UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29

TULLY CONSTRUCTION CO., INC.
Employer

and Case No. 29-RC-11706[1]

THE SHEET ASPHALT WORKERS LOCAL UNION 1018 OF THE DISTRICT COUNCIL OF PAVERS AND ROAD BUILDERS OF THE LABORERS' INTERNATIONAL UNION OF NORTH AMERICA
Petitioner

and

LOCAL 175, UNITED PLANT & PRODUCTION WORKERS INTERNATIONAL UNION OF JOURNEYMEN AND ALLIED TRADES

Intervenor

YONKERS CONTRACTING CORP.
Employer

and Case No. 29-RC-11707

THE SHEET ASPHALT WORKERS LOCAL UNION 1018 OF THE DISTRICT COUNCIL OF PAVERS AND ROAD BUILDERS OF THE LABORERS' INTERNATIONAL UNION OF NORTH AMERICA
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Intervenor

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[1] The two cases were not consolidated, and there is no evidence of any relationship between Tully and Yonkers.

DECISION AND DIRECTION OF ELECTIONS

Upon petitions duly filed under Section 9(c) of the National Labor Relations Act, herein called the Act, as amended, a hearing was held before Tara O'Rourke, a Hearing Officer of the National Labor Relations Board, herein called the Board.

Pursuant to the provisions of 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, the undersigned finds:

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

2. (a) The parties stipulated that Tully Construction Co., Inc., herein called Tully, is a domestic corporation, with its principal office and place of business located at 127-50 Northern Boulevard, Flushing, New York, where it is engaged in highway and street construction, including asphalt paving. During the past year, which period is representative of its annual operations generally, Tully, in the course and conduct of its business operations described above, purchased and received at its Flushing, New York facility, goods and materials valued in excess of $50,000, directly from suppliers located inside the State of New York, said goods and materials having originated from points located outside of the State of New York.

Based on the stipulation of the parties, and the record as a whole, I find that Tully is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.

(b) The parties stipulated that Yonkers Contracting Corp., herein called Yonkers, is a domestic corporation, with its principal office and place of business

located at 969 Midland Avenue, Yonkers, New York, where it is engaged in highway and street construction, including asphalt paving. During the past year, which period is representative of its annual operations generally, Yonkers, in the course and conduct of its business operations described above, purchased and received at its Yonkers, New York facility, goods and materials valued in excess of $50,000, directly from suppliers located outside of the State of New York.

Based on the stipulation of the parties, and the record as a whole, I find that Yonkers is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The parties stipulated that the Sheet Asphalt Workers Local Union 1018 of the District Council of Pavers and Road Builders of the Laborers' International Union of North America, herein called the Petitioner, and Local 175, United Plant & Production Workers International Union of Journeymen and Allied Trades, herein called the Intervenor, are organizations in which employees participate, and which exist, in whole or in part, for the purpose of dealing with employers concerning wages, hours and other terms and conditions of employment.

Based on the stipulation of the parties, and the record as a whole, I find that the Petitioner and the Intervenor are labor organizations within the meaning of Section 2(5) of the Act. The labor organizations involved herein claim to represent certain employees of Tully and Yonkers.

4. A question affecting commerce exists concerning the representation of certain employees of Tully and Yonkers within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. (a) The parties stipulated, and I find, that the following unit is appropriate for the purposes of collective bargaining:

> All full-time and regular part-time employees employed by Tully at its Flushing, New York facility, who perform asphalt paving, including foremen, rakers, screedmen, micro pavers, AC paintmen and liquid tar workers, but EXCLUDING all clerical employees, guards and supervisors as defined in the Act.

(b) The parties stipulated, and I find, that the following unit is appropriate for the purposes of collective bargaining:

> All full-time and regular part-time employees employed by Yonkers at its Yonkers, New York facility, who perform asphalt paving, including foremen, rakers, screedmen, micro pavers, AC paintmen and liquid tar workers, but EXCLUDING all clerical employees, guards and supervisors as defined in the Act.

At the hearing, the Intervenor took the position that the petitions should be dismissed on contract bar grounds. The Petitioner and the Employers took the contrary position.

In support of its position, the Intervenor called as its witnesses Roland Bedwell, the Intervenor's Business Manager, and Peter Tully, President of Tully. The Petitioner and Employers did not call witnesses. All of the parties filed post-hearing briefs.

I have considered the evidence and the arguments presented by the parties. As discussed below, I have concluded that there is no contract bar to the instant petitions. Accordingly, I will direct elections in the bargaining units I have found to be appropriate. The facts and reasoning in support of my conclusions are set forth below.

FACTS

The petition in Case No. 29-RC-11706 was filed on December 30, 2008. The petition in Case No. 29-RC-11707 was filed on January 5, 2009.

The document asserted by the Intervenor to bar the instant petitions is titled, "Agreement Between Tully Construction Co., Inc. and Yonkers Contracting, Inc. [and]

United Plant and Production Workers Local Union 175 Paving Division." These words are followed by a date, "June 30, 2008," which is crossed out.

The first page of the document states that the agreement is "effective upon execution for a period of one year." The words, "upon execution for a period of one year," are handwritten (no initials), and replace the crossed-out date, "June 30, 2008."

Article IX, Section 2, of the document states that, "This Agreement shall be executed by both parties hereto." However, the signature page contains just one signature, by the Intervenor's Business Manager, Roland Bedwell. Bedwell's signature is dated December 29, 2008. It is followed by blank signature and date lines for Tully and Yonkers.[2]

The record reflects that the Intervenor delivered four originals of this document to Tully's Flushing facility on December 30, 2008, with the request that it be signed by Tully and forwarded to Yonkers for signature. On that same date, December 30, 2008, the Intervenor's attorney sent a letter to Yonkers and Tully's attorney, requesting that the contract be executed. To date, neither Tully nor Yonkers has executed this document.

The Intervenor offered into evidence a December 19, 2008, e-mail from the attorney for Tully and Yonkers to the Intervenor's attorney, indicating that "a clean copy of the agreement my clients are willing to sign" was attached to the e-mail. However, the Intervenor made handwritten changes to this document, purporting to incorporate changes to which the attorney for Tully and Yonkers had agreed. The document delivered to Tully on December 30, 2008, included these handwritten changes.

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[2] The signature and date lines for Tully and Yonkers are set forth on the same document, rather than on a separate copy for Tully and a separate copy for Yonkers. Accordingly, the Intervenor sought to have Tully sign the contract first, and then forward this same document to Yonkers for its signature.

Peter Tully testified that he has not yet executed the document because he still has some questions about these handwritten changes, and other aspects of the agreement. He testified that he was in Europe on December 30, 2008, when the contract was delivered to the Flushing facility by the Intervenor, and that he was "the only one that could sign it."

The Intervenor attempted to show, through extrinsic evidence, that the parties intended the contract to go into effect as soon as it was executed by the Intervenor, regardless of whether it was executed by Tully or Yonkers.

DISCUSSION

In *Appalachian Shale*, 121 NLRB 1160 (1958), the Board held that contracts not executed by the parties before the filing of a petition cannot serve as a bar. In support of its position that the contract here was executed prior to the filing of the petition, the Intervenor relies on *Diversified Services*, 225 NLRB 1092 (1976). There, the Board held that "in order to constitute a bar a contract need not be encompassed within a single formal document but may consist of an exchange of the written proposal and a written acceptance." *Diversified Services*, 225 NLRB at 1092. The "written proposal" in *Diversified* consisted of a signed letter from the Employer's attorney, enclosing two unexecuted copies of the contract to which the parties had agreed. The Union executed the contract, without making any changes. In the instant case, by contrast, the Intervenor made changes to the "clean copy" e-mailed by the attorney for Tully and Yonkers. Tully's President was not willing to execute the contract until it could obtain a clarification of these changes, and Yonkers has not executed the contract. The e-mail relied on by the Intervenor was not signed by the attorney for Tully and Yonkers, and the Intervenor sought to obtain the signatures of Yonkers and Tully on the contract itself.

Under these circumstances, I do not find that the unsigned e-mail to the Intervenor, from counsel for Tully and Yonkers, constitutes a "written proposal" as contemplated by *Diversified*.

More applicable to the instant cases is *B.C. Acquisitions, Inc., d/b/a Branch Cheese*, 307 NLRB 239 (1992), cited by Tully and Yonkers, in which the Board held:

> In addition, although *Appalachian Shale* indicates some willingness to honor the parties' decision to memorialize their contract through a more informal exchange of documents, 121 NLRB at 1162, the Union and the Employer here conscientiously did not opt for that approach. The evidence shows that they intended to prepare and execute a formal agreement, which was not accomplished before the filing of the representation petition. *B.C. Acquisitions*, 307 NLRB at 240.

In the instant cases, the contract itself states that, "This Agreement shall be executed by both parties hereto."[3] On December 30, 2008, the Intervenor, both by letter and in person, requested that the contract be executed by Yonkers and Tully. Accordingly, the record reflects that the parties "intended to prepare and execute a formal agreement, which was not accomplished before the filing of the representation petition." *B.C. Acquisitions*, 307 NLRB at 240.

Moreover, even were I to find that there was a fully executed contract on December 29, 2008, for purposes of binding the parties to the agreement, the effective date and expiration date of the contract cannot be determined from the four corners of the document asserted as a bar, without resort to extrinsic evidence. And, "the Board has consistently limited its inquiry to the four corners of the document or documents alleged to bar an election and has excluded the consideration of extrinsic evidence." *Waste Management of Maryland, Inc*., 138 NLRB 1002 (2003); *see also Jet-Pak Corporation*,

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[3] Although the dictionary definition of "both" denotes two entities, there are <u>three</u> signature lines on the same contract, for the Intervenor, Tully and Yonkers.

231 NLRB 552 (1977); *Merico, Inc*., 207 NLRB 101 n. 2 (1973). More specifically, in the instant cases, the contract language calls for the contract to be executed by "both" parties, and states that the agreement is "effective upon execution for a period of one year." However, the contract is only executed by one party and has one signature date. The lack of a signature by Tully or Yonkers, creates an ambiguity as to the contract's effective date and expiration date. In *South Mountain Healthcare and Rehabilitation Center*, 344 NLRB No. 40, slip op. (2005), cited by the Petitioner, the Board held:

> 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. Both an effective date and an expiration date are material terms of a contract. Unless these dates are apparent from the face of the contract, without resort to parol evidence, the contract will not serve as a bar. The terms of the agreement must be clear from its face so that employees and outside unions may look to it to determine the appropriate time to file a representation petition. *South Mountain*, slip op. at 2 (citing *Cind-R-Lite*, 239 NLRB 1255, 1256 (1979); *Cooper Tire & Rubber Co*., 181 NLRB 509 (1970); *Appalachian Shale*, 121 NLRB at 1163).

The public policy justification for this rule is more fully set forth in *Bob's Big Boy Family Restaurants*, 259 NLRB 153 (1981). The contract at issue in *Bob's Big Boy* was effective December 11, 1974, through December 31, 1977, according to the text of the document. However, the cover of the contract distributed to employees contained the dates, "January 1, 1975 to December 31, 1977." A petition was filed that was timely filed with respect to the cover dates on the contract, but untimely filed as to the dates set forth in the text of the document. The Board held:

> The Board's contract bar rules are designed to balance the twin goals of employee freedom of choice and industrial stability. For example, contracts may bar a representation petition for up to 3 years. This contract-bar rule provides employee or union petitioners the opportunity to file petitions at reasonable, identifiable times to change or eliminate the employees' bargaining representative if they so desire, and at the same time affords a reasonable period of stability for

> the contracting parties and employees. The Board has also provided for a "window period" during which petitions may be filed to be timely with respect to an existing contract. And when an employee, or other petitioner, seeks to determine the proper time to file a representation petition, it is axiomatic that one would look first to the existing contract between the employer and the union to determine the appropriate dates for filing such a petition...[T]he contract urged by Respondent as a bar to the petition should not operate to deny its employees the opportunity to vote on union representation...[W]here parties to a contract create a situation in which a petitioner cannot clearly determine the proper time for filing a petition, the ambiguity does not inure to the benefit of the parties but instead means that the petition will not be barred. *Bob's Big Boy*, 259 NLRB at 153-154 (citations omitted).

In the instant cases, the Intervenor claims that, in light of the earlier e-mail from the attorney for Tully and Yonkers, the effective date of the contract is December 29, 2008, when the contract was executed by the Intervenor. The instant petitions were filed on December 30, 2008, and January 5, 2009, after the Intervenor executed the contract. Petitions filed after the effective date of a valid contract are barred by that contract. *Deluxe Metal Furniture Company*, 121 NLRB 995, 999 (1958); *National Broadcasting Company, Inc.,* 104 NLRB 587 (1953).

However, as noted above, the contract itself states that, "This Agreement shall be executed by both parties hereto," and that the contract will be "effective upon execution for a period of one year." The contract has not been executed by Tully or Yonkers. An employee or union petitioner examining the contract, without knowledge of or access to the e-mail sent by the attorney for Tully and Yonkers, could not reliably determine the proper time for filing a representation petition. For a petitioner, the blank signature lines for Tully and Yonkers would likely convey the impression that the contract has not yet been fully executed, that the contract is therefore not yet in effect, and that the instant petitions were timely filed. In the future, for example, if Tully ultimately signs the contract on March 2, 2009, and Yonkers signs the contract on April 1, 2009, a petitioner

would be hard pressed to determine with a high degree of certainty which of the three execution dates is "the" execution date for the purpose of determining the effective date and the expiration date of the contract.[4] This, in turn, would make it impossible to determine when the "window period" begins and ends for the purpose of filing a petition in the future.

In sum, based on the foregoing, in addition to finding no fully executed contract, I find that the effective date and expiration date of the contract are not apparent from the face of the document, and, therefore, that those dates are ambiguous; thus, a petitioner "cannot clearly determine the proper time for filing a petition." *Bob's Big Boy*, 259 NLRB at 154. Accordingly, I find that the petitions herein are not barred by the document relied on by the Intervenor. I will therefore direct elections in the appropriate units.

DIRECTION OF ELECTIONS

Two elections by secret ballot shall be conducted by the undersigned among the employees in the units found appropriate at the times and places set forth in the notices of election to be issued subsequently subject to the Board's Rules and Regulations. Eligible to vote are employees in the units 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. Also eligible are (a) employees in the units who were employed for at least 30 days in the 12-month period preceding the eligibility date for the election, and (b) employees in the units

[4] The contract is just one document with three separate signature lines, for the Intervenor, Tully and Yonkers. If Yonkers and Tully sign on different dates, since the companies are apparently unrelated, the effective and expiration dates applicable to Tully might be different from the effective and expiration dates applicable to Yonkers.

who had some employment during that 12-month period and were employed for at least 45 days within the 24 months immediately preceding the eligibility date for the election.[5] 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 who are employed in the units 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 to vote shall vote whether or not they desire to be represented for collective bargaining purposes by the Sheet Asphalt Workers Local Union 1018 of the District Council of Pavers and Road Builders of the Laborers' International Union of North America, by Local 175, United Plant & Production Workers International Union of Journeymen and Allied Trades, or by neither labor organization.

LISTS OF VOTERS

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of the statutory right to vote, all parties to the elections should have access to a list of voters and their addresses that may be used to

[5] *Steiny and Company, Inc*., 308 NLRB 1323 (1992); *Daniel Construction Company, Inc*., 133 NLRB 264 (1961), *as modified,* 167 NLRB 1078 (1967).

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 hereby directed that within 7 days of the date of this Decision, four (4) copies of two separate eligibility lists, containing the full names and addresses of all the eligible voters at Tully and Yonkers, shall be filed by Tully and Yonkers with the undersigned who shall make the lists available to all parties to the elections. *North Macon Health Care Facility*, 315 NLRB No. 50 (1994). In order to be timely filed, such lists must be received in the Regional Office, Two MetroTech Center, 5th Floor, Brooklyn, New York 11201 on or before **February 11, 2009**. No extension of time to file the lists may be granted, nor shall the filing of a request for review operate to stay the filing of such lists except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the elections whenever proper objections are filed.

NOTICES OF ELECTION

Please be advised that the Board has adopted a rule requiring that election notices be posted by Tully and Yonkers at least three working days prior to an election. If either Tully or Yonkers has not received the notices of election at least five working days prior to the election date or dates, 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 12:01 a.m. of the day of the election that it has not received the notices. *Club Demonstration Services*, 317 NLRB No. 52 (1995). The failure of Tully or Yonkers to comply with these posting rules 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, D.C. 20570-0001. This request must be received by the Board in Washington by 5 p.m., EST on **February 18, 2009.**

In the Regional Office's initial correspondence, the parties were advised that 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 the Regional Office's initial correspondence 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 website, 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. The request for review may not be filed by facsimile.

Dated: February 4, 2009, Brooklyn, New York.

"/s/{Alvin P. Blyer]"