

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION TWENTY-FIVE

Indianapolis, IN

CALUMITE COMPANY, LLC,  
Employer

and

Case 25-RC-10433

INTERNATIONAL UNION OF OPERATING  
ENGINEERS LOCAL 150,  
Petitioner

and

PRODUCTION WORKERS UNION OF CHICAGO AND  
VICINITY, LOCAL 707,<sup>1</sup>  
Intervenor

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 July 1, 2008, before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board, to determine an appropriate unit for collective bargaining.<sup>2</sup>

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<sup>1</sup> The Intervenor, Production Workers Union of Chicago and Vicinity, Local 707, did not appear 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 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 Section 2(6) and (7) of the Act.

## I. ISSUES

The International Union of Operating Engineers Local 150 (hereafter the "Petitioner" or "IUOE") seeks an election within a unit comprised of all full-time and regular part-time heavy equipment operators, plant operators, maintenance personnel, and laborers employed by Calumite Company, LLC (hereafter the "Employer") at its Portage, Indiana facility.<sup>3</sup>

The Employer contends that the Board's contract bar rule prohibits such an election, since the Employer has a valid and binding collective bargaining agreement with the International Longshoremens' Association, Local 2038 (hereafter the "ILA"). Therefore, the Employer maintains that the Regional Director should dismiss the representation petition filed by the Petitioner.

The Petitioner argues that no contract bar exists since the ILA's disclaimer was made in response to a decision by an impartial umpire, as a result of an AFL-CIO Article XX hearing.<sup>4</sup> It asserts that since the hearing was adversarial and all parties were represented by counsel and allowed to call and cross-examine witnesses, the ILA's disclaimer is valid, therefore there is no contract bar and the petition should proceed to a representation election.

## II. DECISION

The evidence produced at hearing, more fully discussed below, establishes that the ILA waived and disclaimed any interest in representing the bargaining unit employees pursuant to an adversarial AFL-CIO Article XX hearing. Under recent Board precedent, such disclaimer is valid. VFL Technology Corporation, 332 NLRB 1443. Because ILA validly disclaimed interest in the employees covered by the agreement, the contract between ILA and the Employer does not operate as a bar to the petition. Therefore an election will be held in the following unit which constitutes a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

All full time and regular part time heavy equipment operators, plant operators, maintenance personnel and laborers employed by the Employer at its Portage, Indiana facility, BUT EXCLUDING all supervisors, guards and clericals as defined by the Act.

The unit found appropriate herein consists of approximately 9 employees.

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<sup>3</sup> The appropriate unit was stipulated to by the parties and is not in dispute.

<sup>4</sup> There is a program established within the AFL-CIO for handling representation disputes (raiding) between and among affiliates of the AFL-CIO. This program has two components. The first, contained in Article XX of the AFL-CIO Constitution applies to an organizational attack by one AFL-CIO union on the established bargaining relationship maintained by another AFL-CIO union. NLRB Casehandling Manual (Part Two), Representation Proceedings, Sections 11017 and 11018.

### III. STATEMENT OF FACTS

On or about November 28, 2005, a representation election was held in Case 25-RC-10312 to determine whether the ILA would represent the Employer's employees in its Portage, Indiana facility. On December 6, 2005, a Certification of Representative was issued certifying the ILA as the exclusive collective-bargaining representative for the following bargaining unit:

All employees employed by the Employer at its Portage, Indiana facility performing work as loader operators, plant maintenance employees, and plant operators; BUT EXCLUDING all office clerical employees, professional employees, managerial employees, and guards and supervisors as defined by the Act.

On December 5, 2005, the General President of the International Union of Operating Engineers (the "IUOE") alleged in a letter to the AFL-CIO that the ILA had violated Article XX of the AFL-CIO constitution in representing the Employer's employees. Specifically, the IUOE claimed that the Calumite employees that had chosen the ILA as their exclusive bargaining representative were in fact replacement workers for striking employees that had previously been represented by the Petitioner. As a result of this letter, the ILA and the Petitioner participated in mediation before the AFL-CIO and on December 20, 2005, Andre Joseph, then President of the ILA, disclaimed interest in representing the Calumite bargaining unit employees.

Notwithstanding the ILA's earlier disclaimer, on April 24, 2006, Joseph sent a letter to Fred Millett, Plant Supervisor of Calumite, asserting that the ILA had obtained authorization cards from a majority of Calumite employees who wished to be represented by the ILA. Based upon further investigation, ILA determined that it had a valid claim to represent the Calumite employees and, therefore, sought voluntary recognition from the Employer. As a result of a card check held by an impartial third party, the Employer recognized the ILA as the bargaining representative of the same employees who had been included in the December 6, 2005, certification. Thereafter, the ILA and the Employer reached agreement on a collective bargaining agreement. The effective dates of the agreement are October 1, 2006 through September 30, 2011 (Employer's Exhibit 7).

On October 24, 2006, the IUOE again contacted the AFL-CIO alleging that the ILA had violated its earlier disclaimer by again seeking to represent the Calumite employees and asking that the AFL-CIO intervene and schedule a hearing to conclusively resolve the issue. On February 20, 2007, an Article XX hearing was held before an impartial umpire at the AFL-CIO headquarters in Washington, DC to determine whether the ILA or the Petitioner was entitled to represent the Calumite employees. The record evidence reflected that both parties were represented by counsel and had the opportunity to call and cross-examine witnesses. The impartial umpire issued his decision on May 29, 2007, finding that based on the evidence IUOE enjoyed the full protection of Article XX and the ILA had violated Article XX by seeking to represent and then representing the employees at Calumite.

On June 9, 2008 an enforcement hearing was held at the AFL-CIO headquarters and, as a result, the President of the International Longshoremen's Association, Richard Hughes, directed ILA: ". . . to refrain from taking any action whatsoever to interfere

with the IUOE's bargaining rights at any of the Levy facilities, including Calumite . . .". In letters dated June 11, 2008, the ILA's current President, Michael Devaney, Jr. informed the Employer and the bargaining unit employees that the ILA disclaimed any further interest in representing the Calumite bargaining unit employees.

#### IV. DISCUSSION

The issue of contract bar was addressed and explained in Direct Press Modern Litho, Inc., 328 NLRB 860 (1999). The Board stated:

When the circumstances are appropriate, the existence of a collective bargaining agreement will preclude, or bar, a Board representation election involving employees covered by the contract. The Board's contract bar doctrine is intended to achieve, "a finer balance between the statutory policies of stability in labor relations and the exercise of free choice in the selection or change of bargaining representatives'." Citing Appalachian Shale Products Co., 121 NLRB 1160, 1161 (1958)

In Mack Trucks, Inc., 209 NLRB 1003 (1974), the Board held that a collective bargaining agreement between the employer and the International Association of Machinists (IAM) barred an election petition filed by the United Auto Workers (UAW), notwithstanding the IAM's disclaimer of representation. In that case the employer notified the IAM that it was expanding its business operations. The IAM contacted the Employer and claimed to represent a majority of the employees and, in less than ten days, the parties negotiated and executed a collective bargaining agreement. Within a day or two the Employer was contacted by the UAW claiming majority status in the same bargaining unit. The Employer refused to recognize the UAW's claims, citing its collective bargaining agreement with the IAM. Approximately two months later, the UAW again contacted the employer asserting, among other things, that the UAW and the IAM had agreed that "under our joint UAWIAM jurisdictional pact and under the contractual circumstances and relationships involved that the UAW should be the appropriate bargaining agent." *Id.* 1004. In reaching its contract bar decision the Board held that 'no raiding agreements' between the parties cannot "be used to supersede a binding collective bargaining agreement interposed as a bar to an immediate election."

The Board again addressed the issue of disclaimer in American Sunroof Corporation-West Coast, Inc., 243 NLRB 1128 (1979). In the face of a deauthorization petition, the Teamsters disclaimed interest in the bargaining unit, notwithstanding that more than a year remained on the collective bargaining agreement between the parties. When the UAW, filed a representation petition, the Employer raised the issue of contract bar and argued that the Teamsters disclaimer should not be given effect. The Board held that the Teamster's disclaimer was valid, stating: "[a]s we have held in the past, a contract does not bar an election when the contracting union has properly disclaimed interest in the employees covered by the contract. *Id.* 1129. The Board distinguished this case from Mack Trucks, pointing to a "collusive agreement between the contracting union and the union which was seeking an election." Specifically, the Board seemed to be referring to the fact that both unions in Mack Trucks agreed that the IAM

would disclaim its representative status and that the UAW would seek to replace them. The evidence suggested that in Mack Trucks the UAW was chosen as a result of an agreement between the parties and did not involve any adversarial actions, nor any Article XX proceedings filed with the AFL-CIO.

In VFL Technology Corporation, 332 NLRB 1443 (2000), a case in almost perfect accord with the instant proceeding, the Board specifically upheld a disclaimer when the United Steelworkers of America (USWA) was forced to disclaim, as the result of an Article XX proceeding. In addressing this issue the Board held, “[i]t is well settled that a contract does not bar an election when the contracting union has validly disclaimed interest in representing the employees covered by the agreement. To be effective a disclaimer must be clear and unequivocal and made in good faith.”

In 1994, VFL signed an agreement with the USWA and later that year the petitioners, filed an Article XX proceeding challenging the USWA’s right to represent the employees.<sup>5</sup> As a result of these proceedings, the AFL-CIO found that the USWA had violated Article XX and “that the [p]etitioner’s should be given an opportunity to establish themselves as the representative of the Employer’s employees.” Despite USWA’s disclaimer, it continued to act as the employees bargaining representative. This resulted in the petitioners’ filing a non-compliance complaint with the AFL-CIO against the USWA. The USWA was again instructed to disclaim interest in the bargaining unit, which it did.

The Board in VFL Technology stated: “[w]e find that the USWA’s disclaimer of interest was clear and unequivocal, and expressly stated not only the USWA’s intention to cease and desist from currently representing the [e]mployer’s employees, but also renounced any future representational interest.” The Board, in accord with its earlier decision in American Sunroof, held, “the evidence does not establish that the disclaimer arose from a collusive agreement between the USWA and the [p]etitioners, or from any other improper motive.” Id. 1444. Specifically, the Board went on to quote the NLRB Casehandling Manual (Part Two), Representation Proceedings, Section 11017 et seq. “[t]he disclaimer here stemmed from the independent Article XX ‘no-raid’ procedures, a process long recognized and accorded deference by the Board.”

The Employer argues that ILA’s disclaimer should be invalidated and the contract between ILA and the Employer should act as a bar to the instant petition. The Employer’s position is that the Board’s holding in VFL Technology Corp. is in direct conflict with its decision in Mack Trucks. In support of this position, the Employer points to the dissent in Garden Manor Farms, 341 NLRB 192 (2004). In the dissent, Member Schaumber, questions the evolution of the law in this area since Mack Trucks and states that the decision in VFL Technology renders Board precedent on the issue of union disclaimers incoherent. The Employer points out that while the Board in American Sunroof, used the term “collusive” to describe the agreement between the two unions in Mack Trucks, the Mack Trucks decision made no implicit or explicit reference to anything fraudulent or deceitful about the agreement. The Employer argues that since under Mack Trucks disclaimers stemming from any “no-raiding”

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<sup>5</sup> The petitioners were the Teamsters, Operating Engineers, and the Laborers.

agreements are ineffective, the instant disclaimer by ILA is not valid. Therefore, in order to promote the contract-bar's dual policy purposes of ensuring employees free choice and effective representation and stability in labor relations, the agreement between ILA and the Employer should bar the processing of the instant petition. According to the Employer, allowing the ILA's disclaimer to remove the contract bar to the petition allows unions to use processes outside the Board to circumvent the contract bar doctrine.

There is, however, a notable difference between the facts in VFL Technology and the instant case, and those in Mack Trucks. In Mack Trucks, there was no evidence of the involvement of an impartial third party or any adversarial procedure in the process. In Mack Trucks, it appears that the parties agreed among themselves that the UAW would represent the employees. Unlike the agreement reached between the parties in that case, the AFL-CIO is not a party to this dispute and has no vested interest in the outcome. Instead, the ILA's waiver was as a result of the decision of an impartial umpire of the AFL-CIO. As such, there is no evidence that this disclaimer was the result of collusion.

## V. CONCLUSION

Accordingly, based upon the evidence described above, it is concluded that no contract bar exists and the Petitioner may proceed to an election in the petitioned for unit.

## VI. DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether they wish to be represented for purposes of collective bargaining by International Union of Operating Engineers, AFL-CIO, the Production Workers of Chicago and Vicinity, Local 707, or no representative. The date, time and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

### A. Voting Eligibility

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before 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. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3)

employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

B. Employer to Submit List of Eligible Voters

To ensure 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, which may be used to communicate with them. Excelsior Underwear, Inc., 156 NLRB 1236 (1966); NLRB v. Wyman-Gordon Company, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. North Macon Health Care Facility, 315 NLRB 359, 361 (1994). The list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). This list may initially be used by the undersigned to assist in determining an adequate showing of interest. In turn, the list shall be made available to all parties to the election.

To be timely filed, the list must be received in the Regional Office, Room 238, Minton-Capehart Federal Building, 575 North Pennsylvania Street, Indianapolis, Indiana 46204-1577 **on or before August 6, 2008**. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted to the Regional Office by electronic filing through the Agency website, [www.nlr.gov](http://www.nlr.gov),<sup>6</sup> by mail, or by facsimile transmission at (317)226-5103. The burden of establishing the timely filing and receipt of the list will continue to be placed on the sending party.

Since the list will be made available to all parties to the election, please furnish a total of two copies of the list, unless the list is submitted by facsimile or e-mail, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

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<sup>6</sup> To file the list electronically, go to [www.nlr.gov](http://www.nlr.gov) and select the **E-Gov** tab. Then click on the **E-Filing** link on the menu. When the E-File page opens, go to the heading **Regional, Subregional and Resident Offices** and click on the "File Documents" button under that heading. A page then appears describing the E-Filing terms. At the bottom of this page, the user must check the box next to the statement indicating that the user has read and accepts the E-Filing terms and then click the "Accept" button. The user then completes a form with information such as the case name and number, attaches the document containing the election eligibility list, and clicks the Submit Form button. Guidance for E-filing is contained in the attachment supplied with the Regional Office's initial correspondence on this matter and is also located under "E-Gov" on the Board's web site, [www.nlr.gov](http://www.nlr.gov).

### C. Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for at least 3 working days prior to 12:01 a.m. of the day of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 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 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

### VII. 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, N.W., Washington, DC 20570-0001. This request must be received by the Board in Washington by **August 13, 2008**. The request may be filed electronically through E-Gov on the Board's web site, [www.nlr.gov](http://www.nlr.gov),<sup>7</sup> but may not be filed by facsimile.

SIGNED at Indianapolis, Indiana, this 30<sup>th</sup> day of July, 2008.

Rik Lineback  
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<sup>7</sup> Electronically filing a request for review is similar to the process described above for electronically filing the eligibility list, except that on the E-Filing page the user should select the option to file documents with the **Board/Office of the Executive Secretary**.