

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

S & S MEAT COMPANY, INC.

Employer/Petitioner

and

Case 17-RM-846

U.F.C.W. DISTRICT UNION LOCAL 2

Union

DECISION AND ORDER

S & S Meat Company, Inc., the Employer, has petitioned for an election to determine whether a majority of the current unit employees desire continued representation by U.F.C.W. District Union Local 2, the Union. The Union contends that further processing of the petition is barred by the existence of a contract with the Employer. The Employer counters that there is no contract bar, because the last contract was terminated or was reopened for negotiations by the Union, and no subsequent contract was executed. The Employer further contends that even if the Union's efforts to negotiate a new contract did not constitute a termination or reopening of the last executed contract, language in that contract permits it to be terminated at will, which the Employer ultimately did. Moreover, the Employer asserts that the number of employees in the unit has increased significantly since the execution of the last contract, and that the contract therefore cannot bar the instant petition. Finally, the Employer asserts that the Union's alleged failure to administer the contract precludes a contract bar to this petition.

Based upon a thorough review of the record, the controlling legal authorities, and the parties' arguments, I conclude that the Employer and the Union have an existing contract that bars the processing of this petition, and that bar is not superseded by changes in the size of the unit, or a failure on the part of the Union to administer the contract. Accordingly, based on the rationale set forth below, the petition is dismissed.

Under Section 3(b) of the Act, I have the authority to hear and decide this matter on behalf of the National Labor Relations Board. Exercising that authority and based upon the entire record in this proceeding, I find as follows:

1. Rulings made by the hearing officer during the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is a Missouri corporation engaged in the processing and distribution of meat products from its facility located at 637 Prospect, Kansas City, Missouri, the only facility involved here. During the past year, a representative period, the Employer in the course and conduct of its business operations purchased and received goods and services valued in excess of \$50,000 directly from sources located outside the State of Missouri. Accordingly, the Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction.
3. The Union is a labor organization within the meaning of Section 2(5) of the Act.
4. The parties stipulated, and I agree, that the following unit is appropriate for collective bargaining: All full-time and regular part-time meat cutters, apprentices, skilled, semi-skilled, and unskilled meat workers employed by the Employer at its facility located at 637 Prospect, Kansas City, Missouri, but excluding all relations of

management, all office clerical employees, professional employees, guards and supervisors as defined in the Act.

Bargaining History and the Contract

For approximately 40 years, the Employer and the Union have maintained a collective-bargaining relationship. During that period, the parties have executed many successive collective-bargaining agreements, the last five or six having been negotiated on the Union's behalf by Cindi Nance, the Union's Business Representative and Director of Collective Bargaining. In January 1997, the parties signed a comprehensive collective-bargaining agreement that contained the following language:

Article XVIII – Period of Agreement

This Agreement shall become effective January 1, 1997 and shall remain in full force and effect through January 1, 1998, and shall continue in full force and effect from year to year thereafter until sixty (60) days notice is served.

Negotiations for any changes in this contract may only be made by notice in writing to either party sixty (60) days prior to January 1, 1998, or any termination date thereafter, if extended.

By letter dated October 20, 1997, received by the Employer on October 21, 1997, the Union gave formal notification of its "...desires to open the contract covering your employees for the purpose of contract negotiations." The Union simultaneously sent notice to FMCS that the contract had been opened for negotiations. Pursuant to that request to reopen the contract, the parties negotiated a Memorandum of Agreement that expressly incorporated "All of the terms and conditions of the Agreement dated January 1, 1997 through January 1, 1998 with the following changes..." The changes effected by the Memorandum of Agreement included a new minimum wage scale to be effective July

1, 1999; a new monthly contribution rate to be paid to the Health and Welfare plan, with a stipulation that if contribution rates were increased by the plan's trustees, the Employer would increase its contributions accordingly, but not above 10%; and the effective dates for the agreement. More specifically, Article XVIII - Period of Agreement provided as follows:

Article XVIII – Period of Agreement

This Agreement shall become effective January 1, 1998 and shall remain in full force and effect through January 1, 2000, and shall continue in full force and effect from year to year thereafter until sixty (60) days notice is served.

This “Period of Agreement” clause did not include the language found in the corresponding provision of the predecessor agreement, quoted above, that required a party to give written notice to negotiate changes to the contract 60 days prior to the expiration date.

The foregoing Memorandum of Agreement is the last executed collective-bargaining agreement between the parties. Thus, at no time prior to the filing of this petition had either the Employer or the Union given written notice that expressly terminated or reopened for negotiations the 1998-2000 Memorandum of Agreement.¹ Nevertheless, the question remains whether certain events and communications that took place between December 2000 and December 2001 served as a de facto termination or reopening of the Memorandum of Agreement which effectively foreclosed the Union from invoking it as a contract bar.

¹ In its post-hearing brief the Employer argues that because the Union never expressly asked Cindi Nance during her testimony whether she had sent a document that terminated the contract, an adverse inference must be drawn that such a document was sent. The record discloses that Nance testified as follows:

Q: Okay, so prior to the expiration date, had either party terminated this agreement or re-opened negotiations?

A: No.

The Employer's witness, John Scavuzzo, did not state during his testimony that such a written notification was ever received. Accordingly, no adverse inference is warranted.

In late 2000, day-to-day management of the Employer was shifted from Molly Scavuzzo to her son, John Scavuzzo. In connection with that change, Cindi Nance, the Union's agent, telephoned John Scavuzzo to reestablish personal contact with him as the principal representative for the Employer, and to check on his assessment of the financial status of the business. This telephone call was made, at the earliest, in December 2000. At the time of Nance's telephone call, the Union was well aware that the Employer had experienced financial problems during about the preceding 2 years. During this telephone conversation, Nance noted that the employees had not had a wage increase since July 1, 1999, as provided for in the Memorandum of Agreement, and expressed the Union's interest in obtaining a wage increase based on the employees' belief that the Employer was profitable. John Scavuzzo informed Nance that the Employer was still having financial difficulties, and it could not afford any cost increase. John Scavuzzo suggested that the parties allow the 1998-2000 Memorandum of Agreement to roll over. Nance replied that in order for the Union to convince its members that the Union should not seek a wage increase, the Employer would need to provide financial information supporting its plea of poverty. Nance confirmed the conversation in a letter to John Scavuzzo dated January 21, 2001.

This conversation between Nance and John Scavuzzo and the confirming letter of January 21, 2001 set in motion a nearly year-long series of events and communications between the parties related to the Employer's profitability. In February 2001, the Employer's attorney James Baker wrote to Nance, stating that he would assist the Employer in "negotiations" with the Union. On March 26, 2001, Attorney Baker sent to Nance the Employer's financial statements through December 31, 2000, which reportedly

reflected the Employer's "continuing and substantial losses." Attorney Baker wrote that the company did not believe that a wage increase was appropriate, and that the appropriate step was to renew the contract through January 1, 2002. In response to the March 26, 2001 letter, Nance wrote to Attorney Baker on March 30, 2001, requesting a formal independent audit of the Employer's financial records, explaining that such an audit was necessary to fully substantiate the Employer's financial status, and to enable the Union to fully represent its members in the negotiation process.

The parties thereafter agreed that an independent accountant would conduct a financial audit. The audit was conducted in September or October 2001 and the final report was issued on November 15, 2001. In a post-audit telephone conversation, Nance acknowledged to John Scavuzzo that the Union was now satisfied that the Employer could not afford a wage increase because of its financial condition. John Scavuzzo stated that he wanted to keep the 1998-2000 Memorandum of Agreement in effect, and confirmed that pursuant to the express terms of that agreement he would continue to make the Health and Welfare contributions at the new rate set by the fund's trustees. Nance told Scavuzzo that while the Union was willing to forego negotiations for a wage increase, it wanted the opportunity to revisit the Employer's financial status in the not too distant future.

Nance followed up the telephone discussion with a confirming letter to John Scavuzzo dated December 20, 2001. In addition to reiterating the results of the audit, and the Employer's acknowledgement that it would continue the Health and Welfare contributions at the newly set rate, Nance stated that the unit employees were agreeable to a status quo arrangement until July 1, 2002. In conformance with the stated wishes of

the employees, Nance enclosed with her letter a proposed agreement that restated the same provisions as those contained in the 1998-2000 Memorandum of Agreement, and updated the Health and Welfare provision to reflect the higher contribution rates set by the trustees. The only change sought by this proposed contract was to limit its effective period to 6 months, from January 1, 2002 through July 1, 2002. Nance signed the proposed contract.

Upon receipt of the December 20, 2001 letter and the accompanying proposed contract, John Scavuzzo called Nance and informed her that he was not interested in signing anything new, but simply wanted to keep the status quo in place. The Employer never signed the proposed agreement, and the Union never pressed for its execution. The parties continued to comply with the terms of the 1998-2000 Memorandum of Agreement up to the time of the hearing. The parties' bargaining relationship continued without incident after December 20, 2001, until the Employer's attorney sent a letter to the Union dated April 26, 2004 stating as follows: "Pursuant to Article XVIII – Period of Agreement of the Memorandum of Agreement between S & S Meat Company, Inc. and U.F.C.W. Local Two, S & S Meat Company, Inc. hereby terminates its collective-bargaining agreement with Local Two."

1998-2000 Memorandum of Agreement Is a Bar to the Petition

To constitute a bar to a petition, a collective-bargaining agreement must contain substantial terms and conditions of employment sufficient to stabilize the parties' relationship, and it must be signed by the parties prior to the filing of any petition.

Appalachian Shale Products Co., 121 NLRB 1160 (1958). The 1998-2000 Memorandum

of Agreement is the last agreement signed by both parties and, because it governs substantial terms and conditions of employment, it is an adequate agreement to constitute a bar. Where a contract contains an automatic renewal clause, as does the 1998-2000 Memorandum of Agreement, the Board strictly construes those contract provisions that are intended to forestall automatic renewal clauses, requiring that the notice must be received by the other party within the required time period. An untimely notice to terminate or reopen a contract will not forestall its automatic renewal, absent compelling mitigating circumstances. *Koenig Brothers, Inc.*, 108 NLRB 304 (1954); *Deluxe Metal Furniture Co.*, 121 NLRB 995 (1958). Here, there is no evidence that either party, in writing or orally, expressly moved to open the 1998-2000 Memorandum of Agreement 60 days prior to its next termination date. The Employer's letter of April 26, 2004 was drafted and served on the Union after the current petition was filed on April 22, 2004.

Even assuming, as the Employer postulates, that Nance's December 2000 oral inquiry about the Employer's financial status was sufficient notice to terminate or reopen the contract, it would have been untimely under the automatic renewal provision of the 1998-2000 Memorandum of Agreement, because the operative date for such notice would have been no later than November 1, 2000. There is no record evidence that suggests that the Union broached the subject of changes to the contract as early as November 1, 2000. Under Board precedent, such an untimely notice to terminate or modify a contract will be treated merely as a request for a mid-term modification of the contract by mutual assent, unless the parties thereafter clearly terminate the contract. *Motion Picture Machine Operators' Protective Union Local 224*, 238 NLRB 507 (1978); *Deluxe Metal Furniture Co.*, id, 1002.

However, the Board has found that in certain circumstances the parties' conduct may constitute a waiver of an otherwise untimely notice to terminate or reopen the contract, and thus preclude the assertion of the old contract as a bar to a petition. See *Union Steam Pump Co.*, 118 NLRB 689 (1957); *Anchorage Laundry & Dry Cleaning*, 216 NLRB 114 (1975); *Industrial Workers AIW Local 770 (Hutco Equipment)*, 285 NLRB 651 (1987). Cf. *Moving Picture Machine Operators' Protective Union Local 224*, supra; *Champaign County Contractors Association*, 210 NLRB 467 (1974). The foregoing cases illustrate that in order for the Board to find a waiver of an untimely notice, and thus preclude a contract bar, the parties must, by word or deed, have agreed to engage in bargaining although the notice was untimely; the parties must have acted in all respects as if the contract was opened; and the parties must have engaged in substantive bargaining.

In the circumstances here, it would be unreasonable to construe the conduct of the parties in December 2000 and thereafter as sufficient to constitute a waiver of an untimely notice to terminate the contract. Thus, there were never any substantive contract proposals exchanged, nor were face-to-face meetings conducted. While the Union was obviously interested in securing a wage increase for the unit employees, seeking such an increase was wholly conditioned on the Employer's financial status. The Union's conduct between December 2000, when it initially inquired about the status of the Employer's financial condition, and its letter of December 20, 2001, when it agreed to leave in place the terms and conditions of employment set forth in the 1998-2000 Memorandum of Agreement but sought a shortened term, was a preliminary move, premised on the independent audit to verify claims by the Employer of financial inability

to offer any more money to unit employees. The results of the audit convinced the Union that opening negotiations would not be fruitful.

In reaching the conclusion that there was no waiver in this case, I am guided by the decisions in *Champaign County* and *Moving Picture Machine Operators*, supra. In *Champaign County*, a union agent's contact with the employer was characterized as follows:

“. . . clearly preliminary in nature, designed to set the stage for actual bargaining. The fact that their conversations indicated two areas of probable negotiation shows no more than initial sparring. . . . Shapland in talking with Ducey was only engaging in exploratory probing for a way around an apparent technical obstacle. In my view none of this was true bargaining. It was all too tentative and preliminary in nature. The record is clear that at no time did Respondent retreat from or specifically waive its technical position that the contract would continue in effect absent proper notice of termination.”

In *Moving Picture Machine Operators*, the Board found that there was no waiver of the employer's untimely notice to reopen the contract, even though the union agreed to meet with the employer to discuss its poor financial condition and possible wage adjustments. The Board noted that the union's conduct was not inconsistent with its view that the contract had automatically renewed. In accordance with *Deluxe*, the Board treated the employer's untimely notice as a request for mid-term modification of the collective-bargaining agreement that had automatically renewed.

Significant too is the fact that the Employer never treated the 1998-2000 Memorandum of Agreement as having been opened for negotiations. In the March 26, 2001 letter from Attorney Baker, the Employer's position was that the parties should simply continue to abide by the Memorandum of Agreement. Similarly, when the Union sent the Employer the contract for signature in December 2001, John Scavuzzo informed

the Union that the Employer was not interested in signing anything new, and simply wanted the Memorandum of Agreement to continue in effect. The Union accepted that position without protest. Further indication that the Employer considered the Memorandum of Agreement to still be in effect is found in the petition itself. In Section 9 of the petition, which asks for the “Expiration Date of the Current Contract,” the Employer wrote, “June 22, 2004 – see attached” and attached a portion of the 1998-2000 Memorandum of Agreement as evidence of the current contract.

The fact that the Union sent a document entitled “Agreement” to the Employer in December 2001, following the nearly year-long investigation into the Employer’s financial status, does not establish that the parties engaged in negotiations following the termination of the 1998-2000 Memorandum of Agreement. In analyzing what that proposed Agreement was, it must be noted that it was first and foremost a restatement of the terms and conditions of the Memorandum of Agreement, in that it made no changes to the terms and conditions of employment under which the unit employees were then working. The only “change” sought by the Union in its December 20, 2001 proposal was to modify the term of the rollover agreement such that it expired on July 1, 2002, rather than January 1, 2003. The proposed modification to shorten the term of the renewed Memorandum of Agreement was consistent with the Union’s position throughout the preceding 12 months of discussions, during which it maintained that, while it would accede to the Employer’s claim of poverty, it wanted the opportunity to revisit the issue of wage increases for its unit earlier rather than later. As such, the proposed Agreement was nothing more than a proposed mid-term modification to which the Employer did not assent. Consequently, it cannot serve as evidence that the 1998-2000 Memorandum of

Agreement was terminated. See *Movie Picture Machine Operators' Protective Union Local 224*, supra.

The Employer's alternate argument is that its letter of April 26, 2004, which was submitted to the Union approximately 4 days after the instant petition was filed, served to terminate the Memorandum of Agreement effective 60 days thereafter, thus ending the contract on "June 24, 2004," which is the date entered in Section 9 of the petition form. That argument is not persuasive. The language in the Memorandum of Agreement covering the Period of Agreement provides that "[t]his Agreement shall become effective January 1, 1998 and shall remain in full force and effect through January 1, 2000, and shall continue in full force and effect from year to year thereafter until sixty (60) days notice is served." (emphasis added). The language of that provision expressly provides that the parties intended for the agreement to be in effect through January 1 of each successive year. It would be a strained interpretation to read that provision as implying that the contract was terminable at will, as urged by the Employer. Such an interpretation would require the Board to ignore the unambiguous language of the contract that mandates that it *shall be in full force and effect from year to year*, and would ignore the parties' history, during which they have treated that language as meaning that their contracts are in effect through January 1 of each successive year.

Thus, the Employer's April 26, 2004 letter did not terminate the contract 60 days hence, but was merely the 60 day notice required to terminate the contract as of January 1, 2005.

The Union Has Not Abandoned Administration of the Contract

The Employer presented evidence at the hearing that in June 2002 it increased the wages of the unit employees without prior negotiations with the Union. The Employer also presented evidence that it twice changed the Health and Welfare contributions after the 1998-2000 Memorandum of Agreement was signed. Further, the Employer represented that it was deducting Union dues from the checks only of those employees who had requested it. According to the Employer, the Union has not grieved these actions, and the failure to do so supports the proposition that the Union was not administering the contract. The Employer further asserts that under the principles of *Tri-State Transportation Company*, 179 NLRB 310 (1969), a stabilizing labor agreement does not exist, which can bar the instant petition.

The Employer's position is untenable both from a factual and a legal standpoint. Factually, the 1998-2000 Memorandum of Agreement sets forth only a minimum wage scale and does not preclude the Employer from paying more than the minimum amount. Thus, there is no contractual prohibition against increasing wages, and the absence of a Union protest is meaningless. Similarly, the 1998-2000 Memorandum of Agreement provides that the Employer will pay the Health and Welfare contributions periodically set by the fund's trustees. While the Memorandum of Agreement does provide that the Employer is only required to increase the rate of its contribution by no more than 10% of the previous rate, its decision to increase the contributions by more than the 10% limit, without the Union grieving the action, does not imply that the Union is not administering the contract. As for the dues deduction issue, the Employer is obligated by law to deduct

Union dues only from those employees who have given express authorization for those deductions.

The *Tri-State Transportation* case relied on by the Employer is inapposite to this case. In *Tri-State Transportation* the Board found that a local union was not administering its contract when its unit employees received *none* of the benefits set forth in the contract. The Board noted that the employer made no contributions to the health and welfare fund under the contract, but instead included the unit employees in its health plan for its unrepresented employees; failed to grant the contractually required vacations and holidays; and did not enforce the union security provision. The complete abandonment of the contract in *Tri-County* is a far different situation from the one that exists here.

The General Extrusion Doctrine Does Not Apply

In *General Extrusion Co., Inc.*, 121 NLRB 165 (1958), the Board ruled that a contract does not bar an election, irrespective of its term, if it was executed before any employees were hired or prior to a substantial increase in unit personnel. When there has been an increase in unit personnel subsequent to the execution of a collective-bargaining agreement, the Board held that the contract will serve as a bar only if at least 30% of the unit complement employed at the time of the hearing on a petition had been employed at the time the contract was executed, and 50% of the job classifications in existence at the time of the hearing were also in existence at the time the contract was signed. See also, *United Service Co., d/b/a A-1 Linen Service*, 227 NLRB 1469 (1977).

The Employer urged that the *General Extrusion* doctrine should be followed here to preclude a contract bar, because of its recent increase in unit employees. The

evidence, however, failed to lend any support to the Employer's position. Thus, the record shows that there were 11 unit employees in December 1997-January 1998, when the controlling Memorandum of Agreement was signed. By March 2004, the unit complement had decreased to only two employees. Between March 9, 2004 and April 21, 2004, five new employees were added to the unit. Because there were 11 employees working in the unit in January 1998, when the last executed contract became effective, and 7 in the unit at the time of the hearing in May 2004, the *General Exclusion* doctrine is not applicable in this situation. Accordingly, the 1998-2000 Memorandum of Agreement serves to bar the Employer's petition.

ORDER

IT IS ORDERED that the petition filed herein be, and it hereby is, 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 and Order may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. The request must be received by the Board in Washington by June 22, 2004.

Dated: June 8, 2004

/s/ Daniel L. Hubbel

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