NATIONAL LABOR RELATIONS BOARD
Region 20

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March 23, 2006

Mr. Stephen J. Burke, Jr.
Vice President
United Screeners Association, Local One
3661 Fleetwood Drive
San Bruno, CA 94066

Re: **Covenant Aviation Security, LLC**
Case **20-UD-445**

Sir:

The above-captioned case, petitioning for an investigation and referendum under Section 9(e) of the National Labor Relations Act, has been carefully investigated and considered. The investigation conducted pursuant to Section 102.85 of the Board's Rules and Regulations disclosed that the Petition was not timely filed and, moreover, is not supported by a sufficient showing of interest. Accordingly, pursuant to Section 102.88 of the Board's Rules and Regulations, for the reasons set forth more fully below, I find that further proceedings are unwarranted and I am dismissing the Petition in this matter.

Background:

In Case 20-RC-17896, Region 20 conducted a secret ballot election on May 10[1] among screeners, baggage handlers and certain specialists employed by the Covenant Aviation Security, LLC (the Employer) at San Francisco International Airport (SFO).[2] The tally of ballots showed that of approximately 1024 eligible voters, 235 employees voted in favor of and 396 employees voted against representation by United Screeners Association Local 1 (Screeners).[3] Screeners filed objections to the election over alleged conduct by both the Employer and by Service Employees Union Local 790 (Local 790), which had not appeared on the ballot but which Screeners characterized as "Intervener."[4] By Supplemental Decision dated June 20, the Acting Regional Director overruled the Objections, and on August 6, I certified the results of the election.

On September 30, a panel of neutrals conducted a card check, and determined that 555 of the 1010 employees then on the Employer's payroll had designated Local 790 is their representative for collective-

[1] All dates refer to 2005 unless otherwise specified.
[2] As I am dismissing the Petition herein on other bases, I need not consider whether the Board has statutory jurisdiction over the Employer's operations at SFO. The Board is condidering this issue in the context of a similar operation at a different location in *Firstline Transportation Security*, 344 NLRB No. 124 (June 30, 2005).
[3] This was a rerun of an election conducted on February 24, 2004, in which among approximately 1055 eligible voters, the vote was 200 in favor of Screeners and 582 against. That election was set aside because of objections that Screeners filed and because of alleged violations by the Employer of Section 8(a)(1) of the Act that were remedied by an informal Settlement Agreement in 20-CA-31763 and -31917.
[4] Subsequent to filing its objections, Screeners stated that it should have referred to Local 790 as "Third Party."

bargaining.[5] On October 3, the Employer recognized Local 790 on the basis of Local 790's demonstration of majority status. Negotiations began on about November 18. Following negotiations, the Employer and Local 790 reached tentative agreement over terms for a collective-bargaining agreement. Local 790 first shared the terms of that agreement with employees on December 28, and conducted a ratification vote among them from December 28 through 31. Employees ratified the contract by a vote of 378 to 229. The Union did not sign the contract until January 12, 2006, and the Employer did not sign until January 13, 2006.

The Instant Petition:

On January 11, 2006, two days before the collective-bargaining agreement was fully executed, employee Stephen J. Burke, Jr. filed the instant Petition. Although Burke listed his name as the name of the party filing the petition, he also listed Screeners as the name of the national or international labor organization of which the filing party is an affiliate, and listed himself as the Vice-President of that organization.

The investigation of the showing of interest in support of the petition showed that nearly 70% of the signatures submitted with the instant Petition are dated in October and, thus, were collected over a month before contract negotiations had begun and two or more months prior to disclosure of the terms of the proposed contract to employees. All but about 8% of the support predates the ratification vote, and all of it predates the execution of the contract on January 13, 2006. As noted above, the tally of the reported ratification vote on December 31 showed 378 employees voting in favor of the contract, which included the union security clause at issue, and only 229 against.

Decision:

As noted above, the instant Petition was filed prior to execution of the collective-bargaining agreement between the Employer and Local 790 that contains the union security clause at issue in this matter. Although the contract bears a term of January 1, 2006, through December 31, 2008, because retroactivity does not apply to a union security clause,[6] that particular term did not take effect until the Employer added its signature to the document on January 13, 2006. Section 9(e)(1) of the Act provides as follows:

> Upon the filing with the Board, by 30 per centum or more of the employees in a bargaining unit covered by an agreement between their employer and a labor organization made pursuant to Section 8(a)(3), of a petition alleging the desire that such authority be rescinded, the Board shall take a secret ballot of the employees in such unit and certify the results thereof to such labor organization and to the employer.

The Act itself thus contemplates that the condition precedent to this type of petition is the existence of a union security clause to which employees are subject. This is also reflected on the face of the Board's Petition itself, which describes the category "UD – Withdrawal of Union Shop Authority (Removal of Obligation to Pay Dues) Thirty percent or more of employees in a bargaining unit covered by an agreement between their employer and a labor organization desire that such authority be rescinded."

The Act does not provide for prospective rescission of the authority of an employer and union to enter into a union security clause. Because the clause between the Employer and Local 790 did not become effective until January 13, the instant Petition was premature when filed on January 11, and it must therefore be dismissed for this reason.[7] Although this deficiency is fundamental, if it stood alone

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[5] The panel did not count an additional 75 signed cards because of questions about signatures.

[6] *Teamsters Local 25 (Techweld Corp.)*, 220 NLRB 76 (1975).

[7] In reviewing a U.S. District Court injunction ruling that revolved primarily around an alleged contract bar, a Circuit Court nevertheless made this instructive observation: "We are in full agreement with the District Court that Section 9(e)(1) contemplates that the parties are subject to a union security agreement at the time the de-authorization petition is filed. It refers to a petition filed by 30 percent or more of the employees in a bargaining unit covered by an agreement between their employer and a labor organization

Petitioner could easily enough eliminate the flaw. Because of the complication that I address next, however, the filing of a new petition will not alone eliminate the problem of prematurity.

The statutory requirement in Section 9(e)(1) that this kind of petition be supported by 30% or more of the employees whom the union security clause covers suggests that, as with the Petition itself, the showing of interest in favor of deauthorization must occur in the context of an existing, rather than a prospective and potential, union security clause. Support that is couched in terms of "a proposed union security clause" will not save the showing of interest if it is executed in advance of the date when union security takes effect. This interpretation conforms to the plain wording in the Act, which makes the procedure available to employees in a "bargaining unit covered by an agreement." A review of apparent Congressional intent, and our responsibility to the taxpayers to utilize scarce Agency resources prudently, show that is no mere and unwarranted hyper technical interpretation of the meaning of the Act's reference to "covered."

Among the amendments that Congress made to the Act in 1947 was a requirement denominated as Section 9(e)(1) that employees authorize union security before it could take effect. In the House version of the bill, the employer would have had to commit to union security in advance of an authorizing election. The Senate version approved in conference provided, however, that an affirmative vote by employees would authorize the labor organization "to make" a union security agreement. Given the prerequisite of authorization established by Section 9(e)(1) for the creation of union security, it is clear that the procedure established by Section 9(e)(2) for deauthorization could apply only in the context of an existing union security clause.[8]

In 1951, by Public Law 189, Congress again amended the Act. This time it eliminated the prior authorization requirement for union security established in 1947, reworded the deauthorization provision to read as stated above, and designated it as Section 9(e)(1). There is no suggestion that in doing so, however, Congress contemplated that deauthorization would apply prospectively, rather than only in the context of an existing union security provision that was a given when it crafted Section 9(e) four years earlier. It appears from the legislative history that, to a large extent, Congress eliminated the pre-agreement authorization procedure because of concern about the resources that the Board was expending to implement it. The 1951 House Report states as follows with respect to pre-agreement authorization elections:

> Such elections have imposed a heavy administrative burden on the Board, have involved a large expenditure of funds, and have almost always resulted in a vote favoring the union shop. (See National Labor Relations Board Fourteenth Annual Report, beginning on p. 6.) Elimination of these elections will permit the Board to devote its time to more expeditious handling of its heavy docket of representation and unfair-labor-practice cases.[9]

Indeed, the concern about not expending resources unnecessarily is particularly apt in this matter. The Board has long required administratively that most petitions seeking an election be accompanied by support of at least 30% of the affected employees. The primary goal of this requirement is described in Section 11020 of the Board's Representation Case Handling Manual as follows:

> The purpose of the demonstration of an adequate showing of interest on the part of labor organizations and individual petitioners that initiate or seek to participate in a

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entered into pursuant to Section 8(a)(3). We must conclude that Congress intended to provide relief from an existing union security clause…" *Machinery, Scrap Iron, Metal and Steel Chauffeurs etc. v. Madden,* 343 F. 2d 497 (7th Cir., 1965).

[8] See *United States Code, Congressional and Administrative Service, 80th Congress, First Session, 1947, Congressional Comments* at pages 1156-1157.

[9] See *United States Code, Congressional and Administrative Service, 82nd Congress, First Session, 1951, House Report No. 1082* at pages 2379-2381.

> representation case is to determine whether the conduct of an election serves a useful purpose under the statute, i.e., whether there is sufficient employee interest to warrant the expenditure of the Agency's time, effort and resources in conducting an election. This requirement prevents parties with little or no stake in a bargaining unit from abusing the Agency's machinery and interfering with the normal administration of the Act and reasonably assures that a genuine representation question exists.

In the case of UD elections, of course, the requirement of a "30 per centum" showing of interest is specified in Section 9(e)(1) of the Act.

As noted above, the bargaining unit identified in the Petition is large, and the nature of the work requires that employees work 24 hours a day, 7 days a week. To conduct the election in Case 20-RC-17896 on May 10, this Regional Office assigned six agents to each of four polling sessions ranging from one to 3.5 hours in length. Accounting for travel time to and from the facility, the pre-election conference, and the tally of ballots, it appears that at least 100 hours of agent time were devoted just to the election. Significant additional time, of course, was devoted to the post-election investigation of objections.

This expenditure of resources is warranted in a situation where current support for a petition assures that interest in the proposition is genuine and extensive. The showing of interest submitted in support of the instant Petition, however, does not provide that assurance. It is not unreasonable to infer that employees form a judgment about whether to financially support a union to represent them based, at least in some measure, upon the benefits that they perceive to obtain from the union's representation. When, as here, employees sign a petition prospectively to withhold from their collective-bargaining representative the authority to enter into a union security clause, they are acting in a vacuum. Because the collective-bargaining agreement has not yet been finalized, they clearly are stating a preference without regard to any evaluation of benefits that representation may have secured, and such a statement, made as it is in a vacuum, is a rather tenuous basis for the expenditure of valuable tax dollars and the resultant disruption of an employer's work place. In view of the fact that nearly 70% of the support submitted with the instant Petition is dated substantially before the presentation of the proposed contract to employees and all but about 8% of the support predates the ratification vote, this showing of interest simply is not a reliable indication of employee sentiment that would justify the dedication of resources needed to conduct an election.

Thus, like the Petition, the showing of interest was premature, collected before the union security clause had taken effect and before employees knew what benefits the collective-bargaining agreement would provide. This showing of interest does not comport with the plain language of the Act, with the history that led to the Amendment that led to the deauthorization procedure now codified in Section 9(e)(1), or the duty responsibly to budget the Agency's resources. Accordingly, the deficiency of the showing of interest also compels dismissal of the instant Petition.[10]

Pursuant to the National Labor Relations Board's Rules and Regulations, any party may obtain a review of this action by filing a request for review with the National Labor Relations Board, Washington, D.C. 20570. A copy of the request for review must be served on each of the other parties to the proceeding, as well as on the undersigned. This request for review must contain a complete statement setting forth the facts and reasons on which it is based.[11] The request for review (eight copies) must be received by the Executive Secretary of the Board by close of business (14 days from date of letter, month-

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[10] A new UD petition, supported by 30% or more of bargaining unit employees indicating their desire on a date subsequent to the effective date of the collective-bargaining agreement to withdraw Local 790's authority to enforce the union security clause, would not have the flaws that compel dismissal of the instant Petition, and would be processed.

[11] Any request for review or document filed in support or opposition thereof should address the issue of the Board's statutory jurisdiction, which I have alluded to at footnote 2, *supra*.

day-year). Upon good cause shown, however, the Board may grant special permission for a longer period within which to file. A request for extension of time should be submitted to the Executive Secretary in Washington, and a copy of any such request for extension of time should be submitted to this Office and to each of the other parties to this proceeding.

The request for review and any request for extension of time must include a statement that a copy has been served on this Office and on each of the other parties to this proceeding in the same or a faster manner as that utilized in filing the request with the Board.

Very truly yours,

/s/ *Joseph P. Norelli*

Regional Director

cc: Executive Secretary
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