

**UNITED STATES GOVERNMENT  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 15**

**TOM BRANIGHAN, INC.<sup>1</sup>**

**Employer**

**and**

**Case 15-RD-899**

**INTERNATIONAL BROTHERHOOD  
OF ELECTRICAL WORKERS LOCAL  
UNION 130**

**Union**

**and**

**RONALD HILDAGO, JR.**

**Petitioner**

**DECISION AND DIRECTION OF ELECTION**

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held on June 3, 2008, before a hearing officer of the National Labor Relations Board, herein referred to as the Board, to determine whether to direct an election on the petition or if there exists a contract bar that requires dismissal of the instant petition.<sup>2</sup>

**I. Issue**

The International Brotherhood of Electrical Workers Local Union 130 (Union) asserts that the Union and Tom Branighan, Inc. (Employer), and herein collectively called the Parties

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<sup>1</sup> The names of the Employer and Petitioner appear as amended at the hearing.

<sup>2</sup> Upon the entire record in this proceeding, the undersigned finds:

- a. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
- b. 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.
- c. The labor organization involved claims to represent certain employees of the Employer.
- d. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Sections 2(6) and (7) of the Act.

executed a Confidential Settlement Agreement (Settlement) extending the term of a pre-hire Section 8(f) agreement between the Parties, and thus the instant Petition is barred by the settlement agreement and/or the 8(f) agreement and should be dismissed.

Ronald Hildago, Jr. (Petitioner) took the position at the hearing that the election should go forward pursuant to the instant Petition.<sup>3</sup> The Employer asserts in its post-hearing brief that the Settlement was executed with the understanding it would not interfere with the existing 8(f) status between the Parties. Further, the Employer contends the Settlement can not infringe upon the rights of bargaining unit employees without their approval. Thus, the Petitioner and the Employer assert that there is no contract or settlement bar and an election should be directed.

## **II. Decision**

Based upon the entire record of this proceeding and for the reasons discussed below, I find that dismissal of the instant Petition is not warranted.

Accordingly, IT IS HEREBY ORDERED that an election be conducted under the direction of the Regional Director for Region 15 in the following stipulated bargaining unit:

All full and part-time electricians, including foremen, apprentices, intermediate journeymen, and residential trainees employed by the employer in the following parishes in the State of Louisiana: St. Bernard Parish, Orleans Parish, Jefferson Parish, St. Charles Parish, St. John the Baptist Parish, and St. James Parish; excluding all clerical employees, guards and supervisors as defined in the Act.

## **III. Statement of Facts**

The Employer, Tom Branighan, Inc. is a Louisiana corporation with a place of business located in New Orleans, Louisiana. The Employer is engaged in the business of electrical contracting.

The Employer and the Union have had an 8(f) relationship for approximately twelve years. Most recently, the Employer and the Union became signatories to a pre-hire Section 8(f) agreement on September 1, 2004. The agreement was effective through November 30, 2007.

On an unspecified date after Hurricane Katrina hit New Orleans on August 29, 2005, the Union learned the Employer was back in business and operating with employees hired off the streets rather than through referrals from the Union. The Union, through its Business Manager and Financial Secretary Robert Franklin Hammond, III, informed the Employer that it was not in compliance with the pre-hire Section 8(f) agreement because it was not submitting employee reports for wages and fringe benefits as required by the pre-hire Section 8(f) agreement. A dispute arose, and the Union filed a civil suit against the Employer in the United States District Court, Eastern District of Louisiana.

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<sup>3</sup> The Petitioner did not submit a post-hearing brief.

There are discrepancies in the record as to what prompted the Parties to discuss settling the civil suit, but the record is clear that effective June 1, 2006, the Parties entered into the Settlement to resolve all litigation pending before the United States District Court, Eastern District of Louisiana. As part of the Settlement, the Employer agreed to extend for one year its pre-hire Section 8(f) agreement with the Union. The extension made the 8(f) agreement effective September 1, 2004 through November 30, 2008. The Union agreed to waive any claims it may have for wages, dues, miscellaneous costs, fringe benefits, and contributions for the period August 31, 2004 through May 31, 2006. Further, the Union agreed the Employer has the right to repudiate the Section 8(f) agreement with such repudiation becoming effective on November 30, 2008, unless the Union obtained formal Section 9(a) status as the majority representative of the Employer's employees in an appropriate bargaining unit. Moreover, the Parties agreed that the Settlement would be enforceable pursuant to Section 301(a) of the Labor Management Relations Act and ERISA, as well as an agreement compromising litigation.

None of the Employer's employees signed the Settlement.

In an Order of Dismissal dated June 12, 2006, the Honorable Mary Ann Vial Lemmon, United States District Judge for the Eastern District of Louisiana, dismissed the civil action pursuant to the Settlement executed by the Parties. The Order reflects that the court retained jurisdiction for enforcement of the Settlement.

The Union, through the testimony of Business Manager and Financial Secretary Hammond, acknowledges that the executed Settlement basically extends the Union's 8(f) relationship with the Employer for one year. Further, the Union admits there is nothing in the Settlement that prohibits the Employer's employees from filing a decertification or certification petition.

The Petitioner, employee Ronald Hildago, Jr., filed the instant decertification petition on June 21, 2007.

#### **IV. Analysis**

The Union does not assert that the June 1, 2006 Settlement changed the nature of the 8(f) relationship. Rather, the Union asserts the Settlement it executed with the Employer extended their Section 8(f) relationship to November 30, 2008, and as such, the contract works as a bar to the election and the bargaining unit must remain intact until November 30, 2008. Additionally, the Union contends the execution of the Settlement, by itself serves as a contract bar to the instant decertification petition. I find the Union's arguments to be without merit for a number of reasons.

First and foremost, the Union did not present any evidence at the hearing, or make any claim in its post hearing brief, that it has a Section 9(a) relationship with the Employer. Moreover, it is well settled Board law that the Section 8(f) relationship between the Parties does not serve as a bar to the processing of the instant decertification petition during the term of the

pre-hire agreement. *John Deklewa & Sons*, 282 NLRB 1375, 1385 (1987). Although the Board has recognized that signatory parties to a collective-bargaining agreement can waive their rights to file a petition, for the reasons set forth below, the waiver principle is not applicable to the instant decertification petition.

The instant petition was filed by employee Robert Hildago, Jr., and the record reflects that neither Hildago nor any other employee signed the pre-hire agreement or the Settlement that extended the term of the pre-hire agreement to November 30, 2008. The record establishes it was the Union, not the Petitioner that executed the Settlement with the Employer. Therefore, the Petitioner did not waive his right to file the instant decertification petition. Moreover, the Union acknowledges there is nothing in the Settlement that prohibits the Employer's employees from filing a decertification or certification petition

In support of its position that the instant petition should be dismissed, the Union relies on the Board's decision in *Briggs Indiana* and its progeny. *Briggs Indiana Corporation*, 63 NLRB 1270 (1945). However, I find the Union's reliance upon *Briggs Indiana* is misplaced. Specifically I note that in *Briggs*, the certification petition was filed by the union in direct contravention of an agreement the union had with the employer not to seek to represent the employer's plant protection employees. In fact, in reaching its conclusion, the Board noted that it was the union, not an employee that sought an election and the imprimatur of a Board certification. *Id.* at 1273.

Likewise, I find the Union's reliance upon the Board's decisions in *Allis-Chalmers Manufacturing Company*, 179 NLRB 1 (1969) and *Lexington Health Care Group*, 328 NLRB 894 (1999) is unsupported. In *Allis-Chalmers*, the Board agreed with the Regional Director's dismissal of a petition filed by a union to represent a unit of clerical and technical employees where the union had agreed not to represent such employees during the term of its collective-bargaining agreement with the employer. Similarly, in *Lexington Health*, the Board reversed the Acting Regional Director's decision that there was no bar against the union seeking to represent the employer's service and maintenance employees. The Board found that the petition was barred by the union's express agreement with the employer not to organize the employees for a period of 12 months. The Board concluded that an express promise not to organize is sufficient to gain its enforcement, even if the express promise is not embodied in a collective-bargaining agreement. I find *Allis-Chalmers* and *Lexington Health* inapposite to the instant decertification petition proceeding as the petitions in those cases were not filed by an employee. Rather, the petitions were filed by a party to an agreement that contained an express promise not to organize the petitioned for employees.

Moreover, even in *Northern Pacific Sealcoating, Inc.*, 309 NLRB 759 (1992), another case the Union argues supports a bar to the instant decertification petition, the Board affirmed the Regional Director's dismissal of a petition filed by the employer where the employer signed a memorandum agreement which extended the duration of its 8(f) relationship with the union and in which the employer clearly and unmistakably waived any right to file or process any petitions before the Board seeking to terminate, abrogate, repudiate or cancel the agreement during its term. The Board specifically noted, however, that "... the waiver provision in the agreement was clear and unequivocal, and that it was not contrary to Board policy as neither party contended

that the employees were precluded from filing a petition.” Id. at 759. The Board further highlighted its protection of employees’ rights to file decertification petitions in such circumstances when it wrote “... our decision to enforce the waiver does not affect the rights of employees or outside unions to file representation petitions.” Id. at 760.

Unlike the petitioners in *Briggs, Allis-Chalmers, Lexington Health, and Northern Pacific*, the Petitioner in the instant proceeding for a decertification election is an employee, not an employer or a union that expressly waived the right to file a representation petition. The Petitioner is not signatory to the Settlement and the record is void of any evidence that the Petitioner made a promise to the Union or the Employer not to file a petition during the term of the pre-hire agreement. Therefore, I find that neither the Settlement nor the pre-hire agreement executed by the Parties, jointly or individually, serve as bar to an election in this decertification proceeding.

The Union further argues in its post hearing brief that to allow the decertification petition to go forward would vitiate the Settlement it executed with the Employer. I find the Union’s argument is misguided as it relates to the Board’s role in protecting the rights the National Labor Relations Act provides for employees to select the representative of their own choosing. To permit the 8(f) relationship between the Parties to bar processing of the instant petition would be in contravention of Board policy that allows employees to file decertification petitions at anytime during the existence of 8(f) relationships. Therefore, I find that the instant petition was timely filed and is not subject to any contract bar or settlement bar theory.

Finally, the Union argues in its brief that the issue before the Board is whether the Employer has agreed to comply with the terms of its 8(f) relationship until November 2008. Again, I find the Union’s argument misplaced. The issue before the Board in the instant decertification proceeding is not whether the Employer complied with the terms of its 8(f) relationship with the Union. Rather, the issue in this proceeding is whether there is a basis to bar the processing of the decertification petition filed by an employee in the context of an 8(f) relationship between the Parties. The Board has addressed this issue and determined that the existence of an 8(f) relationship does not serve as a bar to the processing of the instant decertification petition. *John Deklewa & Sons*, 282 NLRB 1375 (1987). Accordingly, I direct an election in the instant decertification proceeding.

## V. CONCLUSION

In view of the above, record evidence and the parties’ briefs, I shall direct an election in the following appropriate Unit:

All full and part-time electricians, including foremen, apprentices, intermediate journeymen, and residential trainees employed by the employer in the following parishes in the State of Louisiana: St. Bernard Parish, Orleans Parish, Jefferson Parish, St. Charles Parish, St. John the Baptist Parish, and St. James Parish; excluding all clerical employees, guards and supervisors as defined in the Act.

## **VI. Direction of Election**

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. 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 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 and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by the International Brotherhood of Electrical Workers Local Union 130.

## **VII. Notices of Election**

Please be advised that the Board has adopted a rule requiring election notices to be posted by the Employer at least three working days prior to an election. If the Employer has not received the notice of election at least five working days prior to the election date, please contact the Board Agent assigned to the case or the election clerk.

A party shall be estopped from objecting to the non-posting of notices if it is responsible for the non-posting. An employer shall be deemed to have received copies of the election notices unless it notifies the Regional Office at least five working days prior to 12:01a.m. of the day of the election that it has not received the notices. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure of the Employer to comply with these posting rules shall be grounds for setting aside the election whenever proper objections are filed.

## **VIII. List of Voters**

To insure that all eligible voters 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 which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *N.L.R.B. v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is directed that 2 copies of an eligibility list containing the full names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within 7 days from the date of this Decision. *North Macon Health Care Facility*, 315 NLRB 359, fn. 17 (1994). The Regional Director

shall make this list available to all parties to the election. In order to be timely filed, such list must be received in Region 15's Office, 1515 Poydras Street, suite 610, New Orleans, Louisiana 70112, on or before **June 25, 2008**. No extension of time to file this list will be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

**IX. 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, 1099 14th Street NW, Washington, DC 20005-3419. This request must be received by the Board in Washington by **July 2, 2008**.

DATED at New Orleans, Louisiana this 18<sup>th</sup> day of June 2008.

*/s/ M. Kathleen McKinney*

M. Kathleen McKinney, Regional Director  
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