

**UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 31**

MV TRANSPORTATION, INC.,

Employer,

and

Case No. 31-RC-8032

UNITED TRANSPORTATION, INC.,

Petitioner.

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, herein referred to as the Act, a hearing was held before a hearing officer of the National Labor Relations Board, herein referred to as 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 are hereby affirmed.^{1/}
2. 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.^{2/}
3. The labor organization involved claims to represent certain employees of the Employer.
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of the Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:^{3/}

INCLUDED: All full-time and regular part-time drivers employed by the Employer at its facility located at 1031 West L-12, Lancaster, California.

EXCLUDED: All office clerical employees, all other employees, guards and supervisors as defined in the Act, as amended.

DIRECTION OF ELECTION ^{4/}

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 issue subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who are 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 which commenced less than 12 months before the election date and who retained the status as such during the eligibility period and their replacements. Those in the military services of the United States Government may vote if they appear in person at the polls. Ineligible 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 shall vote whether they desire to be represented for collective bargaining purposes by **United Transportation Union International**.

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 their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969); *North Macon Health Care Facility*, 315 NLRB 359 (1994). Accordingly, it is hereby directed that an election eligibility list, containing the **FULL** names and addresses of all the eligible voters, must be filed by the Employer with the Regional Director for Region 31 within 7 days of the date of the Decision. The list must be of sufficiently large type to be clearly legible. This list may initially be used by me to assist in determining an adequate showing of interest. I shall, in turn, make the list available to all parties to the election, only after I shall have determined that an adequate showing of interest among the employees in the unit found appropriate has been established.

In order to be timely filed, such list must be received in the Regional Office, 11150 West Olympic Blvd., Suite 700, Los Angeles, California 90064-1824, on or before **September 18, 2001**. No extension of time to file this 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. The list may be submitted by facsimile transmission. Since the list is to be made available to all parties to the election, please furnish a total of 2 copies, unless the list is submitted by facsimile, in which case no copies need be submitted. To speed the preliminary checking and the voting process itself, the names should be alphabetized (overall or by department, etc.).

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, DC 20570.
This request must be received by the Board in Washington by September 25, 2001.

DATED at Los Angeles, California this 11th day of September, 2001.

/s/ James J. McDermott
James McDermott, Regional Director
National Labor Relations Board
Region 31
11150 W. Olympic Blvd.
Suite 700
Los Angeles, CA 90064-1824

FOOTNOTES

1/ The Employer, MV Transportation, Inc. (“MV”), moved to dismiss the instant petition on the grounds that the Order granting petitioner’s request for withdrawal of its earlier-filed petition invoked the six-month prejudice bar against re-filing. MV asserts that the instant petition must be dismissed since it was filed within six months of the withdrawn petition by the same Petitioner seeking the same bargaining unit, without good cause for that re-filing. MV also argues that equity demands the instant petition be dismissed because MV just acquired a new workforce and has not had a chance to get to know its new employees, and those employees have not had a chance to get to know MV. MV maintains that, in the interest of fairness and the best interests of the employees, there should be a waiting period to allow for the formation of an employer-employee relationship before a new petition is processed. Petitioner opposes MV’s motion.

1. Background

On July 3, 2001, the Petitioner filed a petition (“first petition”) seeking to represent a unit of employees employed as drivers by Laidlaw Transit Services, Inc. (“Laidlaw”) at 1031 West Avenue, L-12, Lancaster, California (“Lancaster facility”). At the time of the filing, Laidlaw had the contract to provide bus transportation services for Antelope Valley Transit Authority (“AVTA”). Pursuant to the first petition and a Stipulated Election Agreement thereafter executed on July 9, 2001, between the Petitioner and Laidlaw, an election was scheduled for August 10, 2001. However, on August 1, 2001, AVTA announced that Laidlaw would be ceasing operations at its Lancaster facility, thereby no longer providing them with bus services, and that MV, a competitor in the same industry, had been awarded the contract for bus services. On August 5, 2001, AVTA assumed operations at the Lancaster facility.

MV concedes that it is a successor employer to Laidlaw pursuant to *NLRB v. Burns Int’l Sec. Servs.*, 406 U.S. 272 (1972). MV also concedes factually that it has employed the majority of Laidlaw employees who were operating the transit systems for AVTA, occupies the same facility that Laidlaw occupied and has a substantial continuity in the operations of both MV and Laidlaw. As such, the Employer contends that, except for the substitution of MV for Laidlaw, the relationship between the unit employees and their employer has remained essentially unchanged.

On August 8, 2001, the Petitioner requested permission to withdraw its first petition. The Employer had no objection thereto. The Acting Regional Director issued an Order on August 9 granting the Petitioner’s request and canceling the election scheduled for August 10. Although the Order did not specify whether Petitioner’s request was granted with or without prejudice, the absence of language denoting prejudice reflected that administrative approval was granted without prejudice. The Employer admits that when it asked for such clarification, it was informed that the request to withdraw the first petition was approved without prejudice.

On August 13, 2001, the Petitioner filed the instant petition (the “petition”). In letters dated August 21 and August 23, 2001, the Petitioner revised the unit description such that only the drivers remained, as in the first petition, concerning which Laidlaw and

the Petitioner had previously entered a stipulated election agreement on July 9. On August 24, MV filed its Motion to Dismiss the petition.

2. Section 11112

A request to withdraw a petition after approval of an election agreement or close of a hearing, but before an election is held, is addressed by Section 11112 of the National Labor Relations Board Casehandling Manual, Part Two, Representations Proceedings (“Casehandling Manual”). That Section provides that, when a petitioner makes the request for withdrawal of a petition for certification of representative after the close of the hearing or after the election agreement has been approved, but before the holding of the election, “a variety of circumstances may arise” requiring appropriate action. As this indicates, as well as the language of Section 11112’s title, which states “Prejudice Possible,” it is not the intention of the Casehandling Manual to mandate any particular result.

Section 11112.1(a) of the Casehandling Manual further provides:

Where, after the approval of an election agreement or the close of a hearing, but before the holding of the election, the petitioning union, the sole union involved, requests timely withdrawal of its petition, the request should be approved (Sec. 11111) with 6 months prejudice (Sec. 11118) and the election should be canceled.

Similar to the language in Section 11112, this section sets forth no language mandating imposition of a six-month prejudice bar on the Petitioner. Rather, the Section clearly reads that the request should be approved, not that that it must or shall be approved with six months prejudice. Underpinning these sections is the policy of conservation of “the Agency’s resources by discouraging repetitive and duplicative filings.” Section 11118, Casehandling Manual.

Such policy considerations, however, do not apply to the situation at hand, where the withdrawal was based on the loss and assumption of a government/municipal contract for services. As such, it is noteworthy that, while the Case Handling Manual guidelines serve as a procedural and operational guide, it is “not intended to be and should not be viewed as binding procedural rules. Rather, they provide a framework for the application of the Board’s decisional law and rules to the facts of the particular situations presented to the Regional Directors.” Casehandling Manual, Part Two, Representation Proceedings, Purpose of the Manual. It is the Regional Directors who make the decision through the exercise of their discretion. *See General Dynamics Corp.*, 175 NLRB 1035, 1037 n.10 (1969); *Bendix Aviation Corp.*, 125 NLRB 380, 383 n.5 (1959); *Radio Station WFLA*, 120 NLRB 903, 905 n.8 (1958).

The discretionary latitude in Sections 11112 and 11112.1(a) is patently clear when read in conjunction with the expressed intent of the Casehandling Manual which specifically states that a request by a Petitioner for withdrawal of a certification petition may, under certain circumstances, be granted without prejudice. Casehandling Manual, Section 11112. Since the Order did not specifically grant the withdrawal with prejudice, it was implicit that, consistent with the above-referenced guidelines and, as verbally

communicated, an administrative decision had been made to approve the request without prejudice.

Having approved the withdrawal without prejudice consistent with Agency policy, the circumstances herein do not warrant a contrary conclusion. As stated *supra*, according to Section 11118 of the Casehandling Manual, the reason for attaching prejudice to a withdrawal is “to conserve the Agency’s resources by discouraging repetitive and duplicative filings” by petitioners who withdraw petitions, simply to make repetitive and duplicative filings against the same employer, and not petitioners who withdraw petitions due to circumstances beyond their control. Herein, there was no indication that the petitioner, in withdrawing its first petition, was seeking to take advantage of the system and misuse the Agency’s resources by making repetitive filings. Instead, the Petitioner justifiably withdrew the first petition only after Laidlaw closed its operations.

Even if the withdrawal Order had issued with prejudice, the refiling would still have been proper given these circumstances. For, Section 11118 of the Casehandling Manual only bars Petitioner from filing new petitions encompassing the same or substantially the same unit of employees during a six-month period if good cause cannot be shown. As per the Casehandling Manual, “no investigation, evaluation, or opinion as to what might constitute the good cause referred to above should be made at the time of the withdrawal. Such assessments should be made on the filing of a new petition by the affected Union.” *Id.* Again, it is the Regional Director who is responsible for determining whether there is good cause to justify processing the newly filed petition. *Id.* Section 11118.1 of the Casehandling Manual provides the following guidance to Regional Directors in making this determination: “what constitutes sufficient good cause to warrant entertaining a new petition filed prior to the expiration of the 6-month prejudice period may not be stated comprehensively; it depends on each individual case.”

The circumstances here, which led the Petitioner to withdraw its first petition and file the instant petition, constitute good cause. As discussed *supra*, the original petition was withdrawn when the Employer took over the contract between Laidlaw and AVTA, after Laidlaw ceased operations. At that time, it was uncertain whether the petitioned-for bargaining unit was still employed, and the majority of the employees in the unit (the drivers) were in the process of being hired by the Employer. As such, at the time of the withdrawal, there was uncertainty as to the number of drivers that would be transferred to or re-hired by MV. In addition, the Employer could not have been forced to agree to an election agreed upon by Laidlaw. Therefore, upon refiling, the very fact that the identity of the unit’s employer had changed made the instant petition no different than any other newly filed petition by the petitioner. Moreover, the fact that the instant petition seeks certification of the Employer’s newly acquired bargaining unit made the unit itself different.

Finally, as to the Employer’s argument that, in the interest of fairness, there should be a waiting period to allow for the formation of an employer-employee relationship before a new petition is entertained, there is no basis for such an argument simply because the Employer is a successor. While the Employer concedes it is a successor, it

has not recognized the Petitioner as the bargaining representative of the unit. As such, it is not entitled to any protection against the filing of a new petition. Further, even if it had recognized the Petitioner, this would not have prevented the Petitioner from effectively raising a question concerning representation and seeking the protections afforded through certification. *General Box Co.*, 82 NLRB 678, 680 (1949). Since the requisite showing has been made attendant to the petition and the record herein supports the conclusion that the new petition must be entertained and processed, the Employer's motion was properly denied.

2/ MV Transportation, Inc., the Employer, a California corporation with a facility located in Lancaster, California, is engaged in the business of providing public transportation. During the past twelve-months, a representative period, the Employer received gross revenues for providing transit systems services in excess of \$250,000, including at least \$50,000 from transit systems within California which themselves purchase goods from sources located outside the State of California in at least the aggregate sum of \$50,000. *Charleston Transit Co.*, 123 NLRB 1296 (1959).

3/ There are approximately 108 employees in the unit.

4/ In accordance with Section 102.67 of the Board's Rules and Regulations, as amended, all parties are specifically advised that the Regional Director will conduct the election when scheduled, even if a request for review is filed, unless the Board expressly directs otherwise.

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