

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2**

**CRYSTAL TRANSPORTATION CORP.
EMPLOYER**

and

CASE NO: 2-RC-22803

**LOCAL 553, IBT
PETITIONER**

DECISION AND DIRECTION OF ELECTION

Upon a petition¹ 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.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, the Board has delegated its authority in this proceeding to the Regional Director, Region 2.

Upon the entire record in this proceeding, it is found that:

1. The Hearing Officer's rulings are free from prejudicial error and hereby are affirmed.
2. I find that Crystal Transportation Corporation, herein the Employer, is a New York corporation with its principal place of business located at 2010 White Plains Road, Bronx, New York, and is engaged in the business of

¹ Briefs filed by the Employer and the Petitioner have been carefully considered.

transporting fuel oil between fuel oil distributors and their customers. Annually, in the course and conduct of its operations, the Employer purchases and receives goods valued in excess of \$50,000 from other enterprises, including Schildwachter and Gabrelli Mack, located within the State of New York, each of which other enterprises had received those goods from points outside the State of New York.

Accordingly, I find that 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 parties stipulated and I find that Local 553, International Brotherhood of Teamsters, AFL-CIO), the Petitioner, is a labor organization within the meaning of Section 2(5) of the Act.

4. The Petition, as amended, seeks an election in a unit of all full-time and regular part-time drivers and dispatchers employed by the employer at its facilities located at 2010 White Plains Road, Bronx, New York, excluding all other employees, including office clerical employees and guards, professional employees and supervisors, as defined by the Act. The Employer does not contest the appropriateness of such a unit. However, it seeks the dismissal of the petition because of the existence of a current collective-bargaining agreement ("Agreement") between itself and Local 124, R.A.I.S.E., International Union of Journeymen and Allied Trades, AFL-CIO, CLC("Local 124").

After considering the evidence and the arguments presented by the parties, I find that the petition is not barred by the above-described contract. To

provide a context for my discussion, I will provide an overview of the Agreement, followed by my analysis.

I. Background

a. Contract at Issue

The Employer and Local 124 executed a formal collective-bargaining agreement on January 29, 2004. Gil Rella, President and sole shareholder of the Employer, testified that a card check was conducted to confirm that Local 124 had majority employee support prior to executing the above-mentioned agreement. On January 28, 2004, there was a handwritten agreement signed by the Employer and Local 124, which terms were incorporated into the formal Agreement executed the following day. The Agreement by its terms is effective from January 29, 2004 until January 28, 2007. Thereafter, the collective-bargaining agreement by its terms automatically renews for annual terms, absent notice by either party to terminate or modify the agreement at least sixty days prior to the expiration date.

The Agreement recognizes Local 124 as the “sole and exclusive collective bargaining agency for all of its employees, with respect to wages, hours and conditions of employment, excluding executives, supervisors and guards as defined in the Labor Management Relations Act, as amended, and agrees to deal collectively only with this Union for and on behalf of such employees.” Among other things, the Agreement contains a dues check-off provision, determines the length of the workweek, holidays, vacation days and sick days, provides for scheduled wage increases, establishes a grievance arbitration procedure, and provides for employee benefits.

b. The Petition and the Disclaimer

Following the filing of the petition on January 30, 2004, by Local 553, an AFL-CIO affiliated labor organization, Local 124, also an AFL-CIO labor organization, sent a letter to the Region disclaiming interest in representing the employees of the Employer.² The Employer claims to have had no direct communication from Local 124 regarding its disclaimed interest prior to the hearing. Local 124 did not intervene at the Board hearing.

II. Analysis

The major objective of the Board's contract bar doctrine is to achieve a balance between the conflicting statutory aims of stability in labor relations and the exercise of worker free choice in selecting a bargaining representative. *Appalachian Shale Products Co.*, 121 NLRB 1160, 1161 (1958) In order for a contract to serve as a bar to an election, Board doctrine requires that the agreement (1) be in writing; (2) be signed by the parties prior to the filing of the petition that it would bar; and (3) contain substantial terms and conditions of employment. *Seton Medical Center*, 317 NLRB 87 (1995); *Appalachian Shale Products Inc.*, supra. The burden of proving that a contract is a bar is on the party asserting the doctrine. *Roosevelt Memorial Park*, 187 NLRB 517 (1970).

A contract will cease to serve as a bar if the incumbent union makes a clear and unequivocal disclaimer of interest in representing the petitioned-for employees. *American Sunroof Corp.*, 243 NLRB 1128(1979). In *VFL Technology Corp.*, 332 NLRB 1443 (2000), the Board found a clear and unequivocal disclaimer of interest by a

² Judicial Notice is taken that an Article XX charge may occur where there is a representational (raiding) dispute among affiliates of the AFL-CIO. The procedures associated with this charge are internal to the AFL-CIO, however, there was no evidence presented that the parties involved herein

union after it lost an Article XX proceeding. The Board stated that a union's disclaimer would be effective absent collusion between the parties to avoid the terms of a collective-bargaining agreement. *Id.* See *NLRB v. Circle A & W Products Co.*, 647 F.2d 924 (9th Cir. 1981).

In the instant case, I find Local 124's disclaimer of interest is effective. Unlike *VFL Technology Corp.*, *supra*, there was no evidence that that the Petitioner and Local 124 were parties to an Article XX proceeding. There is also no evidence that Local 124's disclaimer was the result of collusion or any other improper motive.³

It is possible for a union's contemporaneous and subsequent conduct to make an otherwise effective disclaimer insufficient. See *Miratti's Inc.*, 132 NLRB 699(1961). Thus, a disclaimer is ineffective if the union engages in conduct inconsistent with an alleged disclaimer. *McClintock Market*, 244 NLRB 555(1979). In the instant case, the Employer proffered no testimony or evidence to establish an ineffective waiver. Therefore, there is no evidence that Local 124 continues to represent the Employer's employees by processing grievances or otherwise by

were parties to an Article XX.

³ In *Garden Manor Farms Inc.*, 341 NLRB No. 24, 174 LRRM113 (2004), in which the Board granted the Petitioner's request to withdraw the petition, Board Member Schaumber dissented and stated that in his view *VFL Technology Corp.*, *supra*, should be overruled and the Board's prior holding set forth in *Mack Trucks, Inc.*, 209 NLRB 1003(1974), where the Board denied effect to all disclaimers pursuant to "no-raiding" agreements, should be reinstated as the controlling case law regarding disclaimers. In this case, there is no evidence that any Article XX procedure was instituted. Additionally, the policy considerations set forth by Board Member Schaumber in *Garden Manor*, *supra*, are not present herein. Specifically, in the instant case employees signed authorization cards for both Local 124 and the Petitioner during the same time period. Thereafter, recognition was granted to Local 124 by the Employer after a card check. Within days of the card-check, a collective-bargaining agreement was entered into between Local 124 and the Employer. Given that the employees signed cards for both Local 124 and the Petitioner in and around the same time period, that recognition was granted based upon a card count, and that the terms for a collective-bargaining agreement were agreed upon within days of the card check and were never implemented, some of the concerns expressed by Board Member Schaumber in *Garden Manor*, regarding the employees' freedom of choice and the investment of time and money in the collective-bargaining

enforcing the agreement. Indeed, at no time did the Employer apply the terms of the agreement to its employees. For the foregoing reasons, I find that the disclaimer of interest by Local 124 removes the agreement as a bar to processing the instant petition. Therefore, a question concerning representation exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c) and Section 2(6) and (7) of the Act.

I therefore find the petitioned-for unit, as amended to be appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

Included: All full-time and regular part-time drivers and all full-time and regular part-time dispatchers employed by the Employer at its facilities located at 2010 White Plains Road, Bronx, New York.

Excluded: All other employees, including office clerical employees and guards, professional employees and supervisors as defined in the Act.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the Regional Director, Region 2, among the employees in the unit found appropriate at the time⁴ and place

process are not present herein. *Garden Manor Farms Inc.*, supra.

⁴ Pursuant to Section 101.21 (d) of the Board's Statements of Procedure, absent a waiver, an election will normally be scheduled for a date or dates between the 25th and 30th day after the date of this decision.

set forth in the notice of election⁵ to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit were employed during the payroll period ending immediately preceding the date of the Decision, including employees who did not work during that period because they were ill, on vacation or temporarily laid off and those in the unit who have been employed for 30 working days or more within the 12 months preceding the eligibility date for the election, or had some employment during those 12 months and have been employed for 45 working days or more within the 24-month period immediately preceding the eligibility date. Employees engaged in any economic strike, who have retained their status as 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 strike 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 who are in the unit 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

⁵ The Board has adopted a rule requiring that election notices be posted by an employer "at least 3 full working days prior to 12:01 a.m. of the day of the election." Section 103.20(a) of the Board's Rules. In addition, the Board has held that Section 103.20 (c) of the Board's Rules requires that an employer notify the Regional Office at least five full working days prior to 12:01 a.m. of the day of the election, if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB No. 52 (1995).

and who have been permanently replaced.⁶ Those eligible shall vote whether they desire to be represented for collective bargaining purposes by Local 553, IBT.⁷

Dated at New York, New York,
March 15, 2004

Celeste J. Mattina

Regional Director, Region 2
National Labor Relations Board
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New York, New York 10278

⁶ In order to assure 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 that may be used to communicate with them. *North Macon Health Care Facility*, 315 NLRB 359 (1994); *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within seven days of the date of this Decision, three copies of an election eligibility list, containing the full names and addresses of all eligible voters, shall be filed by the Employer with the Regional Director, Region 2, who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the Regional Office at the address below, on or before **March 22, 2004**. No extension of time to file this list may be granted, nor shall the filing of a request for review operate to stay the filing of such list, except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

⁷ 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, NW, Washington, D.C. 20570-0001. This request must be received by the Board in Washington by no later than **March 29, 2004**.