were executed on April 30 or "immediately thereafter."<sup>5</sup>

Although the Intervenor and Flagg assert that the MOAs were executed on about April 30, the record reveals that its terms had not been put into effect as of the time of the hearing. Further, WPG did not receive the MOAs until May 19, at 5:25 p.m., two days after the petition was filed, when Marilyn Wallach, Flagg's Treasurer, faxed it copies of the MOAs along with a letter instructing WPG to

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<sup>5</sup> The transcript shows this exchange between the Wallach and the Hearing Officer:  
H.O.: OK. Let me ask you this. The contract, when was the contract signed by all the parties?  
Wallach: The meeting was the 29<sup>th</sup>, so it was either the 30<sup>th</sup> or immediately thereafter. And, again, I'm trying to remember, but it was absolutely immediately. It certainly was not more than two business days.

begin implementing their terms. The MOAs did not name WPG as a party.<sup>6</sup> The letter accompanying the MOAs attributed Flagg's delay in forwarding them to "a transition in management." Wallach testified that the delay was attributable to acrimony between Flagg and WPG. This acrimony had begun to develop in April, and on May 4, 1999, WPG had sent Flagg a letter providing Flagg with 30 days notice of its intention to terminate their relationship.<sup>7</sup>

Phil Whalen, the Chief Operating Officer of WPG, testified that WPG did not implement the terms of the MOAs because by the time WPG had received the MOAs, it had also received a notice to appear at the instant hearing. He stated he did not believe it prudent to implement the terms of the MOAs under these circumstances.

Guerrero testified that as of the time of the hearing, the Intervenor had not billed the Employers for the increase in welfare fund contributions because it generally takes time to compute retroactive increases, which, in this case, were retroactive to January 1, 1998, and to prepare whatever additional paperwork is necessary. He testified that the Intervenor had recently sent either WPG or Flagg a letter regarding the implementation of the MOAs. However, no such letter was produced at the hearing.

It is well established that to bar an election, a contract must be executed prior to the filing of the petition. Freuhauf Trailer Co., 87 NLRB 589 (1949); Appalachian Shale Products Co., 121 NLRB 1160, 1161 (1958). While the lack

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<sup>6</sup> Marilyn Wallach did not testify during the hearing. Her May 19 letter states that she had informed WPG in April that she would be mailing it a signed agreement.

<sup>7</sup> WPG's May 4 letter states it is resigning due its "desire to maintain our moral and ethical reputation."

of an execution date will not in itself vitiate a contract's bar status,<sup>8</sup> the Board will not find such a contract to be a bar where the evidence as to the date of execution is vague, ambiguous or inconsistent. Roosevelt Memorial Park, 187 NLRB 517 (1960); The Lane Construction Corporation, 222 NLRB 1224 (1976). I find the evidence in the instant case to be too ambiguous to warrant a finding that the MOAs were executed prior to the filing of the petition. The lack of an execution date is a departure from the Intervenor's standard practice of dating its contracts. Unlike the prior contracts, which named both Flagg and WPG as parties, the MOAs only name Flagg.<sup>9</sup> WPG did not even receive these documents until May 19, after the filing of the petition. Nor had the Intervenor sought to enforce the terms of the MOAs prior to the petition's filing. Thus, the evidence, in my view, is too ambiguous to unequivocally support the conclusion that these documents were executed prior to the filing of the petition. Thus, I find that the MOAs do not bar an election in the instant matter.<sup>10</sup>

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<sup>8</sup> Western Roto Engravers, 168 NLRB 986 (1986).

<sup>9</sup> WPG had not forwarded its letter of resignation at the time Flagg and the Intervenor claim they executed the MOAs.

<sup>10</sup>In addition, I note that the union security clause (Article 1, Section B) of the fully integrated agreements requires membership in the Intervenor as a condition of employment after 30 days following the beginning of an employees employment "or the *effective* date of this agreement, whichever is later." The MOAs in the instant matter are effective January 1, 1998. Union security clauses that are retroactively keyed to a contract's effective date, rather than its execution date, fail to accord current employees the 30 day grace period to which they are entitled under 8(a)(3) of the Act. Such clauses are unlawful. Anderson Express Ltd., 126 NLRB 798, 803 (1960). With regard to the bar status of contracts containing unlawful union security clauses, the Board has held that when such clauses are unlawful on their face, and no parol or extrinsic evidence is required to determine their illegality, they will not bar an election. In Jet Pak Corporation, 231 NLRB 552 (1977), the Board reversed a Regional Director's finding that a retroactively effective union security clause was not a bar. In that matter, as in the instant case, the execution date did not appear in the contract. As a resort to extrinsic evidence was necessary to determine the date of execution, the Board found that the union security provision was not facially invalid. Assuming that the Board's finding in Jet Pak remains viable, the MOAs in the instant case would not forfeit their bar quality due to their union security clause. However, it would appear incongruous to rely upon extrinsic evidence concerning the MOAs' execution to

5. The parties stipulated, and I find, that the following unit is appropriate for the purposes of collective bargaining:

All full time and regular part time building service employees employed at 7200 Ridge Boulevard, Brooklyn, New York excluding all guards and supervisors as defined in the Act.

### **DIRECTION OF ELECTION**

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently subject to the Board's Rules and Regulations. Eligible to vote are employees in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation or temporarily laid off. Also eligible are employees engaged in an economic strike that commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States who are employed in the unit may vote if they appear in person or at the polls. Ineligible

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determine whether they were signed before the filing of the petition, and to exclude such evidence when examining the impact their union security clause have upon their bar status.

The MOAs may also forfeit their bar status because they cover inappropriate units. Moveable Partitions, 175 NLRB 915 (1969). One covers the lone superintendent while the other covers the remaining building service employees. The Board will not certify one person units. Roman Catholic Orphan Asylum, 229 NLRB 251 (1977). It also disfavors units that exclude one employee because they effectively foreclose that employee from obtaining representation. Vecellio & Grogan, Inc., 231 NLRB 136 (1977). In the instant matter, Flagg contended that the superintendent was a Section 2(11) supervisor, and the parties agreed to leave the resolution of that issue to the challenged ballot procedure. Thus, although the unit of one superintendent is inappropriate regardless of his supervisory status, the appropriateness of the unit of remaining building service employees cannot be determined from the record.

to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible to vote shall vote whether they desire to be represented for collective bargaining purposes by Local 32B-32J, Service Employees International Union, AFL-CIO, Local 2, New York State Independent Union, or by neither labor organization.

### **LIST OF VOTERS**

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of the statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *N.L.R.B. v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within 7 days of the date of this Decision, four (4) copies of an election eligibility list, containing the full names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned who shall make the list available to all parties to the election. *North Macon Health Care Facility*, 315 NLRB 359 (1994). In order to be timely filed, such list must be received in the Regional Office, One MetroTech Center North-10th Floor (Corner of Jay Street and Myrtle Avenue), Brooklyn, New York 11201 on or before June 16, 1999. No extension of time to file the list may be

granted, nor shall the filing of a request for review operate to stay the filing of such list except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

### **NOTICES OF ELECTION**

Please be advised that the Board has adopted a rule requiring that election notices be posted by the Employer at least three working days prior to an election. If the Employer has not received the notice of election at least five working days prior to the election date, please contact the Board Agent assigned to the case or the election clerk.

A party shall be estopped from objecting to the nonposting of notices if it is responsible for the non-posting. An Employer shall be deemed to have received copies of the election notices unless it notifies the Regional office at least five working days prior to 12:01 a.m. of the day of the election that it has not received the notices. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure of the Employer to comply with these posting rules shall be grounds for setting aside the election whenever proper objections are filed.

### **RIGHT TO REQUEST REVIEW**

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street,

N.W., Washington, D.C. 20570. This request must be received by June 23, 1999.

Dated at Brooklyn, New York, this 9<sup>th</sup> day of June, 1999.

/S/ ALVIN BLYER

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