

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 13

FRESH EXPRESS, INC. – ADDISON FACILITY¹

Employer

And

PRODUCTION WORKERS UNION OF CHICAGO & VICINITY, LOCAL 707

Petitioner

And

ALLIED PRODUCTION WORKERS UNION, LOCAL 12, AFL-CIO

Intervenor

Case 13-RC-20998

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, 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 record² 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.

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

3. The labor organization(s) involved claim(s) to represent certain employees of the Employer.⁴

4. A 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.⁵

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:⁶

All full time and regular part time production employees employed by the Employer at its facility currently located at 11010 West Addison, Franklin Park, Illinois, but excluding office and clerical, temporary, seasonal and casual employees, technical and professional employees, sales employees, foremen and other supervisory and managerial employees 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(s) 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 those in the unit(s) 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. Employees engaged in any economic strike,

who have retained their statuses strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike, which commenced less than 12 months before the election date, employees engaged in such strikes who have retained their status, as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Those in the military services of the United States 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 or not they desire to be represented for collective bargaining purposes by PRODUCTION WORKERS UNION OF CHICAGO & VICINITY, LOCAL 707.

LIST OF VOTERS

In order to insure 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); *N.L.R.B. v. Wyman-Gordon Company*, 394 U.S. 759 (1969); *North Macon Health Care Facility*, 315 NLRB 359, fn. 17 (1994). Accordingly, it is hereby directed that within 7 days of the date of this Decision 2 copies of an election eligibility list, containing the full names and addresses of all of the eligible voters, shall be filed by the Employer with the undersigned Regional Director who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in **Suite 800, 200 West Adams Street, Chicago, Illinois 60606** on or before September 4, 2003. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

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, Franklin Court Building, 1099-14th Street, N.W., Washington, D.C. 20570**. This request must be received by the Board in Washington by September 11, 2003.

DATED August 28, 2003 at Chicago, Illinois.

/s/Gail R. Moran
Acting Regional Director, Region 13

- */ The National Labor Relations Board provides the following rule with respect to the posting of election notices:
- (a) Employers shall post copies of the Board's official Notice of Election in conspicuous places at least 3 full working days prior to 12:01 a.m. of the day of the election. In elections involving mail ballots, the election shall be deemed to have commenced the day the ballots are deposited by the Regional Director in the mail. In all cases, the notices shall remain posted until the end of the election.
 - (b) The term "working day" shall mean an entire 24-hour period excluding Saturdays, Sundays, and holidays.
 - (c) A party shall be estopped from objection to nonposting of notices if it is responsible for the nonposting. An employer shall be conclusively deemed to have received copies of the election notice for posting unless it notifies the Regional Director at least 5 working days prior to the commencement of the election that it has not received copies of the election notice.

1/ The names of the parties appear as amended at the hearing.

2/ The arguments advanced by the parties at the hearing and the Intervenor in its brief have been carefully considered.

3/ The Employer is a corporation engaged in processing fresh produce.

4/ Allied Production Workers Union, Local 12, AFL-CIO intervened in this proceeding based upon being the incumbent representative of the employees sought by the Petitioner in its petition and on the basis of its collective bargaining agreement with the Employer covering these employees.

5/ The Petitioner seeks to represent a unit of all full time and regular part time production employees at the Employer's Addison facility. The Intervenor takes the position that it has a collective bargaining agreement with the Employer that acts as a bar to the Petitioner's petition, and the petition should therefore be dismissed. The Petitioner contends that the collective bargaining agreement between the Employer and the Intervenor is not a bar to processing its petition. The Petitioner asserts that under well establish precedent a collective bargaining agreement may only serve as a bar for three years, and its petition was filed after the third year of the collective bargaining agreement between the Employer and the Intervenor. The Employer takes no position as to whether there is a contract bar to processing the instant petition.

Thus, obviously, the issue to be considered herein is whether there is a contract bar to processing the instant petition. The unique factual circumstances herein require consideration of some fine distinctions in the application of the Board's contract bar doctrine.

The Employer and the Intervenor are parties to a collective bargaining agreement, which is, on its face, effective from January 1, 2000 through December 31, 2003 – a four-year agreement. The December 31, 2003 termination date of the agreement between the Employer and the Intervenor is set forth on the cover page, the wage scale appendix to the agreement, and in the termination article of the agreement that appears just before the signature page. On October 1, 2002, the Intervenor, being under the impression that it had negotiated a three-year contract with the Employer, sent a letter to the Employer to open negotiations for a new collective bargaining agreement. The Employer disagreed with the Intervenor's position on the duration of the contract and did not enter into negotiations for a new collective bargaining agreement with the Intervenor. However, the Employer in the fall of 2002 made a decision to shut down the Addison facility, with an anticipated shut down date of March 6, 2003. Thereafter, the Employer and the Intervenor entered into negotiations over the terms of shutting down the Addison facility, and on October 15, 2002, they signed a shutdown agreement covering such things as severance pay for the employees, preferential hiring, waivers and releases. The shutdown agreement provided that it was controlling over the provisions of the January 1, 2000 collective bargaining agreement in the event of any conflicts between the two agreements. The shutdown agreement further provided that the collective bargaining "which may be in effect" between the Employer and the Intervenor shall remain in effect until production is discontinued. The testimony of an agent for the Intervenor at the hearing on the instant petition asserts that this conditional language in the shutdown agreement to describe the January 1, 2000 collective bargaining agreement reflects the

Intervenor's and the Employer's dispute regarding the termination date of the collective bargaining agreement.

On October 4, 2002, the Petitioner, in Case 13-RC-20858, filed a timely petition under the Board's contract bar rules in the 90 to 60 day open period for filing petitions prior to the expiration of the third year of the January 1, 2000 collective bargaining agreement between the Employer and the Intervenor. That petition sought the same unit of employees as sought herein. On November 19, 2002, the Regional Director issued a Decision and Order dismissing the Petitioner's petition in Case 13-RC-20858 based on a record and the parties' stipulation at a hearing that showed the Employer's cessation of its Addison operations was definite and imminent. No exceptions to the Decision and Order.

The Employer, notwithstanding the negotiation of the shutdown agreement with the Intervenor, continued operations at the Addison facility, and continued to apply the terms of the January 1, 2000 collective bargaining agreement to unit employees. The record herein does not indicate what happened to the Employer's plans to cease operations at its Addison facility, or whether it has any plans in the future to discontinue operations at the Addison facility.

Analysis:

As the Employer has continued operations at the Addison facility well after the anticipated shut down that was the basis for the dismissal of the petition in Case 13-RC-20858 and no party to this proceeding has taken a position that cessation of operations at the Employer's Addison operations is definite or imminent, I find that is no longer an issue or bar to processing the instant petition. The only issue involved is whether there is a contract bar to processing the petition.

Under the Board's current contract bar policy, a contract will only serve as a bar to a stranger petition for a period of three years. *General Cable Corp.*, 139 NLRB 1123, 1125 (1962). *Dobbs International Services*, 323 NLRB 1159 (1997). A contract whose duration is longer than three years is treated, for contract bar purposes, as though it was a contract of three years duration. Thus, regardless of a contract's length in excess of three years, a petition may be filed during the 90 to 60 day open period prior to the third anniversary date of the contract, and after the third year anniversary date of the contract if no new agreement is finalized during 60 day insulated period prior to the third year anniversary of the contract; see, *Deluxe Metal Furniture Company*, 121 NLRB 995, 1000 - 1001 (1958) and *General Cable Corp.*, *supra* at 1125.

The Petitioner contends that under the Board's contract bar doctrine, the instant petition was filed after the third year anniversary date of the January 1, 2000 collective bargaining agreement between the Employer and the Intervenor, and is, therefore, not barred by that agreement. However, the Intervenor, relying upon the Board's decision in *Shen Valley Meat Packers*, 261 NLRB 958 (1982), contends that the shutdown agreement it negotiated with the Employer constitutes a premature extension of the January 1, 2000 collective bargaining agreement beyond the three year term allowed under the Board's contract bar policy. Under *Shen Valley Meat Packers* a premature extension of a long term contract is reaffirmation of the contract negotiated before the 60 day insulated period prior to the third anniversary date of the contract which extends the contract beyond the three year period allowed under the Board's contract bar policy. Under the

Board's rationale in *Shen Valley Meat Packers*, a proper reaffirmation of a long-term contract bars petitions filed during the term of the reaffirmed contract beyond the three-year contract period, but would not bar a petition filed during the 90 to 60 day open period prior to the third anniversary date of the long-term contract.

Here the Intervenor asserts that the shutdown agreement constitutes a reaffirmation of the January 1, 2000 collective bargaining agreement, which operates as a bar to the instant petition as it was filed during the term of the reaffirmed contract rather than during open period prior to the third year anniversary of the original contract. The Intervenor further asserts that only the filing date of the instant petition has any bearing on the contract bar issue, and that the filing of the dismissed petition in Case 13-RC-20858, during the open period prior to the third anniversary date of the January 1, 2000 collective bargaining agreement has no relevance to the contract bar issue herein.

Contrary to the Intervenor, it is the opinion of the undersigned that there is no contract bar to the instant petition. I find on three separate basis that the shutdown agreement does not constitute a reaffirmation of the January 1, 2000 collective such that it acts as a bar beyond the third year of the original collective bargaining agreement within the rationale of *Shen Valley Meat Packers*, supra. First, unlike the amendment to the agreement considered by the Board in *Shen Valley Meat Packers*, the shutdown agreement herein does not reaffirm the January 1, 2000 agreement for a duration for a definite term. Rather, the shutdown agreement at best reaffirms the continuance of the January 1, 2000 agreement until the "the discontinuance of the Company's production and related operations and the termination of the bargaining unit employees . . ." Thus, as the termination date can not be determined from the face of the shutdown agreement but rather requires extrinsic evidence to determine, it is an agreement with no fixed term that can not operate as a bar to a third party petition. *Pacific Coast Assn. of Pulp & Paper Mfts.*, 121 NLRB 990 (1958); *Shen Valley Meat Packers* fn. 1 and p.959.

Second, the Board noted in *Shen Valley Meat Packers* that not all amendments to long-term agreements constitute reaffirmations of long-term agreements. In that case the board distinguished two prior amendments to wage rates in the original agreement that were not deemed to reaffirm the original agreement from more extensive amendments to the original agreement pursuant to a broad reopened provision which the Board, *inter alia*, found established the parties intent to reaffirm the long term agreement. *Shen Valley Meat Packers*, supra at 959. I find that the parties' intent in negotiating the shutdown agreement was not to reaffirm the January 1, 2000 agreement within the rationale of *Shen Valley Meat Packers* but, rather, merely intended to provide an orderly shut down of operations and severance benefits for unit employees.

Third, it is the opinion of the undersigned that it would be inequitable to bar the processing of the instant petition based upon the terms of a shutdown agreement whose underlying basis appears to have dissipated. This is especially true in the instant proceeding where that same shutdown agreement was previously a basis for dismissing Petitioner's timely filed petition covering the same unit.

FRESH EXPRESS, INC.
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Based upon the foregoing reasons and the entire record herein, I find there is no contract bar to processing the Petitioner's petition herein.

6/ The parties stipulated that the above-described unit is an appropriate unit. There are approximately 100 employees in the unit.

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CATS issue
Bar to Election-Contract

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