UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2

Columbus Transit LLC[1]
Employer

- and - **Case No. 2-RC-23351**

Transport Workers Union of Greater New York, Local 100, AFL-CIO
Petitioner

- and -

Local 713, International Brotherhood of Trade Unions, IUJAT
Intervenor

DECISION AND DIRECTION OF ELECTION

Columbus Transit, LLC ("the Employer") provides transportation services throughout the Mount Vernon, New York area. Transport Workers Union of Greater New York, Local 100 AFL-CIO ("Petitioner") filed the instant petition with the National Labor Relations Board under Section 9(c) of the National Labor Relations Act, as amended, ("the Act") seeking to represent a unit of all drivers employed by the Employer, excluding all other employees, including office clerical employees, mechanics, dispatchers, and guards, professional employees, and supervisors as defined in the Act. Thereafter, Local 713, International Brotherhood of Trade Unions, IUJAT ("Intervenor") was permitted to intervene based on the recognition agreement that it entered into with the Employer and to fully participate in the hearing.

Upon a petition filed under Section 9(b) of the Act, a hearing was held before a hearing officer of the National Labor Relations Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the Regional Director, Region 2.

[1] The parties stipulated that the names in this caption are correct and the formal papers are hereby amended to reflect these changes.

Based on the entire record in this matter[2] and in accordance with the discussion above, I conclude and find as follows:

1. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are affirmed.

2. The parties stipulated and I find that the Employer is a New York corporation with a principal office and place of business located at 701 South Columbus Avenue, Mount Vernon, New York, the only facility involved herein. Annually, the Employer provides services valued in excess of $250,000 to New York City, a governmental entity that meets the Board's standard for the assertion of jurisdiction, and purchases and receives at its Mount Vernon facility goods and materials valued in excess of $5,000, directly from suppliers located within the state of New York, which suppliers, in turn, purchased and received said goods and materials directly from outside the state of New York.

Accordingly, I find that the Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.

3. The parties stipulated, and I find, that Petitioner and Intervenor are labor organizations within the meaning of Section 2(5) of the Act.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Sections 9(c)(1) and 2(6) and (7) of the Act. As evidenced at the hearing and in the briefs, the parties disagree on whether to proceed to an election where Petitioner has also filed an unfair labor practice charge alleging, among other things, that the Employer voluntarily recognized the Intervenor in violation of Section 8(a)(2) of the Act.

Specifically, the Employer contends that the petition cannot be processed while an allegation of unlawful assistance is pending in a related unfair labor practice charge involving the Employer and Intervenor, unless Petitioner affirmatively states that Intervenor may be certified as a result of the election (assuming no objections to the election are raised) and that Petitioner will not seek further action on the pending unfair labor practice charge, citing in support of its position, *Carlson Furniture Industries, Inc.*, 157 NLRB 851 (1966). In that regard, the Employer appears to argue that in order to proceed to an election, Petitioner must request withdrawal of the § 8(a) (2) allegations, irrespective of the outcome of the election, because the voluntary recognition, if lawful, creates a bar to the instant petition. Further, while not specifically addressed, the Employer presumably concedes that the § 8(a)(3) allegations regarding the Employer's refusal to hire incumbent employees due to their affiliation with Petitioner, would be

[2] The briefs filed by the parties have been duly considered.

retained for further processing, as their disposition does not relate to a question concerning representation.

In contrast, Petitioner asserts that it timely filed its petition within 45 days of the posting of the notice of recognition and, therefore, the petition should be processed, pursuant to the Board's modified standard regarding the recognition bar doctrine, as set forth in *Dana Corporation*, 351 NLRB 434 (2007). Petitioner argues that if the unfair labor practice charge blocks the election, it effectively is denied rights otherwise granted in *Dana* due to the Employer's alleged unlawful conduct. Moreover, the Employer would benefit from its alleged unlawful assistance by controlling the timing of the election or extracting a withdrawal of the unfair labor practice charge from Petitioner as the quid pro quo for proceeding to an election.

I have considered the evidence and the arguments presented by the parties on these related issues. As discussed below, I find that an election should be conducted in the petitioned-for unit. Further, in directing an election herein, I do so without prejudice and shall expressly condition any certification resulting from such election with respect to the status of Intervenor on any subsequent determinations made in the pending unfair labor practice case, and shall take such action as may be deemed necessary to effectuate the policies of the Act with respect thereto.

To provide a context for my discussion of those issues, I first will provide an overview of the procedural history. Then, I will present in detail the facts and reasoning that supports each of my conclusions on the issues.

I. Procedural History

None of the following facts are in dispute. On November 10, 2008,[3] the Employer and Intervenor signed a recognition agreement whereby they agreed that Intervenor represented a majority of the employees and that the Employer recognized it as the exclusive bargaining representative of its drivers. By letter dated November 12, Intervenor notified the Region of the November 10 voluntary recognition in the drivers unit. In response, the Region sent an official NLRB notice to the Employer and the 45-day posting period began November 17.

On December 22, Petitioner timely filed the instant petition and an unfair labor practice charge in Case No. 2-CA-39089, alleging in relevant part, that the Employer unlawfully recognized Intervenor as the exclusive collective-bargaining representative of its drivers at a time when it did not represent an uncoerced majority and before the Employer hired a representative complement of employees. That charge is currently pending investigation by the Region and, to date, no decision has been made or issued. The Employer and Intervenor have not entered into a collective-bargaining agreement.

[3] All dates are 2008 unless otherwise noted.

II. Analysis

Ample Board precedent supports proceeding to an election on these facts. See *Michigan Bell*, 63 NLRB 941 (1945) (notwithstanding pending charges that the company violated Section 8(a)(2), the Board ordered an immediate election without prejudice). See also, *Columbia Pictures*, 81 NLRB 1313 (1949) (the Board held that an exception may be made where proceeding to an election best effectuates the policies of the Act and promotes the orderly processes of collective bargaining, despite pendency of unfair labor practice charges) I am writing to further address the application of the Board's decision in *Dana*, with respect to the filing of petitions during the 45- day window period where pending unfair labor practices have traditionally been treated as blocking charges.

The determination of questions concerning representation falls within the Board's discretion in fulfilling its functions under Section 9(c) of the Act, including the selection of the time for holding an election. *NLRB v. Wyman-Gordon Co*., 394 U.S. 759 (1969); *NLRB v. A.J. Tower Co*., 329 U.S. 324 (1946). The Regional Director's broad authority regarding "the question of when and under what circumstances to direct an election in the face of unresolved § 8(a)(2) charges," is reflected in the Board's case handling manual which states that the blocking charge policy is not a per se rule. *Intalco Aluminum Corp.,* 174 NLRB 975 (1969). CHM § 11730: "the blocking charge policy is premised solely on the Agency's intention to protect the free choice of employees in the election process."

The primary rationale for blocking an election is that a determination on whether a recognition bar exists depends on the resolution of the unfair labor practice allegations which are not properly litigable in a representation proceeding. The Board, however, in *Dana,* modified the principles of the recognition bar doctrine to create the 45-day window period. Thus, it appears the line of cases holding that the election is blocked due to pending charges was partially overruled by *Dana*, as long as, the petition is timely filed within the window period. *Town and Country*, 194 NLRB 1135 (1972); *Mistletoe Express Service of Texas, Inc.,* 268 NLRB 1245 (1984); *Dura Art Stone, Inc*., 340 NLRB 977 (2003). These cases remain instructive on processing petitions filed outside the 45-day window period where Petitioner's request to proceed could be denied because the recognition may constitute a bar to the election for a reasonable period of time.

In *Dana*, in order to achieve a finer balance between promoting stability in collective-bargaining relationships and protecting employee freedom of choice, the Board held that employee free choice would be enhanced by the 45-day open period. Thus, the window period warrants delaying the imposition of a recognition bar during which the unit employees can decide whether they want to seek a Board-conducted election. Accordingly, where, as here, a union has been

voluntarily recognized, a petition filed within the window period will be processed if it is supported by 30 percent of the bargaining unit. At the expiration of the 45-day period, the Board will consider whether a recognition bar blocks an election based on the facts presented in that circumstance.

The Employer's reliance on *Carlson Furniture Industries, Inc.,* 157 NLRB 851 (1966), is misplaced. In that line of cases, an employer's voluntary recognition of a union was removed as a bar because the Board found a violation of § 8(a)(2) in the companion unfair labor practice case. Generally, the petitioner is waiving enforcement in order to more expeditiously proceed to an election.[4] Here, a waiver is inappropriate because it has not been determined that the Employer's grant of recognition is unlawful.

Based on all of the above, I am directing an election in this matter. If the outcome of the election is in favor of Petitioner, the question concerning representation is resolved and a certification of representative will issue. If the outcome of the election is in favor of Intervenor, as the Employer correctly submits, the issue of its recognition remains. Accordingly, certification will be held in abeyance pending completion of the unfair labor practice proceeding should Intervenor win the election, alleviating the "untenable position" of which the Employer complains – that meaningful bargaining is not possible where the relationship with Intervenor could be disestablished as the remedy of the pending unfair labor practice charge.

5. In its petition, Petitioner sought to represent all full-time and regular part-time drivers at the Employer's facility, excluding all other employees. Both the Employer and Intervenor are in agreement as to the appropriateness of the petitioned-for unit. Therefore, the following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> Included: All full-time and regular part-time drivers employed at the Employer's facility at 701 So. Columbus Avenue, Mount Vernon, NY.
>
> Excluded: All other employees, and guards, professional employees, and supervisors as defined in the Act.

[4] The Board, in *Intalco Aluminum, supra*, further limited the *Carlson* waiver and noted that petitioner's waiver applied to the unlawful recognition allegation, but did not reach the disgorgement remedy. Accordingly, the Board ordered that the election should proceed and nothing in the decision affected the Board's right to seek enforcement of the disgorgement portion of the case.

Direction of Election

An election by secret ballot shall be conducted by the Regional Director, Region 2, 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.[5] Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date of the Decision, including employees who did not work during the period because they were ill, on vacation or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military service of the United States who are in the unit 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 eligibility 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.[6] Those eligible shall vote on whether or not

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[5] Please be advised that the Board has adopted a rule requiring that election notices be posted by the Employer "at least 3 full working days prior to 12:01 a.m. of the day of the election." Section 103.20(1) of the Board's Rules. In addition, please be advised that the Board has held Section 103.20(c) of the Board's Rules. requires that the Employer notify the Regional Office at least five 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).

[6] In order to assure 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 that may be used to communicate with them. *North Macon Health Care Facility*, 315 NLRB 359 (1994); *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 days of the date of this Decision, three copies of an election eligibility list, containing the full names and addresses of all eligible voters, shall be filed by the Employer with the Regional Director, Region 2, who 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 at the address below, on or before **February 12, 2009**. No extension of time to file this list may be granted, nor shall the filing of a request for review operate to stay the filing of such list, except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

they desire to be represented for collective-bargaining purposes by either the Transport Workers Union of Greater New York, Local 100 AFL-CIO; or Local 713, International Brotherhood of Trade Unions, IUJAT or neither labor organization. [7]

Dated at New York, New York
this February 5, 2009

/s/_____
Celeste Mattina
Regional Director, Region 2
National Labor Relations Board
26 Federal Plaza, Room 3614
New York, New York 10278

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[7] 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, D.C. 20570-0001. This request must be received by the Board in Washington by no later than **February 19, 2009.** The National Labor Relations Board has expanded the list of permissible documents that may be electronically filed with its offices. If a party wishes to file one of the documents which may now be filed electronically, please refer to the Attachment supplied with this Supplemental Decision for guidance in doing so. Guidance for E-filing can also be found on the National Labor Relations Board web site at www.nlrb.gov. On the home page of the web site, select the **E-Gov** tab and click on **E-Filing**. Then select the NLRB office for which you wish to E-File your documents. Detailed E-filing instructions explaining how to file the documents electronically will be displayed.