

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 8**

THE EXCELLO SPECIALTY COMPANY

Employer

and

UNITED ELECTRICAL, RADIO AND MACHINE
WORKERS (UE)

Case No. 8-RC-16234

Petitioner

and

PRODUCTION WORKERS, LOCAL 148, AFL-CIO

Intervenor

DECISION AND ORDER

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,¹ the undersigned finds:

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

¹ The Petitioner and Intervenor filed briefs that have been carefully considered.

2. The labor organizations involved claim to represent certain employees of the Employer.
3. No question affecting commerce exists concerning the representation of certain employees of the employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act, for the following reasons:

The Petitioner seeks to represent a unit of the Employer's production and maintenance employees. The petitioned-for unit includes approximately 253 employees. The Intervenor argues that the petition is barred by its current contract with the Employer, which it characterizes as a three-year contract with a two-year extension. The Petitioner counters that the agreement in question is actually a five-year contract that does not bar its petition. The Employer takes no position on the contract bar issue, the only issue before me in this matter.

The record evidence clearly establishes that the Employer and the Intervenor are currently parties to a collective bargaining agreement covering the petitioned-for unit. Copies of that agreement offered into evidence at the hearing show that it was effective from December 18, 1996 through December 17, 1999. Attached to this contract is a document entitled Addendum #1. It provides that **“An addendum to this contract extending it two additional years was voted on and passed by the Union membership. The language of this contract as written will remain the same. Wage increases covering the two additional years are as follows: 12/18/99-12/17/2000---4%, 12/18/2000-12/17/2001---5%.** This document is signed by the same representatives of the Employer and Intervenor who signed the contract itself.

The Board has long held that no question concerning representation (QCR) is raised by a petition filed during the term of a valid collective bargaining agreement, unless said petition is filed during the “open period”, 90 to 60 days prior to the expiration of such agreement. **Hexton**

Furniture Co., 111 NLRB 342 (1955). However, a contract bars the filing of representation petitions for only three years or less. Contracts of a longer duration will not serve as a bar after three years from their effective date. **General Cable Corp., 139 NLRB 1123 (1962).** If a contract of three years or less is extended by the parties prior to the open period, petitions filed prior to the expiration of the extension are timely only if filed during one of two open periods; one calculated from the expiration date of the original contract and the other from the expiration date of the extension. **Union Carbide Corporation, 190 NLRB 191, 192 (1971), H.L. Klion, Inc., 148 NLRB 656 (1964).**

As noted above, the Intervenor argues that the agreement in question consists of a three-year contract and a two-year extension. As the instant petition was not filed during either open period, the Intervenor argues that it is barred and should be dismissed.

The Petitioner raises a number of arguments counter to this position. First, the Petitioner claims that the expiration date of the contract and the extension cannot be determined from the face of the document and, therefore, the agreement(s) cannot serve as a bar. To serve as a bar, a contract must meet certain requirements relating to its form and substance. **Appalachian Shale Products Co., 121 NLRB 1160 (1958).** One of those requirements is that the duration and expiration dates of an agreement must be apparent, without resort to parol evidence. **Cind-R-Lite, 239 NLRB 1255 (1979).** The three-year contract at issue contains an express effective and expiration date. While the Addendum does not contain an express expiration date, it provides for a duration of two years and contains effective dates for two annual pay increases. Accordingly, this case is on all fours with **Cooper Tire and Rubber Company, 181 NLRB 509 (1970),** where the Board found a similar contract sufficiently clear in regards to the expiration date and term so as to constitute a bar to a petition.

The Petitioner next argues that the agreement between the Intervenor and Employer is in fact a five-year contract and therefore can serve as a bar for only three years. I note, however, that the mere fact that the contract and extension were ultimately incorporated in one booklet does not, standing alone, serve to establish that they should be treated as a single five-year agreement for contract bar purposes. **Union Carbide Corporation, 190 NLRB 191, 192 (1971), Stubnitz Greene Corp., 116 NLRB 965 (1957).**

In further support of its contention that the contract is a five-year agreement, the Petitioner relies on the testimony of two employee witnesses, Linda Swiger and Andre Rudolph. Petitioner argues the only conclusion that can be drawn from their testimony is that both the contract and extension were agreed to and executed prior to December 18, 1996, the effective date of the contract. I conclude, however, that the testimony of these two witnesses does not suffice to establish that both contract and extension were executed prior to December 18, 1996. Rudolph's testimony consisted largely of hearsay regarding what others told him about the status of negotiations during August and September 1996. Swiger testified that both the contract and extension were agreed to and executed shortly after July 8, 1996. She further testified that the contract was basically finalized prior to that date. Swiger's testimony clearly does not correspond with Rudolph's in terms of the time frame involved. It is also expressly contrary to the testimony of John Wettrick and Sal Ferro, negotiators for the Intervenor and Employer respectively. Both negotiators testified that the contract was executed in late November or early December 1996 and that the extension was then negotiated and signed after December 18, 1996. Further, Swiger failed to recall many specifics about the negotiations of 1996, including the fact that she signed an addendum to the **1993-1996** contract on July 1, 1996, the same time period during which she now claims that negotiations for the **1996-1999** contract and extension were

finalized. In sum, the record convinces me that the testimony of Swiger and Rudolph, while perhaps sincere, is too unreliable to establish the Petitioner's argument. Based on the other evidence in the record, I conclude that the addendum was executed after December 18, 1996 and that, therefore, the contract and addendum do not constitute a single five-year contract.

Accordingly, based on the foregoing and the record as a whole, I find that the Intervenor has met its burden of establishing the existence of a contract bar. **Roosevelt Memorial Park, 187 NLRB 517 (1970)**. Since the petition was admittedly not filed during either relevant open period, I shall order that it be dismissed.²

ORDER

IT IS HEREBY ORDERED that the petition filed herein be dismissed.

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. 20570-0001. This request must be received by the Board in Washington by November 15, 2001.

² I must also reject the Petitioner's argument that this petition was timely filed within the holding in **Weather Vane Outwear Corp., 233 NLRB 414 (1977)** and related cases. This line of decisions holds that if an initial petition is timely filed, and a second petition is filed during the pendency of that unresolved QCR, the contract bar rule is inoperative as to the later petition. I have taken administrative notice that the Petitioner herein filed a second petition in 8-RC-16279 on October 16, 2001, which is being held in abeyance pending this decision. However, **Weather Vane** does not support the proposition that a second, potentially timely filed petition, "saves" an otherwise untimely earlier-filed petition.

Dated at Cleveland, Ohio this 1st day of November, 2001.

/s/ Frederick J. Calatrello

Frederick J. Calatrello
Regional Director
National Labor Relations Board
Region 8

347-4010-2084