

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SEVENTH REGION

SEARS, ROEBUCK AND CO.^{1/}

Employer

and

CASE 7-RD-3356

CHAD P. COWDEN, An Individual

Petitioner

and

LOCAL 580, INTERNATIONAL BROTHERHOOD
OF TEAMSTERS, AFL-CIO^{2/}

Union

APPEARANCES:

Richard Pincus, Attorney, of Chicago, Illinois, for the Employer.

Chad P. Cowden, of Lansing, Michigan, for the Petitioner.

Donald Beecham, of Lansing, Michigan, for the Union.

DECISION AND ORDER

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, hereinafter referred to as the Act, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter 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:^{3/}

¹ The Employer's name appears as corrected at the hearing.

² The Union's name appears as corrected at the hearing.

³ The Employer and Union filed briefs that were carefully considered.

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
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.
3. The labor organization involved claims to represent certain employees of the Employer.
4. For the following reasons, 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.

The Petitioner seeks a decertification election in a unit of about 16 product service associates employed at and out of the Employer's Lansing, Michigan, facility. The incumbent Union maintains that the petition is barred by its 2000-2003 collective bargaining agreement with the Employer, while the Employer asserts that the petition is timely for several reasons, primarily because it was filed during the window period of an allegedly revised duration clause of the contract. For the reasons set forth below, I find that the only relevant document for contract-bar purposes is the parties' 2000-2003 agreement and that it bars the instant petition.

The contract relied upon by the Union was executed by both parties in early 2001, is effective by its terms from November 1, 2000 to (or through) October 31, 2003,⁴ and covers a complete set of terms and conditions of employment. The three categories of workers encompassed by the contract are site technicians who repair appliances in customers' homes; inside or "carry-in" technicians who repair smaller appliances brought by customers to the Lansing facility; and sales associates who sell parts and other merchandise at the counter.

Mid-term during the contract, disputes arose over the Employer's efforts to consolidate its carry-in repairs in a distant facility, eliminate the jobs of the Lansing unit's carry-in service technicians, implement a "home dispatch" system for deploying site technicians, and remove the classification of "lead technician." At least one grievance was filed. In autumn 2001, the parties met to resolve these outstanding controversies and the pending grievance. About November 13, 2001,

⁴ The duration clause in the body of the agreement at Article XIII is expressed as "November 1, 2000 *to* October 31, 2003," while the document's title page recites "effective November 1, 2000 *through* October 31, 2003." (emphasis added) No testimony was offered to explain or clarify the disparity. The unresolved ambiguity does not affect the outcome of this proceeding.

they concluded their bargaining by orally resolving the grievance and settling the other issues.

About November 15, 2001, the Employer's senior labor relations manager sent a note by e-mail to the Union's business agent, stating, "I will put the new language in the contract and send you the revision for your signature. I will overnight you a copy on Tuesday 11/20. Please review and sign as soon as you return from Florida." The manager testified that on November 20, 2001, he mailed to the Union three copies of a complete contract that incorporated the bargained-for revisions. There is no documentary evidence of mailing, and Union witnesses testified that no one in the Union ever received the copies. Sometime later, the Employer's manager remarked to the Union's business agent that nothing had yet been signed. The business agent urged the manager not to worry about it. No further steps were taken, nor conversations held, regarding signing. To date, the parties have not signed or initialed any writings reflecting their November 2001 agreement.

The parties concur in almost all of the details of their November 2001 settlement. In exchange for the elimination of carry-in service work at Lansing and the implementation of the home dispatch system, certain technicians are eligible for larger raises in their fifth year of service; a raise scheduled for November 2002 is due earlier in the year; and workers affected by the consolidation may choose a specially bargained severance package. In addition, the parties agreed that the title and duties of lead technician are eliminated, but the incumbent's premium wage remains payable. The Employer has performed its undertakings, and the Union has withdrawn the related grievance from arbitration.

The central dispute about the November 2001 bargaining involves the expiration date of the original 2000-2003 contract. The Employer presented evidence that the parties agreed to advance contract expiration by one year to October 31, 2002. The Union adduced evidence that the parties did not discuss and never agreed to modify the contract's expiration date of October 31, 2003; rather, the Union reserved a right to initiate mid-term bargaining in October 2002 on issues arising under the home dispatch program.

The Employer theorizes that the unsigned November 2001 proposal superseded the parties' original 2000-2003 contract, that the Union had a statutory duty to sign it, and that the proffered but unsigned document is enforceable as if it had been signed. The Employer contends that the window period for the filing of mid-term petitions is properly measured from the alleged October 31, 2002 expiration date of the unsigned document. Accordingly, the Employer concludes, the petition is timely because it is filed within the 60- to 90-day period prior to expiration. Alternatively, the Employer posits, the existence of two agreements

with different termination dates creates an ambiguity that should be remedied by tipping the public policy scale in favor of allowing employees to vote. In a third argument, raised at the hearing but not restated on brief, the Employer asserts that the only agreement now viable between the parties is the one negotiated in November 2001, which cannot bar any petition because it is unsigned.

The foregoing arguments are unavailing for the twin reasons that they misconstrue the function of a representation proceeding and ignore the Board's contract-bar standards.

I cannot adopt the Employer's threshold premise that the parties' bargaining in November 2001 negated the 2000-2003 written and signed agreement. The Employer is correct that parties have duties under the Act to reduce oral agreements to writing and to sign them upon request. Those duties, however, arise under the Act's unfair labor practice provisions of Sections 8(a)(5), 8(b)(3), and 8(d). Representation proceedings are neither intended nor permitted to address unfair labor practice issues or resolve credibility questions that underlie them. *Texas Meat Packers*, 130 NLRB 279 (1961). On this record, I may make no finding as to which side's account of bargaining is more credible, whether the Union had and flouted a duty to sign the allegedly proffered November 2001 agreement, or whether the parties even had a meeting of the minds in November 2001. Those issues may not be decided in this representation proceeding, and have not been raised in any other such as by the filing of an unfair labor practice charge.

As I must decline to resolve the unfair labor practice issues in the manner advanced by the Employer, I am unable to view the 2000-2003 contract as extinguished, or to regard the unsigned November 2001 proposal as its equal for contract-bar purposes. This defeats the heart of the Employer's argument.

The instant case must instead be decided by applying the Board's contract-bar rules. The Board's contract-bar doctrine is intended to balance the statutory policies of stabilizing labor relations and facilitating employees' exercise of free choice in the selection or change of a bargaining representative. *Direct Press Modern Litho*, 328 NLRB 860 (1999). The doctrine is not imposed by the Act or judicial case law, and the Board has considerable discretion to formulate and apply its rules. *Bob's Big Boy Family Restaurants v. NLRB*, 625 F.2d 850, 853-854 (9th Cir. 1980); *Dexter Fastener Technology v. NLRB*, 145 F.3d 1330 (6th Cir. 1998) (unpublished opinion).

The seminal case establishing the Board's substantive and technical contract-bar rules is *Appalachian Shale Products*, 121 NLRB 1160 (1958). In that case, the Board held that only a written contract fully executed prior to the

filing of a petition may serve as a bar. The Board explicitly rejected the argument, echoed here by the Employer, that an unsigned agreement has bar status because the parties consider it properly concluded and have implemented some or all of its provisions. The signed writing setting forth the parties' agreement may be a formally executed booklet or a series of informal written exchanges initialed by the parties to signify mutual acceptance of terms. *Pontiac Ceiling & Partition Co.*, 337 NLRB No. 16 (Dec. 20, 2001); *Yellow Cab Co.*, 131 NLRB 239 (1961). In no case, however, has the Board ascribed bar quality to an unsigned agreement. The Board characterizes the signing requirement as a "relatively simple" one to which it expects parties to adhere. *Appalachian Shale*, supra at 1162.

In urging that the unsigned November 2001 proposal be placed on the same footing for bar purposes as the parties' 2000-2003 signed contract, the Employer relies on *Cabrillo Lanes*, 202 NLRB 921 (1973). In *Cabrillo Lanes*, the question of whether the petition was timely filed turned on whether the contract had automatically renewed. The Board was presented with two executed contracts, identical in all respects except that only one had an automatic renewal clause. Unable to determine which signed contract constituted the parties' agreement, the Board concluded that a potential petitioner would likewise be prevented from computing the proper time to file a petition. Accordingly, the Board ruled that the conflicting contracts did not create a bar.

Unlike the instant case, *Cabrillo Lanes* involved a conflict between two duly executed contracts, a factor that importantly distinguishes it. Its holding has never been extended to permit an unsigned document to trump an executed one. In fact, the Board has squarely declined to adopt the Employer's reasoning. In *DePaul Adult Care Communities*, 325 NLRB 681 (1998), a union asserted that an unsigned contract revision barred a petition, because the writing accurately reflected the parties' agreement and the employer's attorney unaccountably failed to sign it. The Board reiterated the teaching of *Appalachian Shale* that an unsigned contract does not bar a petition even though the parties consider it properly concluded and have effected some or all of its provisions. The Board further explained, "Although...the moment of apparent contract formation serves as a yardstick...in the context of an alleged unfair labor practice...it is of no moment in a contract-bar context, if the collective-bargaining agreement is unsigned. Without...[a] signature on the collective-bargaining agreement, or some document referring thereto, the agreement is insufficient to act as a bar." *Id.* at 682. See also *Seton Medical Center*, 317 NLRB 87 (1995).

For the above reasons, I do not subscribe to the Employer's theories that the unsigned November 2001 proposal supersedes, or is equivalent to, the parties'

2000-2003 signed contract. I find, rather, that the latter is extant.⁵ I further find that it satisfies the Board's formal requirements for serving as a bar to the instant petition, as it is written, was signed by all parties prior to the filing of the petition, contains substantial terms and conditions of employment, and encompasses the employees in the appropriate unit involved in the petition. The expiration date of the agreement is October 31, 2003. This renders the instant petition, filed on August 19, 2002, untimely. *Leonard Wholesale Meats*, 136 NLRB 1000 (1962).

Accordingly, no question concerning representation has been raised, and the petition is dismissed.

ORDER

IT IS HEREBY ORDERED that the petition be, and hereby is, dismissed without prejudice.⁶

Dated at Detroit, Michigan, this 24th day of September, 2002.

(SEAL)

/s/ William C. Schaub, Jr.
William C. Schaub, Jr., Regional Director
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Classifications

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⁵ In this connection, I note that the 2000-2003 agreement contains numerous provisions that the Employer concedes are wholly unaffected by the parties' November 2001 bargaining. The undisturbed topics include recognition, probationary period, union security, wage language, hours, overtime, vacations, holidays, seniority, layoffs, bumping, job postings, grievance procedure, fringe benefits, health and safety, bulletin boards, jury duty, work apparel, wash-up time, licenses and exam fees, personnel files, personal tools, steward duties and rights, management rights, most of the wage appendix, and most service department rules. The proposal allegedly sent to the Union in November 2001 contained language identical to that of the 2000-2003 contract in the areas just enumerated.

⁶ Under the provisions of the Board's Rules and Regulations, a request for review of the Decision may be filed with the National Labor Relations Board, addressed to **Executive Secretary, Franklin Court, 1099 14th Street, N.W., Washington, D.C. 20570**. This request must be received by the Board in Washington by October 8, 2002.