

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 34

ARROW LINE ACQUISITION, LLC

Employer¹

and

TEAMSTERS LOCAL 493, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS

Petitioner

and

LOCAL 919, UNITED FOOD AND
COMMERCIAL WORKERS UNION

Intervenor

Case No. 34-RC-2272

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 before a hearing officer of the National Labor Relations Board. Pursuant to Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned. Upon the entire record in this proceeding, and the briefs of the parties, I find that: the hearing officer's rulings are free from prejudicial error and are hereby affirmed; the Employer is engaged in commerce within the meaning of the Act; the labor organizations involved claim to represent certain employees of the Employer; and a question affecting commerce exists concerning the representation of certain employees of the Employer.

The Petitioner and Intervenor seek to represent a unit of approximately 70 to 75 full-time and regular part-time casino shuttle bus drivers employed by the Employer at its Waterford, Connecticut facility. Although otherwise in accord as to the scope and

¹ The name of the Employer appears as corrected at the hearing.

composition of the petitioned-for unit, the Employer, contrary to the Petitioner and Intervenor, contends that the petition should be dismissed because it is barred by a contract covering the petitioned-for employees. For the reasons set forth below, I find no merit to the Employer's contention, and I shall direct an election in the petitioned-for unit.

I. Facts

The Employer operates three facilities in Connecticut from which it provides bus transportation services. The charter bus drivers at each of these facilities are represented by a different local union: Amalgamated Transit Workers Local 1734 at the Milford facility; Amalgamated Transit Workers Local 1348 at the Waterford facility²; and Teamsters Local 559 at the East Hartford facility. Solely involved in this proceeding are the casino shuttle bus drivers (herein called shuttle drivers) at the Waterford facility, who have never been represented by any of the above-described unions, none of who are parties to the instant proceeding. The shuttle drivers are solely responsible for transporting employees of the Foxwoods Resort Casino, which is located in Ledyard, Connecticut, between the Casino and remote employee parking lots located in Groton, Stonington and Norwich, Connecticut. The shuttle buses operate 24 hours per day, 7 days per week. Each route takes between 10 and 30 minutes.

In support of its contention that the petition is barred by a contract covering the petitioned-for employees, the Employer proffered the testimony of Colin Johnson, the General Manager of the Waterford facility. According to Johnson, an organization called the "Drivers Committee" has represented the shuttle drivers at least since the time he became the General Manager about ten years ago. According to memos dated

² In its post-hearing brief, the Employer claims that the Region improperly denied a request to intervene filed after the close of the hearing by the "Amalgamated Transit Union". In this regard, and contrary to the Employer's claim, shortly after the close of the hearing on June 12, 2008, the Region contacted Larry Hanley, an international representative of the "Amalgamated Transit Union", and informed him of the union's right to file a motion to intervene in the instant matter. No such motion to intervene was requested during that telephone conversation, nor has any motion to intervene been filed with the Regional office at any other time. Moreover, in a telephone conversation with a representative of the Region this date, Mr. Hanley confirmed that the union had decided not to intervene and that no motion to intervene was ever filed. Accordingly, the Employer's claim that a motion to intervene was filed and improperly denied is without merit, and its related request that the hearing be reopened for the participation of the "Amalgamated Transit Union" is denied.

October 15, 2004 and January 29, 2007, prepared by Johnson and addressed to all shuttle drivers, the purpose and function of the Driver's Committee is stated as follows:

The Committee will meet with the Company a minimum of once per quarter, or 4 times per year, on a pre-determined schedule. Additional meetings, if necessary, will be scheduled upon availability of the Committee and the Company. The Committee members will be paid for the time they spend meeting with the Company and substitute drivers arranged for if there is a conflict in driving schedules. The Committee will be responsible to work with the Company in all matters that concern the procedures for maintaining an orderly and harmonious relationship between Casino drivers and the Company. These matters include, but are not limited to, defining policies, prescribing regulations, clarifying responsibilities, providing good working conditions, maintaining a standard of discipline among the drivers, providing a satisfactory level of service to Foxwoods and their customers and protecting the interests of the Company.

Johnson further testified that in 2005, around the time that the Employer was negotiating a new contract with Foxwoods for the provision of shuttle bus services, he met with the Drivers Committee for the purpose of formulating a "wage and benefit package" that would "coincide" with the Foxwoods contract. As a result of those meetings, Johnson distributed a document dated September 23, 2005 (Employer Ex. 5) to all employees with their paychecks, stating the following:

As a result of the recent discussions between Management and the Driver Committee, the following is a summary of the proposed changes to the wage/benefit package agreement. Please indicate which of the 2 proposals you are in favor of. Proposal #1 reduces the number of years of progression from 10 years to 9 years. Proposal #2 reduces the number of years of progression from 10 years to 8 years. The changes in the non-wage items will be in effect with either proposal you choose. All wage increases will go into effect upon the signing of the new contract with Foxwoods and will be retroactive to May 1, 2005. Please enter your preference, sign and return in the enclosed envelope by Friday, Sept. 30, 2005.

The document set forth the two wage proposals, along with provisions covering night shift premiums, paid vacations, paid holidays, paid personal days, paid earned days,

other paid days, and safety bonuses. The document also contained a section where the shuttle driver could sign and indicate his or her choice of the two proposals. The shuttle drivers' proposal choices were returned directly to Johnson, who then met with the Drivers Committee for the purpose of tabulating the results. The proposed wage and benefit package was "approved" by the drivers and put into effect after the Employer entered into its contract with Foxwoods effective for the period October 1, 2005 to September 30, 2008. Johnson further explained that because the Employer's contract with Foxwoods is expiring later this year, the same process described above that was utilized in 2005 has been initiated in 2008 with the Drivers Committee for the purpose of developing a new wage and benefit package. Several meetings have been held over the past few weeks in pursuit of this process, including a discussion of the wage rates paid to bus drivers employed by other employers in the area.

Johnson admitted that there is no written and signed contract between the Employer and the Drivers Committee, nor did the Employer proffer any such contract. Rather, Johnson testified that the "Shuttle Driver Handbook" that is distributed to all shuttle drivers "coincides and reflects negotiation with the Driver Committee, and represents some of the changes that were made from the prior agreement". However, Johnson admitted that the handbook is not signed by the Drivers Committee, and the only page from that handbook that is in evidence states, inter alia, on the "acknowledgement" page signed by all employees upon receipt of the handbook, that "I understand this Manual is not a contract of employment between me and the Company and that I should not view it as such." Johnson also admitted that Employer Ex. 5 is not the contract between the Employer and the Drivers Committee, and he was unable to point to any document or set of documents setting forth all of the terms of the contract between the Employer and the Drivers Committee.

II. Analysis and Conclusion

It is well established that the burden of proving that a contract is a bar to a petition is on the party asserting it. *Roosevelt Memorial Park*, 187 NLRB 517 (1970). The Board recently reiterated its well-established contract bar rules requiring that to serve as a bar to a petition, a contract must be in writing, signed by the parties, and set

forth substantial terms and conditions of employment. *South Mountain Healthcare and Rehabilitation Center*, 344 NLRB 375 (2005), citing *Cind-R-Lite Co.*, 239 NLRB 1255 (1979) and *Appalachian Shale Products Co.*, 121 NLRB 1160 (1958). In applying these well-established rules, the Board stated in *Seton Medical Center*, 317 NLRB 87 (1995), that:

The single indispensable thread running through the Board's decisions on contract bar is that the documents relied on as manifesting the parties' agreement must clearly set out or refer to the terms of the agreement and must leave no doubt that they amount to an offer and an acceptance of those terms through the parties' affixing of their signatures.

Based upon the foregoing and the record as a whole, I find that the Employer has failed to satisfy its burden of proving that there is a contract barring the petition in the instant matter. More particularly, I note the absence of any evidence establishing the existence of a written agreement signed by the parties setting forth substantial terms and conditions of employment. *Northeastern University*, 218 NLRB 247 (1975) (faculty handbook containing no expiration date, coupled with existing employment practices, insufficient to constitute a collective bargaining agreement for contract bar purposes); *Seton Medical Center*, supra (no signed document identifying the "totality of the parties agreement"). Indeed, the Employer's own witness was unable to point to any document that could even arguably represent the purported "contract" between the Employer and the Drivers Committee. In this regard, Employer Exhibit 5, the only document in evidence that actually describes any of the shuttle drivers terms and conditions of employment, and which was purportedly reached as a result of "bargaining" between the Employer and the Driver's Committee, is unsigned by either party. *Waste Management of Maryland, Inc.*, 338 NLRB 1002 (2003) ("informal documents laying out substantial terms and conditions of employment can serve as a bar, so long as those informal documents are signed."); *De Paul Adult Care Communities, Inc.*, 325 NLRB 681 (1998) (contracts not signed before the filing of a petition cannot serve as a bar to the petition). Moreover, Employer Ex. 5 contains neither an effective date nor an expiration date, and any attempt to establish those dates would of necessity require reliance on parol evidence. *South Mountain Healthcare and Rehabilitation Center*,

supra (to serve as a bar to a petition, contract must have an effective date and an expiration date that are apparent from the face of the contract, without resort to parol evidence). The Employer also admits that Employer Ex. 5 does not contain all of the terms and conditions of employment purportedly negotiated between the Employer and the Drivers Committee. *B.C. Acquisitions, Inc. d/b/a Branch Cheese*, 307 NLRB 239 (1992) (although a signed exchange of written proposals and written acceptances can satisfy the contract bar rule, “the documents must clearly set out the terms of the agreement and must leave no doubt that they amount to an offer and an acceptance of those terms.”); *NLRB v. Arthur Sarnow Candy Co.*, 40 F.3d 552, 147 LRRM 2853 (2nd Cir. 1994), enforcing 312 NLRB No. 126 (1993) (no contract bar where there were varying versions of the contract, confusing handwritten modifications made to key terms, and the absence of written assent by both the employer and the union); *Seton Medical Center*, supra. Finally, Employer Ex. 5 contains neither a recognition clause nor any other provision recognizing the Drivers Committee as the exclusive representative of the shuttle drivers. *Dexter Fastener Technology, Inc. v. NLRB*, 145 F.3d 1330, 1998 WL 199814 (6th Cir. 1998), enforcing 321 NLRB 612 (1996) (contract with in-plant committee lacking recognition clause or any other provision recognizing the in-plant committee as the employees’ exclusive `representative cannot serve as a contract bar).

In reaching this conclusion, I find no merit to the Employer’s claim, in its post-hearing brief, that the absence of a signed contract in the instant case does not preclude the finding of a contract bar because the Employer “is not attempting to conspire with an outside third party in order to suppress employee choice, but is only attempting to assert a relationship it has directly with the employees”, and thus, “the rationale driving the necessity of a signature does not apply to the present situation”. In this regard, the Employer’s claim is not supported by its citation to the Board’s decision in *YWCA of Western Massachusetts*, 349 NLRB No. 78 (4/18/07). That case involved an unfair labor practice proceeding in which the Board found that the employer, after receiving evidence that the union had lost the support of a majority of unit employees after the parties had reached a final agreement, violated Section 8(a)(5) by refusing to

execute the agreed-upon collective bargaining agreement and withdrawing recognition. In reaching this conclusion, the Board specifically noted that the contract bar rules under *Appalachian Shale*, supra, “do not arise in this case.” *YWCA of Western Massachusetts*, supra, slip op. at 3. Indeed, the Employer’s rationale in support of its claim that the absence of a signed contract does not preclude the finding of a contract bar is directly contradicted by another case cited in its post-hearing brief, *NLRB v. Arthur Sarnow Candy Co.*, supra.

Accordingly, I find that the instant petition is not barred by any agreement that may have existed between the Employer and the Drivers Committee.³

Accordingly, based upon the foregoing and consistent with the parties’ off-the-record agreement (of which I take administrative notice), I find that the following employees of the Employer constitute 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 shuttle bus drivers employed by the Employer at its Waterford, Connecticut facility, but excluding all other employees, charter bus drivers, garage workers, dispatchers, driver trainers, secretaries, bookkeepers, and guards, professional employees and supervisors as defined in the Act.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted among the employees in the unit found appropriate herein at the time and place set forth in the notices of election to be issued subsequently.

Eligible to vote: those employees 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 in the military services of the United States, ill, on vacation, or temporarily laid off; and employees engaged in an economic strike which commenced less than 12 months before the

³ In light of this conclusion, I find it unnecessary to address the Employer’s claim in its post-hearing brief that the Drivers Committee is a labor organization under Section 2(5) of the Act, or the Petitioner’s claim in its post-hearing brief that the Drivers Committee did not have “an existence independent and free of the control of the Employer”. With regard to the Petitioner’s contention, I note that no charge has been filed against the Employer alleging a violation of Section 8(a)(2) of the Act.

election date and who retained their status as such during the eligibility period, and their replacements.

Ineligible to vote: 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 strike's commencement 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.

The eligible employees shall vote whether or not they desire to be represented for collective bargaining purposes by Teamsters Local 493, International Brotherhood of Teamsters, or Local 919, United Food and Commercial Workers Union.

To ensure that all eligible employees have the opportunity to be informed of the issues in the exercise of their statutory rights to vote, all parties to the election should have access to a list of voters and their addresses that 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 seven (7) days of the date of this Decision and Direction of Election, the Employer shall file with the undersigned, an eligibility list containing the *full* names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359 (1994). The undersigned shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the Regional office, 280 Trumbull Street, 21st Floor, Hartford, Connecticut 06103, on or before June 27, 2008. No extension of time to file these lists shall be granted except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

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, or electronically pursuant to the guidance that can be found under "E-gov" on the

Board's web site at www.nlr.gov. This request must be received by the Board in Washington by July 7, 2008.

Dated at Hartford, Connecticut, this 20th day of June, 2008.

/s/ Peter B. Hoffman
Peter B. Hoffman, Regional Director
National Labor Relations Board
Region 34