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Coca-Cola Enterprises, Inc., Eastern Great Lakes Division *and* Leigh Purcell and International Brotherhood of Teamsters, Local 529. Case 3–RD–1527

August 14, 2008

DECISION ON REVIEW AND ORDER

BY CHAIRMAN SCHAUMBER AND MEMBER LIEBMAN

On December 10, 2007, the Regional Director for Region 3 administratively found that a September 27, 2007 Memorandum of Understanding (MOU) between the International Brotherhood of Teamsters, Local 529 (the Union) and the Employer constituted a bar to a decertification petition. Thereafter, in accordance with Section 102.67 of the National Labor Relations Board's Rules and Regulations, the Employer filed a timely request for review, contending that the MOU lacks bar quality.

On February 7, 2008, the Board issued an Order remanding the case to the Regional Director for a hearing. Pursuant to the Board's Order, the hearing was held in February and March 2008. On March 27, 2008, the Regional Director issued a Decision and Order, in which she reaffirmed her earlier finding that the petition was barred by the parties' MOU. Thereafter, the Employer filed a timely request for review. The Union filed an opposition.

Having carefully considered the entire record, we grant review, reverse the Regional Director, and reinstate the petition.[1]

Facts

The Employer sells and distributes nonalcoholic beverages from its facility in Horseheads, New York. The Employer and the Union are parties to a collective-bargaining agreement, effective from August 20, 2004 to August 19, 2009. The agreement covers a unit of approximately 37 employees, including drivers, warehousemen, general laborers, cooler service technicians, and cooler service trainees. There are 11 drivers in the unit.

By letter dated April 23, 2007,[2] the Employer's director of labor relations, Steven Johnson, notified the Union's president, John Farwell, that "the Company intend[ed] to implement an Order Fulfillment System (OFS) method of distribution," which was a more efficient method for the Employer to fulfill its customers' orders.[3] The Employer proposed that the OFS implementation occur after June 15, and requested that the Union contact Johnson "to meet and discuss any issues prior to the proposed implementation." Thereafter, the parties agreed to meet to discuss the OFS implementation.

At the first meeting on May 11, the parties primarily discussed the effect of the OFS implementation on drivers and warehousemen. The Union's handwritten notes from that meeting indicate that the following week the Union would receive the "ADDENDUM FOR C.B.A!" When the parties met again on September 4, the OFS had already been implemented. At this meeting, the parties discussed an increase in hours for drivers, pallet stops,[4] stem times,[5] modifying the pallet drop rates for delivering merchandise, and route itineraries. At the parties' final meeting on September 27, the Employer agreed to the Union's proposal to increase the pallet drop rate for drivers from $12 to $13. In addition, the parties agreed on other terms of the MOU and executed the document that same day.[6]

[1] Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Schaumber and Member Liebman constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

[2] All dates hereafter are in 2007, unless otherwise indicated.

[3] Under the old OFS method, delivery drivers were required to sort the customer's orders at the customer's location. Under the new OFS method, the customer orders are all presorted at the warehouse and laid out in a distinct formation on the delivery truck, thereby making the deliveries easier for the driver and more efficient in general.

[4] These are delivery stops where the drivers deliver pallets full of merchandise for large store deliveries as opposed to carts, which are reserved for smaller store deliveries.

[5] Stem time is the driving time when drivers are not making deliveries.

[6] In addition to an adjustment in the pallet drop rate, the MOU includes, among other things:

- The date when the implementation of the OFS would begin;
- The creation of a new classification known as the "OFS Driver," which was to be paid the same rate contained in the contract for "Delivery Merchandiser." All drivers would be reclassified as OFS Drivers;
- Additional pay for OFS Drivers servicing a pallet stop delivery account that is greater than 45 miles roundtrip from the driver's next closest account;
- Employer designated stops for service merchandising and pallet drop delivery; and
- A commitment by the Employer to ensure that drivers and warehouse employees are informed and trained on any new equipment required for OFS delivery.

Approximately 6 weeks later, on November 19, the Petitioner filed the decertification petition. The petition was filed in what would be the fourth year of the parties' 2004–2009 agreement.

Analysis

To serve as a bar to a petition, a contract must contain substantial terms and conditions of employment deemed sufficient to stabilize the bargaining relationship, and must be signed by the parties. *Cind-R-Lite Co.,* 239 NLRB 1255, 1256 (1979), citing *Appalachian Shale Products Co.*, 121 NLRB 1160, 1163 (1958). See also *Cooper Tire & Rubber Co.,* 181 NLRB 509 (1970). The burden of proving the existence of a contract bar rests upon the party asserting the doctrine. *Roosevelt Memorial Park*, 187 NLRB 517 (1970). Under *General Cable Corp.*, 139 NLRB 1123 (1962), an agreement of more than 3 years duration is treated for contract bar purposes as expiring on its third anniversary date.

The issue raised in this case concerns the effect of the parties' signing a MOU amending a long-term contract after the end of the first 3 years of that contract, but prior to the filing of the petition. The Board first confronted the issue of extensions of long-term contracts in *Southwestern Portland Cement Co.,* 126 NLRB 931, 933 (1960). There, the Board stated the following rule:

> [W]here, after the end of the first 2 years of a long-term contract and before the filing of a petition, the parties execute (1) a new agreement which embodies new terms and conditions, or incorporates by reference the terms and conditions of the long-term contract, or (2) a written amendment which expressly reaffirms the long-term agreement and indicates a clear intent on the part of the contracting parties to be bound for a specific period, such new agreement or amendment shall be effective as a contract bar. . . .

Id. at 933. See also *General Cable Corp.,* 139 NLRB 1123 (1962) (the Board expanded the contract-bar period from 2 years to 3 years).

Here, the Regional Director found that the MOU, which was executed after the end of the third year, but before the filing of the petition, satisfied both parts of the *Southwestern Portland Cement* test. We disagree.

It is clear that the parties did not intend for the MOU to be a new agreement embodying new terms and conditions. The Union's notes of the first meeting refer to the MOU as an "Addendum."[7]

Also, the MOU does not have a readily discernible effective date or expiration date, both material terms of a contract. *South Mountain Healthcare & Rehabilitation Center,* 344 NLRB 375 (2005). The only two dates appearing on the face of the MOU are the date of the implementation of the OFS, which is June 1, and the date on which the parties signed the agreement, which is September 27. See *South Mountain Healthcare*, supra (memorandum of agreement with multiple effective dates not a contract bar because third-parties could not discern the appropriate time for filing a petition). Neither one of these dates purports to be the effective date of the MOU. Nor is the duration of the MOU evident because it contains no clear expiration date. It is well-settled Board law that without clear effective or expiration dates, the MOU cannot serve as a bar to the petition because third-parties would be unable to determine the appropriate time for filing a petition. See *South Mountain Healthcare,* supra. Moreover, even if the MOU incorporated the dates of the original contract, it still would not be a bar to the petition because the original contract is for 5 years, too long to bar a petition for its full term.

Further, the MOU cannot be described as "so complete as to . . . chart with adequate precision the course of the bargaining relationship [so that] the parties can look to the actual terms and conditions of the contract for guidance in their day-to-day problems." *Stur-Dee Health Products, Inc.,* 248 NLRB 1100, 1100 (1980) citing *Appalachian Shale Products*, 121 NLRB 1160, 1163 (1958). To the contrary, the MOU's terms are limited to certain supplemental payments for drivers, training for drivers and warehousemen, and the reclassification of drivers to OFS Drivers, and affect only a minority (30%) of unit employees. Cf. *Cooper Tank & Welding Co.*, 328 NLRB 759 (1999) (contract contains substantial terms and conditions pertaining to, inter alia, picket lines, hours of work, vacations, holidays, working conditions, etc., which makes it sufficient to bar a petition). Consequently, the MOU is not an agreement with new terms and conditions of employment affecting *all* bargaining unit employees.[8]

We also find, contrary to the Regional Director, that the MOU does not incorporate by reference the terms of the long-term agreement. To be sure, the MOU refers to the original agreement. For instance, the MOU states, "All other provisions of the compensation system for Delivery Merchandisers shall remain unchanged pursuant to the Collective Bargaining Agreement." It also

[7] An "addendum" is a "supplement." Black's Law Dictionary 39 (7th Ed. 1999).

[8] The Union claims that the MOU affects nearly half of the employees in the bargaining unit—drivers and the 10 warehouse employees. However, we find that the warehouse employees are only incidentally affected by the MOU. Their wages, hours, and working conditions remain unchanged. The only provision that affects them concerns training.

states, "With recognition that the rights and obligations reserved to the Parties under the existing Collective Bargaining Agreement remain unless explicitly waived in this Memorandum of Understanding." As to the former phrase, the MOU simply refers to the contract, but does not incorporate the terms and conditions of employment of that contract. The latter phrase merely affirms the parties' rights and obligations under the long-term agreement. Neither one of these phrases incorporates the terms of the long-term agreement.

We do not agree with the Regional Director's finding that the MOU satisfied the second alternative of the *Southwestern Portland Cement* test, that it was a written amendment that expressly reaffirmed the original agreement and evidenced the parties' clear intention to be bound for the specified period of the long-term agreement, i.e., until 2009. The Regional Director cited, and the Union relies on, *Shen-Valley Meat Packers*, 261 NLRB 958 (1982), to support that finding. That case, however, is readily distinguishable.

There, the Board found that an amendment, signed by the employer and the intervenor union prior to the expiration of the contract's protected reasonable period, and which expressly affirmed the parties' 5-year agreement, constituted a bar to the petition.[9] However, the amendment in *Shen-Valley* differs significantly from the MOU signed by the parties in this case. The amendment in *Shen-Valley* contained various provisions organized according to sections of the parties' original collective-bargaining agreement. The contract also explicitly provided that the amendment "is in effect through the remainder of the agreement," permitting renegotiation of hourly wage rates at specific intervals consistent with the provisions of the parties' original collective-bargaining agreement. The Board found that the parties' amendment expressly affirmed the long-term agreement and indicated a clear intent on the part of the contracting parties to be bound for a specific period. *Shen-Valley,* supra at 959. Here, by contrast, the MOU does not contain certain other substantial terms and conditions of employment; the content of the MOU indicates that it was written for the narrow purpose of addressing the Employer's proposed implementation of the OFS, which primarily affects drivers only; and the MOU is not explicit in its effective and expiration dates.

Moreover, contrary to the Regional Director, we do not find that by including a "rights and obligations" clause,[10] the parties intended for the MOU to be for the duration of the long-term agreement. This clause does not incorporate the duration of the long-term agreement. In *Southwestern Portland Cement,* supra, the Board found that the parties' last supplemental agreement, which amended the original contract, barred the decertification petition because it reaffirmed the original agreement and clearly indicated an intent on the part of the parties to be bound for a specific period. The supplemental agreement there provided that "said Agreements dated June 1, 1957 [original contract], July 21, 1957, and June 1, 1958, shall remain in full force and effect and shall be binding upon the parties hereto except as herein amended and supplemented." 126 NLRB at 932. There is no similar language here. In fact, the dates of the original contract are not mentioned at all in the MOU.

In light of the foregoing, we find that the MOU between the Employer and the Union does not constitute a bar to the petition. Therefore, we reverse the Regional Director, reinstate the petition, and remand this case to the Regional Director for further appropriate action.

ORDER

The petition is reinstated and the case is remanded to the Regional Director for further appropriate action.

Dated, Washington, D.C. August 14, 2008

Peter C. Schaumber, Chairman

Wilma B. Liebman, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[9] Initially, the Board found that the amendment constituted a premature extension of the original agreement because it was executed during the 3-year period of "reasonable duration" and extended the contract beyond the 3 years. However, because the petition was filed after the initial 3-year anniversary date of the long-term contract, the petition was found untimely, and thus dismissed.

[10] That clause states: "With recognition that the rights and obligations reserved to the Parties under the existing Collective Bargaining Agreement remain unless explicitly waived in this Memorandum of Understanding, the Parties agree that this is the full and complete agreement between the Parties and may not be changed, altered, or modified except in writing and signed by the Parties."