

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

Milwaukee, Wisconsin

WINGRA REDI-MIX INC.

Employer

Case 30-UC-408

and

**INTERNATIONAL BROTHERHOOD OF
TEAMSTERS LOCAL 695**

Union/Petitioner

DECISION AND ORDER

The Union filed a petition under Section 10(b) of the National Labor Relations Act seeking to clarify two existing bargaining units. The Employer asserts that the petition should be dismissed as it is untimely, and that the Union is improperly seeking to add historically excluded employees to the unit at issue. Based on an administrative investigation and careful consideration, I conclude that the petition is untimely and should be dismissed.¹

BACKGROUND

The Employer operates a cement trucking company based in Fitchburg, Wisconsin, whose employees are represented by the Union. The “Madison Area Redi-Mix Agreement” covers these employees. The effective dates of the current contract are April 1, 2002 to

¹ Under Section 3(b) of the Act I have the authority to make this determination on behalf of the National Labor Relations Board. Upon the entire investigation in this case, I find: (1) the Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction; and (2) the Union is a labor organization within the meaning of the Act and claims to represent certain employees of the Employer.

March 31, 2008. In 1997 the Employer bought an existing facility in Lake Mills, Wisconsin, approximately 40 miles to the east of the Fitchburg location. Both the Union and the Employer have recognized these employees as a separate unit since that time, and two subsequent “Eastern Division Redi-Mix Agreements” have covered these employees. The most recent Eastern Division agreement expired in 2002 and there is no current contract in the Eastern Division. The Madison Area agreements contain recent, substantially different terms and conditions of employment from the Eastern Division agreements.

This difference forms the basis for the Union’s proposed merger. The Union alleges that the reason for the difference between the contracts is that during previous bargaining the Employer represented it was necessary to have a lower cost agreement in the Eastern Division in order to compete with non-union contractors prevalent in that market. The Union maintains that in response to this position it agreed to Eastern Division agreements that contained wages and benefits lower than the Madison Area agreement. The Union further alleges that once the Employer secured an advantageous Eastern Division contract it began competing against union contractors in the Madison area and never sought to expand in the Eastern Division.

ANALYSIS

The appropriateness of the petition can be determined based on one issue, the timeliness of the petition.² The Board has a well-established prohibition against midterm unit clarification petitions, absent a recent, substantial change to the bargaining unit, on the basis that scope of the unit issues are appropriately left to bargaining. *Edison Sault Electric Co.*, 313 NLRB 753 (1994);

² As the petition is clearly untimely and is properly dismissed on this basis it is not necessary to address the Employer’s alternative argument alleging the Union is improperly seeking to include historically excluded employees.

Wallace Murray Co., 192 NLRB 1090 (1971). Prior to *Wallace Murray* the Board explored a wider role for unit clarification petitions in *Libbey-Owens Ford Co.*, 169 NLRB 126 (1968), and related cases. See also *PPG Industries*, 180 NLRB 477 (1969).

The Union's argument regarding timeliness is that because *Libbey-Owens Ford*, supra, was never explicitly overturned it remains good law and the petition should be considered on its merits as were the petitions in *Libbey-Owens Ford* and other cases in that era. Further, the Union maintains that once the petition is considered on its merits the instant petition is analogous to *PPG Industries*, supra, and that under that decision it is appropriate to process a midterm petition when the Petitioner seeks to combine bargaining units represented by the same Union. The Employer relies on *Wallace Murray* in arguing the instant petition is untimely.

During investigation the Union also raised a secondary argument, that if *Wallace Murray* applies the Employer's misrepresentation in bargaining, specifically its intent regarding the Eastern Division and the subsequent alleged incursion of Wingra East into the Madison area, constitutes a "recent, substantial change." I find, assuming for the sake of argument the alleged misrepresentation and incursion is true, that this activity would not constitute the type of "recent, substantial change" contemplated by the Board in the unit clarification context.

In *Bethlehem Steel Corp.*, 329 NLRB 243 (1999), the Board noted:

Unit Clarification, as the term itself implies, is appropriate for resolving ambiguities concerning the unit placement of individuals who, for example, come within a newly established classification of disputed unit placement, or, within an existing classification which has undergone recent, substantial changes in the duties and responsibilities of the employees in it so as to create a real doubt as to whether the individuals in such classification continue to fall within the category - excluded or included - that they occupied in the past.

Bargaining units are described by job classification. The triggering event under the *Bethlehem Steel* standard is a change that raises a question of whether an employee is in

or out of a particular classification. Two common examples of how this could occur midterm are provided, creation of a new classification and changes to a classification. In the instant case the Union has not met its initial burden under *Bethlehem Steel* of articulating a new or changed classification, but has instead alleged misrepresentations in bargaining that point to no specific classification, ambiguity or confusion regarding employee classification. On this basis I find the exception to the midterm bar is not at issue in this representation proceeding.

I find the Union's position regarding the timeliness of the petition without support and that the instant petition is clearly untimely. Although never explicitly overturned by the Board, for the last 30 years the Board has chosen not to continue on the path of *Libbey-Owens Ford*, but instead has applied the *Wallace Murray* standard. For the reasons stated above I find petition is clearly untimely, and because no exception to *Wallace Murray* is at issue I find it proper to dismiss the instant petition without a hearing.³

ORDER

The petition for unit clarification is dismissed.⁴

³ The Union asserts that a hearing is appropriate to address the legal and factual questions in this case. Under Section 102.63(a) and (b) of the Board's Rules and Regulations it is appropriate to dismiss a petition without a hearing when, as here, I have reasonable cause to believe no question concerning representation exists.

⁴ This Decision and Order does not constitute a recertification of the Union.

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, 1099 14th Street, N.W., Washington, DC 20570. This request must be received by the Board in Washington by September 8, 2004.

Signed at Milwaukee, Wisconsin on August 25, 2004.

/s/Irving E. Gottschalk
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