

**BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19**

FRED MEYER, INC.

Employer-Petitioner

and

Case 19--UC--719

UNITED FOOD AND COMMERCIAL WORKERS
LOCAL 367

Union

ORDER DISMISSING PETITION

This case arose when the Employer-Petitioner (hereafter "Employer") filed a unit clarification petition seeking to exclude a group of nutrition employees from coverage under an existing collective bargaining agreement between the Employer and the Union. On October 6, 2003 I issued an Order to Show Cause setting a deadline of October 14, 2003 for the parties to provide evidence and argument showing why this petition should, or should not, be dismissed. In response, both parties submitted position statements and other evidence in support of their respective positions.

Having carefully considered the evidence and argument submitted by the parties, I have determined to dismiss the petition. I find in this case that the dispute between the parties is not a unit placement issue but rather one of contract interpretation better suited to the grievance arbitration procedure of the parties than to the Board's processes. In addition, I find that even if the issue were one of unit placement, the Employer is barred from pursuing it before the Board because of its prior agreement to submit the matter to an arbitrator. The reasons for this determination are set forth in more detail below.

The Union and the Employer are parties to two separate labor agreements potentially at issue in this case. The "Grocery Agreement" covers employees who work in the grocery section of the Employer's stores. The "General Merchandise Agreement" covers non-grocery employees. For many years employees who worked in the nutrition departments have been covered by the General Merchandise Agreement.

In March 2000, the Union filed a grievance under the Grocery Agreement. The grievance claimed that approximately 24 nutrition employees should be classified under the Grocery Agreement rather than the General Merchandise

Agreement. The grievance asserted that this new classification was warranted because of changes to the nature of the work performed by the nutrition employees and because of changes to the location of their work within the store.

The Employer refused to arbitrate the grievance, and the Union filed suit to compel arbitration. At approximately the same time, the Employer filed an unfair labor practice charge (19-CB-8710) protesting the Union's alleged refusal to provide information to the Employer relative to the pending grievance. In March 2002, the parties reached an agreement to settle both the lawsuit and the unfair labor practice charge.

In the portion of the settlement relating to the charge, the Union stated that it had provided all the information it had relative to the nutrition grievance, that it would provide the Employer with any information it acquired in the future, and that if it sought to introduce in arbitration any evidence not provided to the Employer, the Employer would have a right to reinstate the charge.

The portion of the settlement relating to the lawsuit provided that the nutrition grievance would be submitted to arbitration in a bifurcated proceeding. In the first phase, the arbitrator would determine the arbitrability of the grievance. If the arbitrator found the grievance arbitrable, a second proceeding would address the merits.

In July 2003, Arbitrator Burton White issued a decision in which he found the grievance arbitrable. (Copy attached). The arbitration on the merits has not yet taken place.

On September 17, 2003, the Employer filed the instant UC petition. The petition sought clarification of the grocery unit to exclude the nutrition employees.

The Union now seeks to have the petition dismissed based on its claim that the dispute is not a unit placement issue, but rather one of contract interpretation. The Union also asserts that the agreement settling the lawsuit bars the Employer from filing this petition.

The Employer's position is that the status of the nutrition employees is within the Board's exclusive jurisdiction and therefore not appropriate for resolution by an arbitrator. The Employer also claims that the agreement to arbitrate the dispute does not preclude the Board from exercising jurisdiction in this matter.

I am persuaded by the evidence and argument submitted by the parties that the Union is correct in asserting that this dispute is one of contract interpretation suitable for resolution by an arbitrator. The Union's claim is that the nutrition employees at issue have been doing work traditionally assigned to the grocery unit and that they perform their duties in areas of the store where they

work side by side with grocery employees. The Union argues that since the nutrition employees do grocery work and work in areas of the store where grocery work is performed, they should be classified under the Grocery Agreement, not the General Merchandise Agreement. This claim is one that involves contract interpretation – specifically those provisions of the Grocery Agreement relating to the work to be performed by members of the bargaining unit.

Citing *Williams Transportation Company*, 233 NLRB 837 (1977) and *Ziegler Inc.*, 333 NLRB 949 (2001), the Employer argues that the dispute raises representation case issues that are within the exclusive jurisdiction of the Board. I find that both cited cases are distinguishable because they involve cases where a union sought to use arbitration to bring unrepresented employees within an existing bargaining unit. Here, by contrast, the issue is not whether an unrepresented employee may be brought within an existing bargaining unit by means of arbitration; rather, the issue is whether the jobs of particular employees should be classified as being within one unit or another unit, both of which are represented by the same union. This issue is one of contract interpretation which an arbitrator selected by the parties is uniquely qualified to decide.

I also find that even if the matter does raise representation case issues, the Employer is nevertheless barred from pursuing it before the Board because of its prior agreement to arbitrate the dispute. In *Verizon Information Systems*, 335 NLRB 558 (2001), the Board held that where a union made an agreement to arbitrate a dispute over the scope of a bargaining unit and later received benefits under that agreement, it could not thereafter repudiate the agreement and avail itself of the Board's procedures. In this case, it is undisputed that after the Union sued to compel arbitration, the Employer agreed to settle the lawsuit with an agreement that the issue would be submitted to an arbitrator. The Union's agreement to settle the suit was a benefit to the Employer. In its September 17 position statement accompanying the petition, however, the Employer has asked the Region to stay the arbitration proceedings and proceed with a hearing on the petition. This request, if granted, would be a repudiation of the arbitration agreement, and appears to be expressly prohibited by *Verizon*.

In its October 8 position statement, the Employer argues that it must be permitted a hearing on the petition because the arbitration agreement did not contain any waiver of its statutory right to have the Board process this petition. I reject this argument. When the parties agreed to permit the matter to be arbitrated according to the procedures of the collective bargaining agreement, they agreed that they would be bound by the provisions of the agreement that state that awards of arbitrators are "final and binding on all parties." An agreement that an arbitrator may make a final and binding award is a clear and unambiguous waiver of a right to have the case decided in another forum.¹ In

¹ The Employer also argues that it did not agree that the arbitrator's award would be final and binding. I am not persuaded by this argument. Although the settlement does not contain any express "final and binding"

Verizon itself, the agreement at issue did not contain an explicit waiver of the right to file a petition with the Board. Despite the absence of a waiver, the Board declined to process the petition. I make the same decision here.²

Further citing *Tweddle Litho*, 337 NLRB No. 102 (2002), the Employer argues that the Region should not defer the "unit determination issues" to arbitration. The present case, however, is clearly distinguishable from *Tweddle*. In *Tweddle*, the union attempted to use the contractual grievance procedure to bring a group of unrepresented employees into the unit. The Board refused to defer to arbitration, holding that the dispute raised representation issues that were within the Board's exclusive jurisdiction. In this case, unlike *Tweddle*, the Employer explicitly agreed when it settled the lawsuit to resolve in arbitration the exact issue of whether the nutrition employees are covered by the Grocery Agreement. This is a more specific agreement than the general agreement in *Tweddle* to process unspecified grievances through the grievance arbitration procedure. Thus, it is clear that the agreement to arbitrate here was an agreement to use arbitration to determine which of two contracts properly covered the nutrition employees. Having made this agreement, the Employer is bound to it.

The Employer also argues that the agreement to arbitrate may subsequently be voided because it was procured by fraudulent inducement. According to the Employer, it entered into the agreement to settle the unfair labor practice charge and the lawsuit based on the Union's representation that it had disclosed to the Employer all evidence in support of the nutrition grievance. The Employer now claims that it has recently discovered evidence that the Union violated that agreement by failing to disclose material evidence. This, according to the Employer, would void its agreement to arbitrate.

The portion of the agreement relating to settlement of the charge provides that if the Union introduces into arbitration evidence that has not been previously disclosed to the Employer, the Employer has the option of reinstating the unfair labor practice charge. There is nothing in this agreement that provides for any further remedy for breach of the promise to provide information. There is likewise nothing in the settlement of the charge that states or implies that a breach would have any effect on the agreement to arbitrate the nutrition grievance.

Further, I note that the Employer has not yet established that the agreement to arbitrate was procured by fraud. If at some future date the

language, the grievance was to be arbitrated under the provisions of a collective bargaining agreement that provided that all such awards would be, "final and binding on the parties." Thus it appears that such contractual provision would control.

² The Employer states that it had an oral understanding that it could appeal an adverse arbitration decision. Without reaching the question of whether such an agreement did or did not exist, I will simply note that my decision here leaves those rights, if any, unaffected.

Employer succeeds in persuading a third party of that fact, it may request reconsideration of this decision.

Based on the above, the petition is dismissed.³

DATED at Seattle, Washington, this 22nd day of October, 2003

Richard L. Ahearn, Regional Director
National Labor Relations Board, Region 19
2948 Jackson Federal Building
915 Second Avenue
Seattle WA 98174

³ Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Order 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 the Board by November 5, 2003.